The Unlawful Refusal of Emergency Humanitarian Aid

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ABSTRACT

Recognising that devastating consequences often flow from a State's refusal of emergency humanitarian aid in times of disaster, States and scholars alike have called for and participated in efforts to define, interpret, and develop relevant primary obligations in this area. This thesis examines the extent to which existing international law conditions an affected State's right to refuse. The work identifies and analyses existing primary obligations of States affected by disasters, considering in particular the direct regulation of refusal (principally in treaties but also customary law and non-binding instruments), human rights obligations (namely the right to life and the right to an adequate standard of living), and duties of co-operation (arising primarily from the Charter of the United Nations). The thesis further examines the work of the International Law Commission on the protection of persons in the event of disasters topic since 2007, with focus on its provision of a qualified consent regime for the refusal of emergency humanitarian aid in draft article 13 (adopted as part of a set of eighteen draft articles in 2016). Cognisant of proposals for a new international convention to be concluded on the basis of the Commission's work, these examinations were undertaken with a view to ascertaining the potential for and of such an undertaking.

This thesis argues that despite considerable progress in recent years in developing rules on refusal, existing legal rules remain unsatisfactory and there is still some way to go before State consensus on key aspects of the International Law Commission's draft articles is likely to be achieved such that a new international convention may result. Consideration of other forms of regulation of refusal (a framework convention or set of guiding principles, for example) may therefore be necessary.

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TABLE OF ABBREVIATIONS

ACHR	American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 123
ACRWC	African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (1990)
ACS	Association of Caribbean States
AJIL	American Journal of International Law
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ASEAN	Association of Southeast Asian Nations
ASIL	American Society of International Law
BSEC	Black Sea Economic Cooperation
BYIL	British Yearbook of International Law
CCPR	United Nations Human Rights Committee
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13
CESCR	United Nations Committee on Economic Social and Cultural Rights
CmEDAW	Committee on the Elimination of Discrimination Against Women
CmRC	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3
CRPD	Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3
CUP	Cambridge University Press
DAC	Development Assistance Committee
DFID	Department for International Development (United Kingdom)
DPI	United Nations Department of Public Information
ECHO	European Civil Protection and Humanitarian Aid Operations (European Commission)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended (adopted 4 November 1950, entered into force 3 September 1953) ETS 5
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
ETS	European Treaty Series
FCCDA	Framework Convention on Civil Defence Assistance (adopted 22 May 2000, entered into force 23 September 2001) 2172 UNTS 231

GDP	Gross domestic product
GPID	UN Commission on Human Rights, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add
HFA	UNISDR, 'Hyogo Declaration on Disaster Reduction' (22 January 2005) A/CONF.206/6 and Corr 1 (Hyogo Framework for Action)
HRQ	Human Rights Quarterly
HRuF	Human Rights up Front (UN)
HRTB	Human rights treaty bodies
HRW	Human Rights Watch
IACtHR	Inter-American Court of Human Rights
IASC	Inter-Agency Standing Committee
ICCPR	International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
ICEC	International Conference on Emergency Communication
ICESCR	International Covenant on Economic Social and Cultural Rights (adopted 16 December 1976, entered into force 3 January 1976) 993 UNTS 3
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICL	International criminal law
ICLQ	International & Comparative Law Quarterly
ICRC	International Committee of the Red Cross
IDP	Internally displaced person
IDRL	International Disaster Response Law
IDSN	International Dalit Solidarity Network
IFRC	International Federation of Red Cross and Red Crescent Societies
IHL	International humanitarian law
IHRL	International human rights law
IHRR	International Human Rights Reports
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
IRU	International Relief Union
ITU	International Telecommunications Union
JHSPH	John Hopkins School of Public Health
LRCS	League of Red Cross and Red Crescent Societies
MINUSTAH	UN Stabilization Mission in Haiti
MPEPIL	Max Planck Encyclopedia of Public International Law
MSF	*Médecins Sans Frontières*

NGO	Non-governmental organisation
NYU	New York University
OAS	Organization of American States
OCHA	Office of the Coordination of Humanitarian Affairs
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
PPED	Protection of persons in the event of disaster
R2P	Responsibility to Protect
RBA	Rights-based approach
RCRC	Red Cross Red Crescent
Res	Resolution
SAARC	South Asian Association for Regional Cooperation
SC	Save the Children
SPDC	State Peace and Development Council (Myanmar)
UCL	University College London
UDHR	Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3
UNDP	United Nations Development Programme
UNDRO	Office of the United Nations Disaster Relief Co-ordinator
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNISDR	United Nations Office for Disaster Risk Reduction
UNITAR	United Nations Institute for Training and Research
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
US	United States of America
USAID	United States Agency for International Development
USD	United States Dollar
VCLT	Vienna Convention on the Law of Treaties (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331
WFP	World Food Programme
WHO	World Health Organization

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Military and Paramilitary Activities in and against Nicaragua, Case concerning (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14, 101, 201
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CHAPTER 1

REFUSAL IN INTERNATIONAL LAW

1.0 Introduction

In early May 2008, Cyclone Nargis made landfall in Myanmar. The tropical storm had been intensifying in the Bay of Bengal for over a week in late April, and when it struck the south-west coast on May 2, it brought with it sustained winds of over 135mph, heavy rains, and a storm surge that destroyed over 90% of the buildings and nearly all of the rice paddies in the low-lying Irrawaddy Delta.[1] A day later on May 3, the cyclone hit Myanmar's most populated city, Yangon, wreaking further havoc that included the disruption of electricity and water lines, the collapse of houses, and significant destruction of public infrastructure. Overall, Cyclone Nargis is understood to have led to land, property, and facilities damage totalling between ten and thirteen billion

1 Peter J Webster, 'Myanmar's deadly daffodil' (2008) 1 Nature Geoscience 488; Tripartite Core Group (Association of Southeast Asian Nations, the Government of the Republic of the Union of Myanmar, and the United Nations), 'Post-Nargis Periodic Review IV' (2010) <https://reliefweb.int/sites/reliefweb.int/files/resources/B0F06845E98A40694925777600 1A4A56-Full_Report.pdf> accessed 25 May 2018. See also Michon Scott and others, 'Hurricane Season 2008: Tropical Storm Nargis (Indian Ocean)' (*NASA*, 2008) <www.nasa.gov/mission_pages/hurricanes/archives/2008/h2008_nargis.html> accessed 25 May 2018.

United States (US) dollars (USD),[2] which represents over one third of Myanmar's gross domestic product (GDP) for that year.[3] The human cost of the disaster,[4] however, has been much more difficult to quantify.

Initially, the United Nations (UN) Office for the Coordination of Humanitarian Affairs (OCHA) estimated that over one million people had been severely affected by the cyclone,[5] with the vast majority being in desperate need of emergency humanitarian aid.[6] Within a week, that figure was doubled.[7] Around two and a half million were left needing urgent help owing to unprecedented levels of medical trauma, food insecurity, displacement, orphanage, and economic loss. No consensus has been reached on the final death toll, but most estimates point to

2 'Myanmar/Ban: Nargis causing more economic damage than Indonesia's tsunami' (*ReliefWeb*, 20 May 2008) <https://reliefweb.int/report/myanmar/myanmarban-nargis-causing-more-economic-damage-indonesias-tsunami> accessed 26 May 2018.

3 In 2008, Myanmar's GDP was 31.863 billion USD. World Bank, 'National Accounts Data: Myanmar, GDP (current US$), 2008' (*World Bank*) <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=MM> accessed 25 May 2018.

4 There is no universally-accepted definition of 'disaster' in international law, but treaties and other key documents do outline important definitional aspects. See section 1.0.1 below.

5 OCHA, 'Myanmar: Cyclone Nargis OCHA Situation Report No. 4' (*ReliefWeb*, 7 May 2008) <https://reliefweb.int/report/myanmar/myanmar-cyclone-nargis-ocha-situation-report-no-4> accessed 22 May 2018.

6 As with 'disaster' above (n 4 and section 1.0.1), there is no universally-accepted definition of 'emergency humanitarian aid' in international law. Terms such as 'international assistance', 'external aid', 'disaster relief', and so on are used interchangeably. Heintze and Zwitter, for example, employ the terms '[h]umanitarian [a]ssistance', 'humanitarian action', 'relief aid', and 'emergency response' interchangeably in the first two paragraphs of their 2011 edited collection, with no difference in meaning indicated. See Hans-Joachim Heintze and Andrej Zwitter, 'Introduction' in Hans-Joachim Heintze and Andrej Zwitter (eds), *International Law and Humanitarian Assistance* (Springer 2011) 1. The International Law Commission (ILC), whose important work on the protection of persons in the event of disasters (PPED) is introduced below in section 1.0.1 and 1.1.3(c), provides an authoritative comparable definition: 'external assistance' means 'relief personnel, equipment and goods, and services provided to an affected State by an assisting State or other assisting actor for disaster relief assistance'. ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10, 17-73 (PPED draft articles, with commentaries) art 3. '[R]elief personnel', 'equipment and goods', 'affected State', 'assisting State', and 'other assisting actor' are defined throughout this section as the terms are first used (see n 19, n 17, n 14, n 10, and n 11 respectively).

7 OCHA, 'Myanmar: Cyclone Nargis OCHA Situation Report No. 11' (*ReliefWeb*, 15 May 2008) <https://reliefweb.int/report/myanmar/myanmar-cyclone-nargis-ocha-situation-report-no-11> accessed 22 May 2018.

confirmed deaths in the multiple tens of thousands and a missing-presumed-dead count that would put the overall number of deaths in the hundreds of thousands.[8] These figures mean that Cyclone Nargis was not only one of the costliest disasters to afflict the Southeast Asian region, but also one of the deadliest.[9]

It is unsurprising that in the days following Cyclone Nargis' arrival, numerous offers of assistance were made by other States[10] and humanitarian organisations.[11] Direct offers of assistance were made by Bangladesh, India, Italy, Malaysia, Singapore, Thailand, the United Kingdom (UK), the US, the International Federation of the Red Cross and Red Crescent Societies (IFRC), Save the Children (SC), and *Médecins Sans*

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8 There was considerable controversy over the actual death figures and the authorities in Myanmar were heavily criticised owing to their apparent under-reporting of fatalities. Evidence from humanitarian organisations confirms the figures stated. See, for example, World Vision, 'Myanmar: Cyclone Nargis Response Update' (*ReliefWeb*, 1 August 2008) <https://reliefweb.int/report/myanmar/myanmar-cyclone-nargis-response-update-01-aug-2008> accessed 25 September 2018; International Federation of Red Cross and Red Crescent Societies (IFRC), 'Myanmar: Cyclone Nargis 2008 Facts and Figures' (*IFRC*, 3 May 2011) <www.ifrc.org/en/news-and-media/news-stories/asia-pacific/myanmar/myanmar-cyclone-nargis-2008-facts-and-figures/> accessed 25 September 2018. Recently, the UN Office for Disaster Risk Reduction (UNISDR) confirmed over 138,000 fatalities. UNISDR, 'Lessons of Cyclone Nargis still need to be applied' (*ReliefWeb*, 3 May 2018) <https://reliefweb.int/report/myanmar/lessons-cyclone-nargis-still-need-be-applied> accessed 25 May 2018.

9 Between 1980 and 2008, the annual average number of disaster-related facilities was 39,488 in Asia. Assuming the accuracy of the UNISDR figures (n 8), Nargis alone was responsible for over three times that count. 'Asia Disaster Statistics' (*PreventionWeb*) <www.preventionweb.net/english/countries/statistics/index_region.php?rid=4> accessed 22 August 2018.

10 The ILC defines 'assisting State' as 'a State providing assistance to an affected State with its consent'. PPED draft articles, with commentaries (n 6) art 3.

11 Humanitarian organisations are included in the ILC's definition of 'other assisting actor', which is considered: 'a competent intergovernmental organization, or a relevant non-governmental organization or entity, providing assistance to an affected State with its consent'. PPED draft articles, with commentaries (n 6) art 3.

Frontières (MSF), to name but a few.[12] Furthermore, on May 7, John Holmes, then-UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, reported that the UN had received around thirty international offers to assist the affected population in Myanmar.[13]

Despite offers of assistance being plentiful, aid flow into the disaster-affected[14] State was slow and arduous. Whilst the authorities in Myanmar – the State Peace and Development Council (SPDC) – assured OCHA and the Myanmar Red Cross Society, among others, that they were open to receiving international assistance,[15] the reality on the ground suggested otherwise. At the time, many States complained that their offers of assistance were being rejected or ignored[16] and many humanitarian organisations

12 On account of many offers of assistance being made in camera at high-level bilateral meetings, media reports and the publications of humanitarian organisations played a significant role in the wider public understanding about the availability of international relief. See, for example, 'Bangladesh aid arrives in Burma' *BBC News* (London, 9 May 2008) <http://news.bbc.co.uk/2/hi/7391550.stm> accessed 25 May 2018; 'UK gives £12m more aid to Burma' *BBC News* (London, 9 May 2008) <http://news.bbc.co.uk/2/hi/uk_news/7403324.stm> accessed 25 May 2018; MSF, 'Myanmar one month after Cyclone Nargis – hope and despair' (*MSF*, 4 June 2008) <www.msf.org/en/article/myanmar-one-month-after-cyclone-nargis-hope-and-despair> accessed 25 May 2018; IFRC, 'Myanmar: Red Cross Red Crescent Launches Revised Emergency Appeal' (*IFRC*, 9 July 2008) <www.ifrc.org/en/news-and-media/press-releases/asia-pacific/myanmar/myanmar-red-cross-red-crescent-launches-revised-emergency-appeal/> accessed 25 May 2018.

13 United Nations Department of Public Information (DPI), 'Press Conference on Myanmar Humanitarian Relief' (*UN*, 7 May 2008) <www.un.org/press/en/2008/080507_Holmes.doc.htm> accessed 25 September 2018.

14 '[A]ffected State' means 'a State in whose territory, or in territory under whose jurisdiction or control, a disaster takes place'. PPED draft articles, with commentaries (n 6) art 3.

15 'The Government has said it will receive international aid.' OCHA, 'Myanmar: Cyclone Nargis OCHA Situation Report No. 3' (*ReliefWeb*, 6 May 2008) <https://reliefweb.int/report/myanmar/myanmar-cyclone-nargis-ocha-situation-report-no-3> accessed 25 May 2018.

16 The French government especially was vocal in its criticisms of the SPDC for refusing their offers of assistance. France had sent a naval vessel with 1000 tonnes of aid, enough to 'provide food and access to drinking water for 100,000 people for 15 days and offer shelter to 60,000 victims as well as medical support' but having waited for days without permission to disembark in Myanmar, the ship was eventually sent to Thailand where the World Food Programme (WFP) took over distribution to the affected population in Myanmar. In a statement, the French government claimed that 'nothing justified' withholding consent to aid in this manner. Crispian Balmer, 'Angry France diverts Myanmar aid to Thailand' *Reuters* (London, 25 May 2008) <www.reuters.com/article/us-myanmar-cyclone-france-idUSL254340520080525> accessed 26 May 2018.

reported a series of difficulties in providing relief. Anders Ladekarl, secretary-general of the Danish Red Cross, reported that transportation of equipment and goods[17] was a major issue, noting, *inter alia*, that the SPDC failed to provide sufficient numbers of helicopters and boats (that were known to be available) to enable access to the most rural communities affected, particularly in the shallow obstacle-laden waters of the Irrawaddy Delta (one of the areas worst hit by the disaster).[18] UN agencies similarly reported that their humanitarian imports had been seized by the SPDC, and the Red Cross reported that whilst several Red Cross groups were allowed to deliver stockpiled relief supplies owing to their long-running operations in the country, they were not allowed to admit new supplies or personnel[19] to meet the increased demand.[20]

In 2009, these difficulties were reflected in a detailed study written and published by the Emergency Assistance Team (a grassroots organisation in Myanmar founded to assist those affected by Cyclone Nargis) and the Center for Public Health and Human Rights at John Hopkins Bloomberg School of Public Health (JHSPH). The study found that the SPDC: inadequately and infrequently rendered assistance to communities worst hit by the cyclone; failed to collect corpses; blocked the delivery of medical assistance; closed off or heavily guarded transport routes; turned a blind eye

17 '[E]quipment and goods' means 'supplies, tools, machines, specially trained animals, foodstuffs, drinking water, medical supplies, means of shelter, clothing, bedding, vehicles, telecommunications equipment, and other objects for disaster relief assistance'. PPED draft articles, with commentaries (n 6) art 3.

18 'A nightmare to make this operation run' *Associated Press* (New York, 9 May 2008) <www.nbcnews.com/id/24543907/ns/world_news-asia_pacific/t/nightmare-make-operation-run/#.W30wj5NKjOQ> accessed 22 August 2018.

19 '[R]elief personnel' means 'civilian or military personnel sent by an assisting State or other assisting actor for the purpose of providing disaster relief assistance'. PPED draft articles, with commentaries (n 6) art 3.

20 Alexander G Higgins, 'Relief falls far short in Myanmar, aid organizers say' *Associated Press* (New York, 9 May 2008) <www.ems1.com/ems-products/Ambulance-Disposable-Supplies/articles/400565-Relief-falls-far-short-in-Myanmar-aid-organizers-say/> accessed 26 May 2018.

to rogue military personnel who were stealing relief supplies and charging 'taxes' for entry into the Irrawaddy Delta; arrested and in some cases imprisoned relief personnel; confiscated relief supplies; and directly and indirectly interfered with the delivery of relief, among other highly concerning activities.[21]

Myanmar's Deputy Defence Minister, Aye Myint, however, was quick to reject claims of this nature. Speaking at the International Institute for Strategic Studies in early June 2008, Myint maintained that the SPDC had reacted appropriately and that 'any assistance and aid' offered 'with genuine goodwill' would be accepted, 'provided there are no strings attached.'[22]

The evidence, however, suggests that Myint's assurances never really manifested. Whilst it is true that some limited offers of international assistance were eventually accepted by the SPDC, the rejection of most in the early – critical – days of the disaster had devastating consequences for the effectiveness of the overall response, and, ultimately, the affected population.

As was perhaps to be expected, international condemnation of the SPDC was fierce.[23] France's then-Foreign Minister and founder of MSF, Bernard Kouchner,

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21 Voravit Suwanvanichkij and others, *After the Storm: Voices from the Delta* (2nd edn, John Hopkins Bloomberg School of Public Health 2009) 24-48.

22 Melanie Lee, 'Myanmar rejects criticism of junta cyclone response' *Reuters* (London, 1 June 2008) <www.reuters.com/article/us-myanmar-cyclone-response/myanmar-rejects-criticism-of-junta-cyclone-response-idUSSIN2703120080601> accessed 25 May 2018.

23 Graham Bowley and Steven Erlanger, 'Myanmar faces pressure to allow major aid effort' *New York Times* (New York, 8 May 2008) <www.nytimes.com/2008/05/08/world/asia/08iht-08myanmar.12679448.html> accessed 22 May 2018; 'OPED: Aid for Myanmar' *Washington Times* (Washington, DC, 30 May 2008) <www.washingtontimes.com/news/2008/may/30/aid-for-myanmar/> accessed 22 May 2018; Roberta Cohen, 'The Burma Cyclone and the Responsibility to Protect' (*Brookings*, 21 July 2008) <www.brookings.edu/on-the-record/the-burma-cyclone-and-the-responsibility-to-protect/> accessed 22 May 2018.

described the SPDC response (or material lack thereof) as 'a crime against humanity'[24] and requested UN Security Council (UNSC) consideration of coercive action, which might have included the airdropping of supplies without SPDC consent and the imposition of a requirement on the part of the SPDC to admit relief personnel. Despite garnering support from the UK and the US, those proposals were promptly blocked by China and Russia, among others.[25] Scot Marciel, then-US Ambassador to the Association of Southeast Asian Nations (ASEAN) and Deputy Assistant Secretary for East Asian and Pacific Affairs, described the SPDC's response as 'appalling' and heavily criticised the regime for giving priority to its then-upcoming constitutional referendum over the disaster response – a decision that Marciel considered to '[speak] volumes to [the SPDC's] indifference to the welfare of [its] people.'[26] Similar criticisms emerged from the UK: in a television interview, then-Foreign Minister, David Miliband, claimed that a 'humanitarian catastrophe' was resulting from 'the malign

24 The merits of this characterisation are beyond the scope of this thesis, which does not consider international criminal law (ICL) in any detail owing to the primary focus in that field being the criminal responsibility of individuals. Whilst affected States undoubtedly have rights and obligations in relation to international crimes, those rights and obligations were ultimately considered tangential to the core research focus here. For a detailed analysis of this characterisation elsewhere, see Stuart Ford, 'Is the Failure to Respond Appropriately to a Natural Disaster a Crime Against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis' (2010) 38 Denver Journal of International Law and Policy 227.

25 'Update Report No. 4: Myanmar' (*Security Council Report*, 14 May 2008) <www.securitycouncilreport.org/update-report/lookup-c-glKWLeMTIsG-b-4130257.php?print=true> accessed 22 August 2018. China and Russia's blocking of these proposals should be seen in the wider context of the political situation in Myanmar and historic voting against proposals that might entail restrictions on sovereignty. One year earlier, for example, China and Russia vetoed draft Resolution (Res) S/2007/14 (regarding violence against ethnic minorities and democratisation) at the 5619th meeting of the UNSC. See DPI, 'Security Council Fails to Adopt Draft Resolution on Myanmar, Owing to Negative Votes by China, Russian Federation' (*UN*, 12 January 2007) UN Doc SC/8939.

26 Scot Marciel, 'Burma in the Aftermath of Cyclone Nargis: Death, Displacement, and Humanitarian Aid' (Statement before the Subcommittee on Asia, the Pacific, and the Global Environment of the House Committee on Foreign Affairs, US Department of State, 20 May 2008) <https://2001-2009.state.gov/p/eap/rls/rm/2008/05/105017.htm> accessed 26 May 2018.

neglect of the regime',[27] and a House of Commons debate on Burma revealed a number of further complaints, including an allegation that the 'active denial of aid to hundreds of thousands of people following Cyclone *Nargis*' was an 'egregious human rights abuse'.[28]

Following criticisms of this nature, a number of suggestions were made as to how the international community could compel the SPDC to accept international assistance for Myanmar's battered population. Whilst the UN – which was having the most success negotiating with the SPDC – maintained that political dialogue was the appropriate means of securing humanitarian access,[29] many other actors argued for coercive measures. As mentioned above, France had contended that the necessary relief should be delivered without the SPDC's consent through airdrops and other (presumably militarily-enforced) measures. Momentum also built behind proposals to

27 'Burma: "humanitarian catastrophe"' *BBC News* (London, 11 May 2008) <http://news.bbc.co.uk/1/hi/programmes/politics_show/7385755.stm> accessed 22 August 2018; 'Burma eases restrictions on aid' *BBC News* (London, 11 May 2008) <http://news.bbc.co.uk/2/hi/asia-pacific/7394410.stm> accessed 22 May 2018.

28 Comments of John Bercow MP (Buckingham) (Con). HC Deb 24 June 2008, vol 478, col 135.

29 See, for example, the comments of senior UN officials in 'Aid agencies struggle to assess Burma cyclone damage' *The Irrawaddy* (Yangon, 5 May 2008) <https://reliefweb.int/report/myanmar/aid-agencies-struggle-assess-burma-cyclone-damage> accessed 28 May 2018; DPI, 'Press conference on Myanmar humanitarian situation' (*UN*, 8 May 2008) <https://reliefweb.int/report/myanmar/press-conference-myanmar-humanitarian-situation> accessed 28 May 2018.

extend the controversial Responsibility to Protect (R2P)[30] commitment[31] to peacetime disasters,[32] and others argued that international criminal prosecution of SPDC leaders would be appropriate.[33] Outside of coercive action, some States, such as the US, made available large sums of money for the procurement and delivery of relief supplies (85 million USD[34] in the case of the US, albeit on the understanding that pre-existing US

30 International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect: Report of the ICISS* (ICISS 2001).

31 Advocates of R2P argue that military interventions may be undertaken to protect populations suffering at the hands of negligent or capricious States. Unsurprisingly, this commitment is controversial. Note, for example, the responses to UNSC Res 1973 (2011) authorising States to 'take all necessary measures' to protect civilians in Libya (UN Doc S/RES/1973(2011)). See also Sarah Brockmeier, Oliver Stuenkel, and Marcos Tourinho, 'The Impact of the Libya Intervention Debates on Norms of Protection' (2016) 30(1) Global Society 113. In respect of its legal basis and potential extension to peacetime disasters, including Myanmar, see, Nathan Willis, 'Natural disaster, national sovereignty and state negligence: an international law analysis of the denial of emergency relief after cyclone Nargis in Myanmar (Burma)' (2012) 31(2) University of Tasmania Law Review 134. Despite the controversy, the commitment has proven useful in advocating intervention in refusing States: 'While the invocation of "responsibility to protect" to argue for military intervention in Myanmar was certainly premature, one cannot help but observe the strength this argument had as a rallying point.' Rebecca Barber, 'The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study' (2009) 14 Journal of Conflict and Security Law 3, 33. It was clear from early in the ILC's work on PPED, however, that the application of R2P to the present context would be problematic. See ILC, 'Preliminary report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur' (5 May 2008) UN Doc A/CN.4/598 (SR Preliminary Report), para 55. Ultimately, R2P was excluded from the scope of the PPED project. ILC, 'Third report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur' (31 March 2010) UN Doc A/CN.4/629, para 3.

32 Alpaslan Özerdem, 'The "responsibility to protect" in natural disasters: another excuse for interventionism? Nargis Cyclone, Myanmar' (2010) 10(5) Conflict, Security & Development 693.

33 Recall in text to n 24 that Kouchner had described the SPDC actions as a 'crime against humanity'. Agreeing, Suwanvanichkij and others (n 21) proposed that the UNSC should refer the SPDC to the International Criminal Court (ICC) on the basis that the '[SPDC actions] may constitute crimes against humanity, violating in particular article 7(1)(k) of the Rome Statute of the International Criminal Court, and a referral for investigation by the [ICC] should be made by the [UNSC].' See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 7(1)(k). For commentary, see Ford (n 24). See also n 24 regarding the characterisation of refusal as an international crime.

34 US Government Accountability Office (US GAO), 'BURMA: UN and US Agencies Assisted Cyclone Victims in Difficult Environment, but Improved US Monitoring Needed' (Report to Congressional Committees, July 2011) <www.gao.gov/assets/520/511492.pdf> accessed 26 May 2018.

sanctions[35] should remain in place) in an attempt to convince the SPDC to accept assistance.

In the end, however, none of the suggested measures garnered enough international support to be pursued, and as the condemnation petered out and the international community's focus shifted to other concerns, Myanmar slumped into a slow period of recovery. Aid flow remained intermittent, and humanitarian organisations continued to face resistance from the SPDC, which meant they struggled to meet compounding needs. Furthermore, in a move that revived the international outcry, the SPDC began an aggressive programme of reconstruction that saw thousands of members of the affected population – including children – forced into labour camps to rebuild villages, public infrastructure, and military facilities.[36]

There is no doubt that the controversy borne out of Cyclone Nargis was unprecedented, both in terms of the sheer reprehensibility of the SPDC response and the international reaction thereto. But the tragic situation in Myanmar has proved itself neither an isolated incident, nor a unique one. Regrettably, there are numerous examples of affected States refusing much-needed emergency humanitarian aid, and (in the absence of an automatic 'right of entry' into affected States) of the international community seeking to find ways to compel those States to accept and facilitate appropriate[37] relief.[38]

35 US sanctions have prohibited, *inter alia*, the export of financial services to Myanmar and transactions with Myanmar officials since 1997. 'Timeline: US-Burma/Myanmar Relations' (2010) 32(3) Contemporary Southeast Asia 434; US GAO (n 34). See also Wylie Bradford, 'Burma: cyclone, aid and sanctions' (*openDemocracy*, 27 May 2008) <www.opendemocracy.net/article/burma-cyclone-aid-and-sanctions> accessed 26 May 2018.

36 Suwanvanichkij and others (n 21), 45-48.

37 In regards to what is 'appropriate' and what is not, see section 1.1.5(b) below.

38 Some recent examples of States that have refused international assistance in emergencies include: the US (2005, hurricane); Eritrea (2007, food insecurity); China (2008, earthquake); Pakistan (2010, flooding); India (2013, flooding); Iran (2017, earthquake); Venezuela (2018, economic crisis); and Myanmar (2018, displacement).

Whilst these examples are elaborated throughout the remainder of this chapter and thesis as necessary, for now, it is important to recognise that the controversy surrounding refusal should be understood not as a hallmark of the international community's altruism, but instead as a symptom of a much more fundamental legal problem. One consequence of the ever-increasing global engagement in humanitarian activities has been the development of legal rules that regulate various aspects of those activities. Humanitarian activities are now regulated by several areas of international law, including: humanitarian law, human rights law, refugee law, and the emerging field of disaster law.[39] As it stands, however, it is not clear whether or how the rules in those various fields regulate (individually or collectively) the narrow but critical issue of refusal in the context of peacetime disasters.[40] Central to resolving this issue is the identification of the primary obligations that underpin an affected State's acceptance or refusal of aid. Put simply: Do affected States have an obligation to accept international assistance?

1.0.1 Defining 'disaster' and 'disaster law'[41]

As indicated at the outset of this chapter,[42] there is no universally-accepted definition of the term 'disaster' in existing international law. Giustiniani remarks that the drafters

39 For an explanation of the term 'disaster law', see section 1.0.1 below.

40 As the following section demonstrates, the most extensive development of legal rules on refusal has occurred in the context of armed conflicts, which are primarily regulated by international humanitarian law (IHL). This thesis does not concern the 'disaster' of armed conflict, but rules from that context are relevant to certain issues and as such are referenced throughout the work as necessary. See, for example, the relevance of early IHL rules to the development of disaster law, discussed below in section 1.1.2.

41 Other key terms entail shorter explanations, and as such are defined throughout this chapter as necessary.

42 See n 4.

of relevant international instruments either deliberately omit to define the term, or opt for an all-encompassing definition.[43] The 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations,[44] for example (which as Chapter 2 makes clear is one of the few multilateral instruments to treat disasters exclusively), defines a disaster as:

> a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes.[45]

In its important work on the protection of persons in the event of disasters (PPED), which is introduced in detail below,[46] the International Law Commission (ILC) offers an authoritative definition of disaster in its draft articles on PPED, which were adopted on second reading at the ILC's 68th session in 2016.[47] According to the ILC, a disaster is defined 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'.[48]

There are two key considerations in the notion of 'disaster' that are relevant to this thesis.

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43 Flavia Zorzi Giustiniani, 'The Works of the International Law Commission on 'Protection of Persons in the Event of Disasters'. A Critical Appraisal' in Andrea de Guttry, Marco Gestri and Gabriella Venturini (eds), *International Disaster Response Law* (Springer 2012) 68.

44 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (adopted 18 June 1998, entered into force 8 January 2005) 2296 UNTS 5 (Tampere Convention).

45 ibid art 1(6).

46 See section 1.1.3(c).

47 PPED draft articles, with commentaries (n 6).

48 ibid art 3.

Firstly, while there has often been an appeal to aetiology in defining disasters in some of the earlier literature,[49] there has more recently been recognition that the apparent cause of a disaster is not, in fact, the determinative factor in ascertaining whether a situation should ultimately be described as 'disastrous' for the purposes of international law. Rather, the focus increasingly is on the direct or indirect effect that natural or other (political, industrial, and so on) events have on the human population. This understanding is reflected in contemporary definitions of disaster, as indicated above.

Secondly, the disasters considered throughout this thesis – and indeed those anticipated by the instruments examined – are not considered to include armed conflict. Some definitions of 'disaster' explicitly exclude armed conflict,[50] whereas

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49 Peter Macalister-Smith noted that '[t]he usual method for classifying disasters follows an [a]etiological approach according to which the most basic division is that between man-made and natural disasters', adding that natural disasters could be further classified into 'meteorological, topological, telluric or tectonic' disasters. Peter MacAlastair-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff 1985) 2-3. For its manifest simplicity, this is certainly an appealing division, but in more recent literature this understanding has been replaced by one that focuses on the impact of the event on the human population, hence the articulations in the Tampere Convention (n 44) and PPED draft articles (n 6), as indicated above.

50 See, for example, the definition offered by the IFRC: '"Disaster" means a serious disruption of the functioning of society, which poses a significant, widespread threat to human life, health, property or the environment, whether arising from accident, nature or human activity, whether developing suddenly or as the result of long-term processes, but excluding armed conflict.' IFRC, 'Introduction to the Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance' (*International Disaster Response Laws, Rules and Principles (IDRL) Programme* 2011) <www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20(2).pdf> accessed 25 September 2018.

others, presumably, omit such an exclusion on the basis that in any situation of armed conflict, international humanitarian law (IHL) would apply *lex specialis*.[51]

For the purposes of this thesis, there has been no requirement of a *de novo* definition of disaster. Here it appears appropriate to treat the definition of disaster – as with other key terms – as preconceived terminology guided by the definitions cited. In this regard, it is useful here to stress too some key points on the nomination 'disaster law'.

This thesis adopts the term 'disaster law' throughout, but in the course of its development, this field of international law has been described in many ways, including 'international disaster response law' and the 'international law of disaster relief'. In considering the significance of nomination, one is reminded of Sir Ian Brownlie's comment that 'international environmental law' is nothing more than international law applied to environmental problems.[52] In that sense, then, it could be argued that international disaster law is just international law applied to disaster-related problems. This author argues, however, that whilst that may be true of general principles of international law applied to disasters, which certainly cannot be said to take on a different nomination by virtue of their application to a specific situation, it cannot be true of the entirety of international law that applies to disasters. It is quite clear that

51 On the *lex specialis* application of IHL, particularly in relation to the parallel application of international human rights law (IHRL) obligations (which as Chapter 3 demonstrates constitute much of the protection available to affected populations in times of disaster) see Alexander Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19(1) EJIL 161; Oona Hathaway and others, 'Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law' (2012) Yale Law School Faculty Scholarship Series Paper 4724 <https://digitalcommons.law.yale.edu/fss_papers/4724/> accessed 25 September 2018. See also *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [25].

52 Ian Brownlie, 'Editor's Preface' in Brian D Smith, *State Responsibility and the Marine Environment: The Rules of Decision* (Clarendon Press 1988).

disasters are regulated by a corpus of international law that has its own sources, actors, structures, and processes, and its own way of interacting with other areas of law. Not only that, but the rapidly expanding body of State and organisation statements, institutional literature, and scholarship on the topic that self-consciously reflect the distinctiveness of the field are undeniable. It is true that the nominations are not always consistent, but their use nonetheless indicates an identifiable field of international law concerning one distinct subject matter – disasters.

That being said, disasters *per se* are not governed by disaster law; rather the law governs the actions and inactions of those who are involved in or are affected by disasters. These actors include affected States, affected populations, assisting States,[53] and other assisting actors (humanitarian organisations and individuals). In other words, disaster law grants rights to and imposes duties on these actors; they are the subjects[54] of disaster law. The manner in and extent to which these subjects are governed by law at various levels, however, will depend on several factors, ranging from the position of the subject in relation to the disaster to the more nuanced legal characteristics of the subject itself. The primary obligations are determinative in this respect, hence these concerns are addressed again in more detail in Chapters 2, 3, and 4.

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53 According to the ILC, an 'assisting State' is 'a State providing assistance to an affected State with its consent.' PPED draft articles, with commentaries (n 6) art 3.

54 On the subjects of international law generally, see Jan Klabbers, 'The Concept of Legal Personality' in Fleur Johns (ed), *International Legal Personality* (Routledge 2010); Roland Portmann, *Legal Personality in International Law* (CUP 2010); James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 115-116. On the international legal personality of non-governmental organisations specifically, see Anna-Karin Lindblom, *Non-governmental Organisations in International Law* (CUP 2005) 54-118.

1.1 Refusal in Context

Despite considerable normative development in recent decades, it is still not clear whether – and if so to what extent – international law actually obligates an affected State to accept offers of international assistance.

There is no treaty or clearly defined custom that could serve as a starting point in the discovery of an affected State's obligations in times of disaster.[55] This places disaster law in contradistinction to areas of international law that do enjoy such core normative delineation, such as the law of the sea (1982 United Nations Convention on the Law of the Sea (UNCLOS))[56] and the rights of the child (1990 Convention on the Rights of the Child (CRC)).[57]

Absent a core instrument like UNCLOS or the CRC, enquiries into State obligations in times of disaster must instead survey a more disparate legal landscape. Sivakumaran, for one, has described this landscape as a 'patchwork of norms'.[58] This certainly seems appropriate: bespoke rules on refusal alone exist in a handful of multilateral treaties, numerous bilateral agreements, and several soft law disaster-related instruments. In addition to these bespoke disaster agreements, relevant rules exist in human rights law, particularly in relation to the rights to life and to an adequate

55 Scholars have remarked upon this fact on several occasions. See, for example, Sandesh Sivakumaran, 'Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief' (2017) 28(4) EJIL 1097, 1098.

56 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS). Current parties: 168.

57 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC). Current parties: 196.

58 Sivakumaran (n 55) 1097.

standard of living, and in the law of co-operation. As for disaster law more generally, that survey is even wider.[59]

National legislation on disasters also features in this disparate legal landscape. Many States have enacted legislation based on the Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (Model Act),[60] which was developed by the IFRC as a means of encouraging standardised norms and practices on disaster relief. What is more, whilst generally it is recognised that there are no clearly-defined overarching customary rules explicitly applicable to situations of disaster, it should be noted that some narrower customary rules may in time crystallise if *opinio juris* develops around provisions in presently non-binding guidelines that have been adopted extensively by States in their humanitarian practices.[61] One example of this is the Bruges Resolution on Humanitarian Assistance[62] (which in any case is understood to reflect some hard rules of international law). Finally, other non-binding agreements, such as the Sendai Framework for Disaster Risk Reduction,[63] provide further context and content to the hard rules.

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59 The IFRC's Disaster Law Programme, examined in more detail below at section 1.1.3(b), reveals disaster-related norms in many areas of international law. For more on the Disaster Law Programme, see section 1.1.3(b) below and IFRC, 'About the Disaster Law Programme' (*IFRC*) <www.ifrc.org/what-we-do/idrl/about-idrl/> accessed 1 June 2018.

60 IFRC, 'Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (with commentary)' (*IFRC*, 2013) <www.ifrc.org/docs/IDRL/MODEL%20ACT%20ENGLISH.pdf> accessed 31 May 2018.

61 These norms, agreements, and instruments are examined in Chapter 2.

62 Institute of International Law, 'Resolution on Humanitarian Assistance' Bruges Session (2 September 2003) (Bruges Resolution). See also Chapter 2.

63 The Sendai Framework for Disaster Risk Reduction 2015-2030 was adopted at the Third UN World Conference in Sendai, Japan, on March 18, 2015, and is intended to give further effect to State commitments under the International Framework for Action for the International Decade for Natural Disaster Reduction of 1989. UN, 'Sendai Framework for Disaster Risk Reduction 2015-2030' (*UNISDR*, 2015) <www.unisdr.org/files/43291_sendaiframeworkfordrren.pdf> accessed 22 August 2018.

In the remainder of this section, the evolution of this disparate legal landscape is traced with a particular focus on the development of rules concerning the acceptance or refusal of international assistance. This section suggests that these rules lack clarity and coherence not just because of the wider context of *ad hoc* normative development, but also because those rules bring into sharp focus a further unresolved legal debate concerning the extent to which State sovereignty might prevent recognition of an obligation on the part of affected States to accept international assistance.[64] Despite manifesting in contemporary practice, this is a debate that has its roots in early humanitarianism.

1.1.1 Early humanitarianism

Whilst a precise chronological account of the development of disaster law is precluded by the intersecting and interrelated drivers of such, it is nonetheless useful to highlight certain early developments in humanitarianism that continue to inform the development of rules on refusal today.

Humanitarian action as the expression of the 'humanitarian gesture'[65] is not a new concept. As oft-remarked, humanitarian assistance in times of disaster, especially peacetime disaster, is a practice with well-established roots.[66] Records indicate

64 On certain questions raised by sovereignty in the context of refusal, see J Benton Heath, 'Disaster, relief and neglect: the duty to accept humanitarian assistance and the work of the International Law Commission' (2011) 43 NYU Journal of International Law and Politics 419.

65 Eleanor Davey, John Borton, and Matthew Foley, 'A history of the humanitarian system: Western origins and foundations' (2013) Overseas Development Institute Humanitarian Policy Group Working Paper, 1 <www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8439.pdf> accessed 22 May 2018.

66 See, for example, Macalister-Smith (n 49) 1.

organised assistance as a response to disasters existing as far back as the eruption of Mount Vesuvius in 79 AD[67] when it appears that the Roman navy was among the first actors to initiate and distribute assistance. Later records indicate the creation of specialist orders for the conduct of foreign benevolence, such as the Knights of Malta (better known as the Order of St John) that was formed in 1080 and later inspired the now internationally-recognised organisation, St John Ambulance.[68]

Even with the emergence of the modern system of States around the time of the Westphalian peace treaties[69] and the firming of decidedly more 'Westphalian' notions of sovereignty (those concretising the principle of non-interference in the internal affairs of another State),[70] the compulsions of humanity and charity were not lost with respect to international neighbours. Indeed, no account of the evolution of humanitarian assistance is complete without reference to a key passage from de Vattel's influential work of 1758, *The Law of Nations*:

> [W]hen the occasion arises, every Nation should give its aid to further the advancement of other Nations and save them from disaster and ruin, so far as

67 Will Mather, 'A Voyage Into Catastrophe: Pompeii and the Roman Navy' (*Australian National Maritime Museum*) <http://stories.anmm.gov.au/pompeii/> accessed 22 May 2018.

68 Whitworth Porter, *A History of the Knights of Malta: Or the Order of the Hospital of St. John of Jerusalem* (Scholar's Choice 2015).

69 According to Fassbender, 'To many international lawyers and political scientists, the Peace of Westphalia is a decisive caesura in the history of international law and relations, a divide between an older European order marked by the religious and political unity of the *res publica christiana* under the rule of Emperor and Pope and a modern secular system of sovereign and equal State[s] that is still in existence today, or that lasted at least until the end of World War II'. Bardo Fassbender, 'Westphalia, Peace of (1648)' (February 2011) MPEPIL, para 7. See also Wilhelm G Grewe, *The Epochs of International Law* (De Gruyter Berlin 2000). See also, Randall Lesaffer, 'Peace Treaties and the Formation of International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 72-93.

70 For Besson, the principle of sovereignty entails 'supreme authority within a territory' but what 'counts as sovereignty depends on the nature and structure of the international order and vice-versa.' Samantha Besson, 'Sovereignty' (April 2011) MPEPIL, para 1. The importance of sovereignty has been recognised numerous times. See, for example, the International Court of Justice (ICJ) in *Corfu Channel*: 'Between independent States, respect for territorial sovereignty is an essential foundation of international relations.' *Corfu Channel Case* (*UK v Albania*) (Merits) [1949] ICJ Rep 4, 35.

> it can do so without running too great a risk … To give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would refuse absolutely to do so.[71]

It is upon these most basic historical foundations that, over the decades, States have increasingly co-operated with each other and with international organisations to create, implement, and enforce legal rules in relation to their humanitarian activities.

1.1.2 Preliminary attempts at multilateral treaty-making

The best-known of the early humanitarian treaties emerged in the context of armed conflict. The 1863 Lieber Code[72] regulated the conduct of US armies in the American Civil War and has been credited as one of the first codifications of the principle of humanity. Similarly, the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field[73] – the 'founding text of contemporary international humanitarian law'[74] – sought to check the human cost of warfare by providing for legal regulations applicable thereto.

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71 Emer de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Charles G Fenwick tr, Carnegie Institution of Washington, 1916) 114.

72 Instructions for the Government of Armies of the United States in the Field (24 April 1863) (*International Committee of the Red Cross* (*ICRC*)) <https://ihl-databases.icrc.org/ihl/INTRO/110> accessed 22 May 2018 (Lieber Code).

73 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted 22 August 1864, entered into force 22 June 1865) 22 Stat 940 (1864 Geneva Convention).

74 ICRC, '1864 Geneva Convention' (*ICRC*, 18 August 2013) <www.icrc.org/eng/resources/documents/treaty/geneva-convention-1864.htm> accessed 22 May 2018.

The core concern for humanity expressed in these treaties, however, was not solely limited to the context of armed conflict, and it is unsurprising that States soon turned their attention to the regulation of peacetime humanitarianism as well.

(a) 1927 Convention Establishing the International Relief Union[75]

In the inter-war period, the 1927 Convention Establishing the International Relief Union founded the first major international organisation to dedicate itself to disaster response outside of armed conflict. Hutchinson describes the overall purpose of the International Relief Union (IRU) as being to 'foster solidarity and mutual assistance among peoples of the world'[76] and article 2 of the Convention confirmed this, providing that the two main objectives of the IRU were to 'furnish the suffering population with first aid and to assemble for this purpose funds, resources and assistance of all kinds' and 'to co-ordinate … the efforts made by relief organisations, and … to induce all peoples to render mutual assistance.'[77]

Unfortunately, responses to the IRU were not conducive to these aims. Operationally, the IRU was weak and it found itself having its offers of assistance rejected by affected States.[78] This weakness was owed principally to meagre funding: with only 425,000 Swiss Francs, it was perhaps foreseeable that the IRU would be

75 Convention Establishing an International Relief Union (adopted 12 July 1927, entered into force 27 December 1932) 35 LNTS 249 (IRU Convention). Parties: 29.

76 John F Hutchinson, 'Disasters and the International Order. II: The International Relief Union' (2001) 23 International History Review 253, 254.

77 IRU Convention (n 75) art 2.

78 IRU assistance was declined a number of times throughout the 1930s, for example, by the Indian government in the 1934 Orissa earthquake and by the relevant US authorities in the 1937 Mississippi-Ohio floods. See Peter Macalister-Smith, 'International Relief Union – Reflections on the Convention Establishing an International Relief Union of July 12, 1927' (1986) 54 Tijdschrift voor Rechtsgeschiedenis 363, 370.

unable to fulfil its ambitious objectives.[79] In 1965, having struggled with severe financial difficulties for decades, the UN Economic and Social Council (ECOSOC) resolved that the IRU was to transfer its resources and competences to the UN Educational, Scientific and Cultural Organization (UNESCO) – a resolution that cemented the demise of the IRU.[80]

Despite the ultimate failure of the IRU, its Convention set an important precedent that continues to influence the development of norms in this area nearly a century later. The IRU Convention was the first international instrument applicable to peacetime disasters that was explicit in stating that relief was to be provided with the consent of the affected State. Article 4 of that Convention provided unequivocally that: 'Action by the International Relief Union in any country is subject to the consent of the Government thereof.'[81] As will become clearer later, this requirement of consent is central to the current regime governing international relief. Furthermore, in language not dissimilar to the instruments of today,[82] the parties to the IRU Convention agreed to accord to the IRU and its counterparts 'the most extensive immunities, facilities and exemptions for their establishments, for the movements of their staff and supplies, for relief operations, and for the publicity of appeals'[83] in a provision that, despite not saying so explicitly, demonstrably exists to reduce barriers to effective humanitarian relief (a foundational commitment of contemporary disaster law frameworks).

79 ibid.
80 UNESCO, 'Transfer to UNESCO of Certain Responsibilities and Assets of the International Relief Union' UNESCO Doc 78 EX/19 and add and 78 EX/37 Part III.
81 IRU Convention (n 75) art 4.
82 Many treaties contain provisions of this nature. Select treaties are elaborated in Chapter 2.
83 IRU Convention (n 75) art 10.

For decades, the IRU Convention was the only multilateral agreement to deal exclusively with disaster relief.[84] In the 1980s, however, efforts in this respect were revived.

(b) 1984 Draft Convention on Expediting the Delivery of Emergency Assistance[85]

In the late 1960s and early 1970s, several high-profile disasters prompted the Office of the UN Disaster Relief Co-ordinator (UNDRO)[86] – the forerunner of today's OCHA – and the League of Red Cross Societies (LRCS) to conduct studies of legal issues affecting disaster relief, which culminated in the non-binding 'Measures to Expedite International Relief' in 1977.[87] The Measures went on to inspire other instruments and guidelines in the field. Following further studies and consultations, UNDRO proposed a draft treaty text to ECOSOC: the 1984 Draft Convention on Expediting the Delivery of Emergency Assistance.[88]

Unlike the IRU Convention, and in a drafting move that was particularly significant in terms of future normative development, the Draft Convention addressed a range of issues in disaster response. In addition to providing guiding principles for assistance,[89] which is now common in instruments in this field, the text sought to

84 Macalister-Smith (n 78), 363.
85 UN Disaster Relief Co-ordinator (UNDRO), 'Report of the Secretary-General to the United Nations General Assembly and Economic and Social Council' (18 June 1984) UN Doc A/39/267/Add.2; E/1984/96/Add.2, Proposed draft Convention on expediting the delivery of emergency relief (Draft Convention) 5-18.
86 For a short history of UNDRO, see Ilhan Lütem, 'The United Nations Disaster Relief Coordinator (UNDRO)' (1985) 1 Prehospital and Disaster Medicine 301.
87 UNDRO, 'Report of the Secretary-General to the United Nations General Assembly' (12 May 1977) UN Doc A/32/64, annex II, Measures to expedite international relief.
88 Draft Convention (n 85).
89 ibid art 3.

regulate: the basic conditions for the delivery of assistance;[90] the exchange of information;[91] protection and facilities;[92] communications;[93] notification;[94] identification;[95] import and export;[96] financial provisions;[97] the termination of assistance;[98] and transport.[99] Interestingly, an explicit reference to the requirement of consent – which appeared in the IRU Convention[100] – was not included in the Draft Convention, although there were nonetheless provisions requiring that the sovereignty of the Receiving State be respected.[101] Like the IRU Convention, however, the Draft Convention was not well-received and its ultimate demise was (as with the IRU) predictable. Whilst the text was referred to the UN's Second Committee (the committee of the UN General Assembly (UNGA) responsible for economic and financial matters), that Committee did not take any official action, which might suggest that commitment to such an instrument lacked among States.[102]

Interestingly, however, the LRCS was also partly responsible for the failure of the Draft Convention. Whilst the text did achieve some limited support from States, alongside the majority of States that opposed the draft was the LRCS that claimed that the text as it stood afforded too much to affected States by focussing so heavily on

90 ibid art 5.
91 ibid art 6.
92 ibid art 7.
93 ibid art 8.
94 ibid art 9.
95 ibid art 12.
96 ibid arts 13 and 14.
97 ibid art 15.
98 ibid art 18.
99 ibid arts 19-21.
100 IRU Convention (n 75) art 4.
101 Draft Convention (n 85) art 3(a).
102 On account of the failure to gain traction in the UN system, Beigbeder describes the Draft Convention as an 'aborted initiative'. Yves Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance* (Martinus Nijhoff Publishers 1991) 377.

their sovereignty and control.[103] This was one of the first times that there had been such blatant resistance to prioritising State sovereignty in instruments concerning peacetime relief (recall that the IRU Convention prioritised the sovereignty of States by providing that the consent of the affected State had to be secured prior to assistance being rendered[104]). Like ECOSOC with the IRU Convention, the LRCS cemented the demise of the Draft Convention – the only difference being that the LRCS actively resisted whereas ECOSOC prompted the demise through its inaction. As with the IRU Convention, however, the legacy of the Draft Convention can be seen today in so far as it prompted a more 'institutional' approach to normative development in this area. Recognising that States were failing to enact international agreements to secure more effective humanitarian assistance, leading humanitarian organisations took action themselves.

1.1.3 Organisational efforts in normative development

Despite disappointing receptions, organisations such as the IRU and efforts such as the Draft Convention signalled a change in formal humanitarianism. This new institutional humanitarianism was 'envisioned by its participants and protagonists as a permanent, transnational, institutional, and secular regime for understanding and addressing the root causes of human suffering.'[105] The failures of the more general instruments in 1927 and 1984, however, meant that States had little basis upon which

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103 ibid 378.

104 IRU Convention (n 75) art 4.

105 Keith D Watenpaugh, 'The League of Nations' Rescue of Armenian Genocide Survivors and the Making of Modern Humanitarianism, 1920-1927' (2010) 115 American Historical Review 1315, 1319.

to proceed in efforts to conclude general agreements providing for obligations on relief. The result was greater engagement in narrower treaty-making activities, such as the creation of multilateral treaties that were limited to certain regions or types of assistance, and bilateral treaty-making that required less in the way of mass consensus on divisive issues. For organisations like the UN and the IFRC, however, there was no such impetus to look for other avenues. Instead, spurred on by the recognition that, 'disasters ha[d] adversely affected the lives of a great number of people and caused considerable damage to infrastructure and property worldwide, especially in developing countries'[106] (the 1970 Bhola cyclone, the 1976 Tangshan earthquake, and the 1983 Ethiopian drought to name but a few motivations), those organisations sought to improve the humanitarian system through their own initiatives, often involving non-binding outcomes.

(a) International Decade for Natural Disaster Reduction

Building on the momentum (however short-lived) of the Draft Convention, the UN was proactive in seeking to increase international co-operation in humanitarian activities to improve disaster responses (albeit at the time, only 'natural disaster'[107] responses). This revived international attention to disasters led the UN to designate the 1990s the International Decade for Natural Disaster Reduction.[108]

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106 UNGA Res 44/236 (22 December 1989) UN Doc A/RES/44/236, preambular para 3.

107 Since the late 1990s, there has been a greater appreciation that natural events in and of themselves are not disastrous; it is, rather, human responses (or lack thereof) that may render any given situation disastrous. As a result, whilst in the early 1990s there was a strong focus on natural disasters, the salient contributions of those early efforts have transferred to disasters that are caused by other events, such as industrial accidents and economic crises.

108 UNGA Res 44/236 (n 106).

UNGA Resolution (Res) 44/236, recalling Res 42/169,[109] reiterated the increasing international concern surrounding the impact of natural disasters and identified goals for the decade, policy measures to be taken at national level, and actions to be taken within the UN system. Most importantly, this resolution laid the foundations for another UNGA resolution two years later that became a pillar in the international legal regulation of disaster responses. In Res 46/182, the UN undertook to strengthen its own coordination of its humanitarian activities. The resolution set out thorough guidelines for the conduct of assistance within the UN Organisation and offered preliminary positions on: prevention; preparedness (including early warning); stand-by capacity; consolidated appeals; coordination; co-operation; leadership; and the continuum from relief to rehabilitation and development.[110] Despite only being focussed on the natural disaster response capacities of the UN, it is from this resolution that much of the broader international legal and institutional frameworks on peacetime disaster response have since been inspired.

(b) IFRC Disaster Law Programme

One of the efforts to be inspired by Res 46/182 and the increasing international attention to peacetime disaster responses was the IFRC's Disaster Law Programme.[111]

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109 UNGA Res 42/169 (11 December 1987) UN Doc A/RES/42/169.

110 UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182.

111 The IFRC often refers to its disaster law work as its 'IDRL' project, which stands for 'international disaster response law'. As understandings of how international law addresses disaster situations more generally have shifted, so too have the terms used. The IFRC's Disaster Law Programme was formerly called the 'IDRL Programme'. For more on the Disaster Law Programme, see IFRC, 'About the Disaster Law Programme' (n 59).

Identifying that 'even the best prepared governments may need international support when a major disaster strike[s]'[112] and that '[u]nfortunately, few governments have adequate systems in place to facilitate and regulate outside relief'[113] the aim of the IFRC's Disaster Law Programme, which began in 2001 (and was originally called the International Disaster Response Laws, Rules and Principles (IDRL) Programme), was to 'explore the role of law in the response to disasters, particularly international disaster relief'.[114] Based on the Programme's work, the 30th International Conference[115] adopted the 'Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance' ('IDRL Guidelines'), which indicate to States (*inter alia*, through the National Societies) ways to strengthen their national laws and policies regarding peacetime disaster response.[116] These Guidelines still serve as a point of reference for States[117] and organisations (not least because the UNGA recommended them to States on three occasions in March 2009 alone[118]) and they have

112 'IDRL Guidelines.
113 ibid.
114 'Disaster Law – Background on the Programme' (*IFRC*) <www.ifrc.org/en/what-we-do/disaster-law/about-idrl/background-on-the-programme/> accessed 22 August 2018.
115 30th International Conference of the Red Cross and Red Crescent, Resolution 4: Adoption of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (Geneva 26 – 30 November 2007).
116 'IDRL Guidelines' (*IFRC*) <www.ifrc.org/what-we-do/disaster-law/about-disaster-law/international-disaster-response-laws-rules-and-principles/idrl-guidelines/> accessed 20 June 2018 (IDRL Guidelines).
117 The Philippines, for example, amended its national legislation to reflect the Guidelines on reducing importation restrictions on disaster-related goods (IDRL Guidelines (n 112) s 18.3) by authorising the 'importation and donation of food, clothing, medicine and equipment for relief and recovery and other disaster management and recovery-related supplies … in accordance with Section 105 of the Tariff and Customs Code of the Philippines, as amended, and the prevailing provisions of the General Appropriations Act covering national internal revenue taxes and import duties of national and local government agencies' in Philippine Disaster Risk Reduction and Management Act of 2010, Republic Act No. 10121, 27 July 2009, s 18. For more examples, see 'Adopted legislation and rules' (*IFRC*) <www.ifrc.org/what-we-do/disaster-law/about-disaster-law/international-disaster-response-laws-rules-and-principles/idrl-guidelines/new-legislation-adopted-on-idrl/> accessed 20 June 2018.
118 UNGA Res 63/137 (3 March 2009) UN Doc A/RES/63/137; UNGA Res 63/139 (5 March 2009) UN Doc A/RES/63/139; UNGA Res 63/141 (10 March 2009) UN Doc A/RES/63/141.

provided the foundations for principles and rules on disaster relief that have been adopted in the legislation of at least twelve States[119] thus far. Furthermore, the IDRL Guidelines have informed at least eleven UNGA resolutions,[120] five ECOSOC resolutions,[121] one World Customs Organization resolution,[122] ten regional resolutions,[123] and three International Conference of the Red Cross and Red Crescent resolutions[124] on disaster law thus far.

119 Bhutan; Colombia; Finland; Indonesia; Mexico; Namibia; The Netherlands; New Zealand; Norway; Panama; Peru; and The Philippines. 'Disaster Law - Adopted legislation and rules' (*IFRC*) <www.ifrc.org/en/what-we-do/idrl/idrl-guidelines/new-legislation-adopted-on-idrl/> accessed 22 August 2018.

120 All UNGA resolutions were adopted without vote, but this should not be seen as indicating levels of State support equivalent to unanimity. See Robin C A White, 'A New International Economic Order' (1975) 25(3) ICLQ 542, 543. For examples of the resolutions, see 'UN General Assembly Resolutions mentioning the IDRL Guidelines' (*IFRC*) <www.ifrc.org/en/what-we-do/idrl/research-tools-and-publications/key-resolutions/un-general-assembly-resolutions-on-the-idrl-guidelines/> accessed 20 June 2018.

121 ECOSOC resolutions facilitate international co-operation on economic and social issues and some have encouraged governments to utilise the Guidelines in their disaster response frameworks. For examples of the resolutions, see 'UN ECOSOC Resolutions mentioning the IDRL Guidelines' (*IFRC*) <www.ifrc.org/en/what-we-do/idrl/research-tools-and-publications/key-resolutions/un-ecosoc-resolution-on-the-idrl-guidelines/> accessed 20 June 2018.

122 The World Customs Organization is an independent intergovernmental organisation with the object of improving the administration of customs. In its Resolution of the Customs Co-operation Council on the Role of Customs in Natural Disaster Relief (June 2011), it instructed its Secretariat to note, *inter alia*, the Guidelines in its inventory of customs formalities for the exportation, transit and importation of relief goods. See 'Resolutions from other international organizations mentioning the IDRL Guidelines' (*IFRC*) <www.ifrc.org/en/what-we-do/idrl/research-tools-and-publications/key-resolutions/other-international-organisation-resolution-mentioning-the-idrl-guidelines/> accessed 20 June 2018.

123 Regional resolutions in the Americas, Asia-Pacific, and Europe evidence widespread State recognition of the importance and relevance of the Guidelines. See 'Regional resolutions mentioning the IDRL Guidelines' (*IFRC*) <www.ifrc.org/en/what-we-do/idrl/research-tools-and-publications/key-resolutions/regional-resolutions-mentioning-the-idrl-guidelines/> accessed 20 June 2018.

124 The International Conferences are the highest deliberative body of the Movement and involve all Red Cross Red Crescent (RCRC) organs in discussions on humanitarian challenges. The incorporation of the Guidelines into the resolutions of these Conferences evidences their centrality in the wider RCRC work. See 'Resolutions of the International Conference of the Red Cross and Red Crescent Movements on disaster law' (*IFRC*) <www.ifrc.org/what-we-do/idrl/research-tools-and-publications/key-resolutions/red-cross-and-red-crescent-resolutions-on-disaster-law/> accessed 20 June 2018.

In addition to providing the basis for such important resolutions and being deemed 'the most significant pronouncement on the topic'[125] at the time, the Guidelines received considerable endorsement not just from main organs of the UN[126] but also from the then 194 States Parties[127] to the Geneva Conventions.[128] Importantly, the IDRL project also identified a gap in the broader international legal regime for disaster response:

> There is no definitive, broadly accepted source of international law which spells out legal standards, procedures, rights and duties pertaining to disaster response and assistance. No systematic attempt has been made to put together the disparate threads of existing law, to formalize customary law or to expand and develop the law in new ways.[129]

125 Arnold Pronto, 'Consideration of the Protection of Persons in the Event of Disasters by the International Law Commission' (2008-2009) 15 ILSA Journal of International & Comparative Law 449, 449.

126 See UNGA Res 63/193, 'Strengthening of the coordination of emergency humanitarian assistance of the United Nations' (5 March 2009) UN Doc A/RES/63/193; UNGA Res 63/141, 'International cooperation on humanitarian assistance in the field of natural disasters, from relief to development' (10 March 2009) UN Doc A/RES/63/141; UNGA Res 63/137, 'Strengthening emergency relief, rehabilitation, reconstruction and prevention in the aftermath of the Indian Ocean tsunami disaster' (3 March 2009) UN Doc A/RES/63/137. See also ECOSOC Res 2008/36, 'Strengthening of the coordination of emergency humanitarian assistance of the United Nations, (25 July 2008) UN Doc E/RES/2008/36; ECOSOC Res 2009/3, 'Strengthening of the coordination of emergency humanitarian assistance of the United Nations' (22 July 2009) E/RES/2009/3.

127 There are currently 196 States Parties to the Geneva Conventions. The two additional ratifications/accessions since 2007 are South Sudan (2013) and Palestine (2014).

128 The Guidelines were unanimously adopted by the States Parties to the Geneva Conventions at the 30th International Conference of the Red Cross and Red Crescent in 2007. See 30th International Conference (n 115). According to Bugnion, the adoption at the Conference is significant for three reasons: (a) because participants in the Conferences are representatives of States, thus are authoritative sources of the State's official position; (b) because the Red Cross institutions have international legal personality; and (c) because the Red Cross contributes to the formation of international law through its activities and drafting of legal instruments that are submitted to diplomatic conferences. François Bugnion, 'Red Cross law' (1995) International Review of the Red Cross, No 308.

129 IFRC, *World Disasters Report – Public Health* (IFRC 2000) 145.

It is into this 'yawning gap'[130] that the UN stepped in 2006, when the ILC began work on the PPED topic. As elaborated in the next section, the UN Secretariat noted that the objective of the work was the elaboration of a set of provisions that would serve as a legal framework for the conduct of international disaster relief activities.[131] The IDRL Guidelines were considered to have served as a 'primary reference point'[132] in the early stages of this work.

(c) The ILC's Work on PPED

In 2007, the PPED topic was formally incorporated into the ILC's long-term programme of work, having been recommended for inclusion by the ILC's Working Group in 2006.[133] A Special Rapporteur – in this case, Eduardo Valencia-Ospina – was appointed by the ILC to oversee the topic. Special Rapporteur Valencia-Ospina's preliminary report notes that the 'protection of persons' was (and indeed still is) to be understood synonymously with 'relief' or 'assistance',[134] which renders the PPED topic of immediate relevance to the question of the development of rules on the refusal of emergency humanitarian aid. The ILC's work on PPED is examined in detail in Chapter 5, but as aspects of the ILC's work will be relevant to certain discussions in Chapters 2, 3, and 4, the PPED topic is introduced here. The remainder of this section introduces key aspects of the ILC's work: its dual mandate of codification and

130 Eduardo Valencia-Ospina, 'The ILC Work on the Protection of Persons in the Event of Disasters' (*SHARES Research Project on Shared Responsibility in International Law*, 4 December 2013) <www.sharesproject.nl/the-ilc-work-on-the-protection-of-persons-in-the-event-of-disasters/> accessed 20 June 2018.

131 ILC, 'Report of the ILC on the Work of its 58th Session' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10, annex III, para 24.

132 Giustianiani (n 43) 67.

133 UNGA Res 62/66 (6 December 2007) UN Doc A/RES/62/66.

134 SR Preliminary Report (n 31) 146.

progressive development; the draft articles relevant to the acceptance and refusal of aid; and the potential outcome.

i. Codification and progressive development

At this stage, what is critical to note is that in attempting to elaborate a set of provisions ('draft articles' in this case) that would serve as a legal framework for the conduct of international disaster relief activities, the ILC engaged both in codification of existing international law and the progressive development of emerging international law.[135]

There is a risk of oversimplifying the respective terms here, so a fuller account of the meanings of codification and progressive development (which are in any case subject to considerable debate themselves) is elaborated in Chapter 5. For the purposes of introducing the PPED topic, suffice it to say that in 'codifying' existing law, the ILC examined extensive State practice and formulated and systematised rules based thereupon, and in 'progressively developing' the law, the ILC identified pressing issues not regulated adequately by existing international law and made efforts to advance the normative development thereof.

There are two important consequences of this mandate. Firstly, the fact that codification and progressive development are activities which themselves are subject

135 The ILC was established with the object of 'the progressive development of international law and its codification'. Statute of the International Law Commission, UNGA Res 174(II) (21 November 1947) UN Doc A/RES/174(II), as amended by Res 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981 (ILC Statute) art 1(1). See also art 15 on the meanings of progressive development and codification respectively. This is discussed further in Chapter 5.

to considerable debate means that any resultant normative development (in the form of the draft articles that follow, in this case) may also be subject to considerable debate. This has certainly been seen in respect of draft article 13 on arbitrary refusal (detailed below). Secondly, and despite the potential for debate, it should be noted that in the carrying out of these important normative development activities, the ILC is positioned to make significant contributions to the present topic.[136] Undoubtedly, and again as Chapter 5 details, these contributions have already been seen with the PPED topic.

ii. Draft articles relevant to the refusal of aid

In 2016, the ILC adopted on second reading its set of eighteen draft articles on PPED with commentaries.[137] As mentioned earlier, Chapter 5 sets out in detail the contribution that the ILC has made to the present topic; the purpose here is to outline the draft articles on PPED that are central to this thesis, namely those relating to the refusal of aid.

A number of the draft articles are relevant to this topic. The most relevant is draft article 13, which concerns 'arbitrary' refusal.[138] The salient sections of draft article 13 provide that: '1. The provision of external assistance requires the consent of the affected State. 2. Consent to external assistance shall not be withheld arbitrarily.' Whilst

136 See section iii below.
137 PPED draft articles, with commentaries (n 6).
138 Article 13: 'Consent of the affected State to external assistance. 1. The provision of external assistance requires the consent of the affected State. 2. Consent to external assistance shall not be withheld arbitrarily. 3. When an offer of external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.' ibid art 13.

there is more to be said later about the motivations for framing the obligation this way, for now it is crucial to stress that this is most likely a reflection of the ILC's compromise on the sovereignty issue (elaborated below) rather than a best-case articulation of the relevant obligation.

Other important draft articles, which serve to support draft article 13 and in effect constitute the bigger picture of the ILC's position on refusal, include: draft articles 4, 5, and 6 on the protection of human rights[139] (which as Chapter 3 makes clear, are a central concern in respect of refusal); draft articles 7 and 8 on duties to co-

139 Article 4: 'Human dignity. The inherent dignity of the human person shall be respected and protected in the event of disasters.' Article 5: 'Human rights. Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law.' Article 6: 'Humanitarian principles. Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.' ibid arts 4-6.

operate;[140] draft articles 10 to 15 on the responsibilities of the State;[141] and finally, draft article 18 on the draft articles' relationship to other rules of international law.[142] Each of these articles is examined in further detail in Chapter 5.

iii. The potential outcome of the ILC's work

The objective of the PPED topic was to 'facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect

140 Article 7: 'Duty to cooperate. In the application of the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors.' Article 8: 'Forms of cooperation in the response to disasters. Cooperation in the response to disasters includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.' ibid, draft articles 7-8.

141 Article 10: 'Role of the affected State. 1. The affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control. 2. The affected State has the primary role in the direction, control, coordination and supervision of such relief assistance.' Article 11: 'Duty of the affected State to seek external assistance. To the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors.' Article 12: 'Offers of external assistance. 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.' Article 14: 'Conditions on the provision of external assistance. The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.' Article 15: 'Facilitation of external assistance. 1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance, in particular regarding: (a) relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and (b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and the disposal thereof. 2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law.' ibid, draft articles 10-15.

142 Article 18: 'Relationship to other rules of international law. 1. The present draft articles are without prejudice to other applicable rules of international law. 2. The present draft articles do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law.' ibid, draft article 18.

for their rights.'[143] At the outset of the work, it was clear that an international convention on PPED – based on the draft articles – was contemplated by the Special Rapporteur as a means of achieving this purpose, although it was by no means a commitment. That a new convention was at least anticipated was evident: not only was the Convention on the Privileges and Immunities of the United Nations identified as a potential model in the Special Rapporteur's preliminary report,[144] but the preparation of a draft convention is in any case an outcome provided for by article 15 of the ILC Statute.[145]

As mentioned above, whether the ILC did actually engage in codification or progressive development of the law is a concern reserved for Chapter 5, where the substance of the draft articles is analysed. As for form, for the work to at least *inspire* a new international convention, the eventual outcome need not have been confirmed at the outset. The Special Rapporteur notes in the preliminary report that 'in practice, the Commission has utilized a variety of other forms in which to couch its final drafts: model rules, principles, guidelines, declarations, codes, etc.'[146] It is only as the work got closer to conclusion that it became clear that the ILC was anticipating a set of draft articles, which in turn could inspire a new convention. By his eighth report in 2016, the Special Rapporteur stated that:

> the surest and most timely manner by which the draft articles on the protection of persons in the event of disasters can serve their purpose and become truly effective in the face of the increasing frequency and intensity of disasters would

143 PPED draft articles, with commentaries (n 6) art 2.
144 SR Preliminary Report (n 31), para 59.
145 ILC Statute (n 135) art 15.
146 SR Preliminary Report (n 31), para 60.

> be to use them as the basis for the adoption of a binding instrument, such as an international convention.[147]

An international convention based on the draft articles is currently the most likely outcome of the ILC's work on PPED. This is so despite comments from States that indicate little consensus on its eventual form: while some States agree that an international convention[148] or framework convention to inspire further bilateral or multilateral instruments[149] is the appropriate outcome, others have recommended that the draft articles be adopted as non-binding guidelines,[150] and others still have recommended a guide to practice[151] or a set of recommendations.[152] The debate on refusal and any convention that might regulate States in relation thereto, then, is still very much alive among States, which renders the assessment of existing international law and the positions that the ILC has taken in that respect (and the State responses thereto) of critical importance.[153]

1.1.4 Rules on acceptance and refusal in existing international law

147 ILC, 'Report by Special Rapporteur Eduardo Valencia-Ospina 2016/697' (2016) UN Doc A/CN.4/697, para 411.

148 For example, Mexico, UN Doc A/C.6/67/SR.19, para 20.

149 For example, Poland, UN Doc A/C.6/64/SR.21, para 78.

150 For example: UK, UN Doc A/C.6/64/SR.29, para 40; UN Doc A/C.6/65/SR.24, para 64; UN Doc A/C.6/66/SR.23, para 45; and UN Doc A/C.6/69/SR.19, para 166; Czech Republic, UN Doc A/C.6/64/SR.20, para 43; India, UN Doc A/C.6/69/SR.21, para 70; Russian Federation, UN Doc A/C.6/66/SR.24, para 37; UN Doc A/C.6/68/SR.25, para 37, and UN Doc A/C.6/69/SR.19, para 96; Slovenia, UN Doc A/C.6/67/SR.18, para 129.

151 For example, Russian Federation, UN Doc A/C.6/65/SR.23, para 58.

152 For example, Germany, UN Doc A/C.6/68/SR.24, para 60.

153 This importance is reflected in the overall structure of the thesis. As elaborated in the roadmap at the close of this chapter, Chapters 2, 3, and 4 concern rules on refusal in existing international law and Chapter 5 concerns the ILC's work on PPED and how it relates to those rules.

As mentioned earlier, a strictly chronological account of the development of disaster law in this area is precluded by the intersection and interrelatedness of the field's normative development. At the same time that the above institutional normative development was gaining traction, States were also engaging in law-making activities that advanced rules on refusal themselves. These rules are critical to the question of how existing international law regulates an affected State's refusal of aid, and as such are elaborated in Chapters 2, 3, and 4. Nonetheless, these rules – as with the ILC's work above – require introduction here. Rather than presenting introductions chronologically, the various normative developments are presented according to their prominence in the overall field of disaster law.[154] Consequently, the remainder of this section introduces: bespoke treaty-making, emerging customary norms, and the development of soft law norms on the refusal of aid; the interpretation of the rights to life and to an adequate standard of living respectively to cover refusal of aid; and the application of the principle of co-operation to the refusal of aid.

(a) Bespoke treaty-making, customary international law, and the development of soft law norms

By now, it perhaps obvious that treaties feature prominently in the landscape of disaster law and on account of the flexibility in their design it is no wonder that they are the instrument of choice to reflect the differences in the types of regulation

154 Recall the explanation of the emerging field of disaster law in section 1.0.1 above.

required. Disaster-related databases[155] indicate that hundreds of international treaties now exist to regulate various aspects of disasters and responses thereto. The broader the definition of disaster, the greater the number of relevant instruments.

As introduced earlier and as Chapter 2 demonstrates in more detail, at the global level, a single multilateral convention governing comprehensively responses to disasters does not exist. Since the failures of the 1927 IRU Convention and the 1984 Draft Convention, States have focussed on creating a diverse range of multilateral and bilateral treaties to address particular aspects of disasters and/or responses thereto, including: early notification;[156] nuclear and radiological emergencies;[157] climate change;[158] industrial accidents;[159] telecommunications;[160] food aid;[161] civil defence assistance;[162] health;[163] and the security of humanitarian personnel.[164]

Further, States have added disaster-related provisions into other treaties not otherwise addressed to disasters. In the Convention on the Rights of Persons with Disabilities (CRPD), for example, article 11 requires States Parties to take 'all necessary measures to ensure the protection and safety of persons with disabilities in situations

155 Several databases are available, the most prominent of which being 'Disaster Law Database' (*IFRC*) <www.ifrc.org/publicaciones/disaster-law-database/> accessed 22 May 2018. See also 'UN Treaty Collection' (*UN*) <http://treaties.un.org/> accessed 22 May 2018.

156 Convention on Early Notification of a Nuclear Accident (adopted 26 September 1986, entered into force 27 October 1986) 1439 UNTS 275 (Early Notification Convention).

157 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (adopted 26 September 1986, entered into force 26 February 1987) 1457 UNTS 133.

158 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

159 Convention on the Transboundary Effects of Industrial Accidents (adopted 17 March 1992, entered into force 19 April 2000) 2105 UNTS 457.

160 Tampere Convention (n 44).

161 Food Aid Convention (adopted 13 April 1999, entered into force 1 July 1999) 2073 UNTS 135 (FAC).

162 Framework Convention on Civil Defence Assistance (adopted 22 May 2000, entered into force 23 September 2001) 2172 UNTS 231.

163 World Health Organization (WHO), International Health Regulations (entered into force 15 June 2007) <www.who.int/ihr/publications/9789241596664/en/> accessed 22 May 2018.

164 Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (adopted 8 December 2005, entered into force 19 August 2010) 2689 UNTS 59.

of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.'[165] Similarly, in the African Charter on the Rights and Welfare of the Child (ACRWC), articles 23(4) and 25(2)(b) ensure that the provisions of the articles (concerning refugee and internally displaced children and separation from parents respectively) apply in the event of a range of disasters, including natural disasters and breakdown of social and economic order.[166] On the subject of sea and air transport, the 1965 London Convention on Facilitation of International Maritime Traffic contains a provision on facilitating the arrival and departure of vessels involved in disaster relief work,[167] and the International Standards and Recommended Practices annexed to the 1997 Convention on International Civil Aviation contains a similar provision on relief flights.[168] Similar provisions exist in treaties on customs[169] and waste[170].

165 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 11. See further n 191 below.

166 African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (1990) (ACRWC) articles 23(4) and 25(2)(b). See further n 191 below.

167 Convention on Facilitation of International Maritime Traffic (adopted 9 April 1965, entered into force 5 March 1967) 591 UNTS 265, annex section F, 5.11-5.12.

168 1997 International Civil Aviation Organization, Annex 9 to the 1997 Convention on International Civil Aviation: International Standards and Recommended Practices — Facilitation (10th edition), 31 August 1997. Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295.

169 Customs Convention on the Temporary Importation of Professional Equipment (adopted 8 June 1961, entered into force 1 July 1962) 473 UNTS 153; International Convention on the Simplification and Harmonization of Customs Procedures (adopted 18 May 1973, entered into force 25 September 1974) 950 UNTS 270 (Kyoto Convention) (revised 1999, entered into force 2006); Convention Relating to Temporary Admission (adopted 26 June 1990, entered into force 27 November 1993) UKTS 60 (1999) (Istanbul Convention). For a detailed overview of these treaties, see Giovanna Adinolfi, 'Customs Obstacles to Relief Consignments Under International Disaster Response Law' in Andrea de Guttry, Marco Gestri and Gabriella Venturini (eds*), International Disaster Response Law* (Springer 2012).

170 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57 (Basel Convention) arts 14, 16, and 25.

The negotiation of more comprehensive disaster treaties has seen most success at the regional level. Again, as Chapter 2 elaborates, such regional treaties have been created in respect of: Organisation of American States (OAS) members in 1991;[171] Black Sea States in 1998;[172] Caribbean States in 1999;[173] Central American States in 2003;[174] South-East Asian States in 2005;[175] and African States in 2009.[176] In respect of the European Union, the European Commission's complex European Civil Protection and Humanitarian Aid Operations department (ECHO) is underpinned by articles 196 and 214 of the Treaty of Lisbon[177] and several related regulations, decisions, and conclusions.[178]

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171 1991 Inter-American Convention to Facilitate Disaster Assistance (adopted 7 June 1991, entered into force 16 October 1996) OAS Treaty Series A-54 (1991) <www.oas.org/juridico/english/treaties/a-54.html> accessed 22 May 2018.

172 1998 Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-Made Disasters (adopted 15 April 1998, entered into force 11 March 2003) <www.bsec-organization.org/documents/LegalDocuments/agreementmous/agr4/Documents/Emergencyagreement%20071116.pdf> accessed 22 May 2018.

173 Agreement Between Member States and Associate Members of the Association of Caribbean States for Regional Cooperation on Natural Disasters (adopted 17 April 1999, entered into force 14 March 2014) (*IFRC*) <www.ifrc.org/docs/idrl/I399EN.pdf> accessed 17 April 2018.

174 2003 Nuevo Convenio Constitutivo del Centro de Coordinación para la Prevención de los Desastres Naturales en America Central (New Constitutive Treaty of the Coordination Center for the Prevention of Natural Disasters in Central America) (*IFRC*) <www.ifrc.org/docs/idrl/N585ES.pdf> accessed 22 May 2018.

175 ASEAN Agreement on Disaster Management and Emergency Response (adopted 26 July 2005, entered into force 24 December 2009) (*ASEAN*) <http://agreement.asean.org/media/download/20140119170000.pdf> accessed 2 July 2018.

176 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 22 October 2009, entered into force 6 December 2012) (Kampala Convention) (*African Union*) <https://au.int/sites/default/files/treaties/7796-treaty-0039_-_kampala_convention_african_union_convention_for_the_protection_and_assistance_of_internally_displaced_persons_in_africa_e.pdf> accessed 22 May 2018.

177 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon) (adopted 13 December 2007, entered into force 1 December 2009).

178 For an up to date overview of the legal framework underpinning ECHO, see 'Legal Framework' (*European Commission*) <http://ec.europa.eu/echo/who/about-echo/legal-framework_en> accessed 22 June 2018.

Increasingly, States are also identifying particular other States with whom they wish to address disaster-related obligations on a bilateral basis. Some bilateral agreements aim for comprehensive coverage of disaster response issues, such as those between Austria-Jordan,[179] Switzerland-Philippines,[180] Canada-United States of America,[181] Greece-Russia,[182] and Austria-Germany,[183] to name but a few, whereas others concern particular elements, such as disaster prevention (US-Philippines[184]), search and rescue (South Africa-Namibia[185]), and health (South Africa-Uganda[186]).

On account of the commonality of some rules across instruments, sensibly there have also been enquiries as to whether any of the rules examined might be customary, or at least be said to be crystallising in that respect. Whilst the customary nature of the rules is a much more dominant discussion in Chapters 3 and 4 regarding

179 Agreement between the Republic of Austria and the Hashemite Kingdom of Jordan on Mutual Assistance in the Case of Disasters or Serious Accidents (adopted 13 March 2004) (*IFRC*) <www.ifrc.org/docs/idrl/I649EN.pdf> accessed 2 July 2018.

180 Agreement between the Swiss Federal Council and the Government of the Republic of the Philippines on Cooperation in the Event of Natural Disaster or Major Emergencies (6 December 2001) (*IFRC*) <www.ifrc.org/docs/idrl/I494EN.pdf> accessed 25 September 2018.

181 International Emergency Management Assistance Memorandum of Understanding (Canada–United States of America) (18 July 2000) (*IFRC*) <www.ifrc.org/Docs/idrl/I653EN.pdf> accessed 25 September 2018.

182 Agreement between the Government of the Hellenic Republic and the Government of the Russian Federation on Co-operation in the Field of Prevention and Response to Natural and Man-Made Disasters, (adopted 21 February 2000) (*IFRC*) <www.ifrc.org/docs/idrl/I204EN.pdf> accessed 2 July 2018.

183 Agreement Concerning Mutual Assistance in the Event of Disasters or Serious Accidents (Austria–Federal Republic of Germany) (23 December 1988) (*IFRC*) <www.ifrc.org/docs/idrl/I218EN.pdf> accessed 25 September 2018.

184 Protocol of Intentions between the Government of the United States of America and the Republic of the Philippines concerning Cooperation in Disaster Prevention and Management (20 November 2001) (*IFRC*) <www.ifrc.org/Docs/idrl/I217EN.pdf> accessed 25 September 2018.

185 Agreement between the Government of the Republic of South Africa and the Government of the Republic of Namibia Regarding the Coordination of Search and Rescue Services (8 September 2000) (*IFRC*) <www.ifrc.org/docs/idrl/I172EN.pdf> accessed 25 September 2018.

186 Declaration of Intent on Cooperation in the Field of Health, Republic of South Africa and Republic of Uganda (4 August 1999) (*IFRC*) <www.ifrc.org/docs/idrl/I300EN.pdf> accessed 25 September 2018.

human rights and co-operation, and whilst the majority of the instruments examined in Chapter 2 address more technical matters, there remains the possibility at least that some of the direct regulation of disasters might be or might be becoming customary. This is especially the case in respect of rules on co-operation, which in their technical sense are examined in Chapter 2 and in their more general sense are examined in Chapter 4.

Finally, there has also been a significant number of soft law instruments developed in relation to disasters, and many have a bearing on the refusal of aid. The IFRC and ILC efforts already mentioned are significant in this regard, but there also exist a range of other contributions: the 1982 UN Institute for Training and Research (UNITAR) Model Rules for Disaster Relief Operations;[187] the 1991 Guiding Principles on Humanitarian Assistance (appended to UNGA Res 46/182 mentioned above);[188] the 1994 Red Cross Code of Conduct;[189] and the 2011 standards developed by the Sphere Project[190] are just a handful of the soft law examples relevant to this subject. Relevant efforts in this regard are also examined in Chapter 2.

(b) Interpretations of the rights to life and to an adequate standard of living

As mentioned earlier, in addition to creating agreements narrower in scope, States have also responded to the failure of comprehensive global treaties by incorporating

187 UNITAR, 'Model Rules for Disaster Relief Operations' (1982) (*IFRC*) <www.ifrc.org/docs/idrl/I126EN.pdf> accessed 13 July 2018.

188 UNGA Res 46/182 (n 110).

189 IFRC, 'Red Cross Code of Conduct' (1994) (*IFRC*) <https://media.ifrc.org/ifrc/who-we-are/the-movement/code-of-conduct/> accessed 13 July 2018.

190 The Sphere Project, 'Humanitarian Charter and Minimum Standards in Humanitarian Response' (2011) (*IFRC*) <www.ifrc.org/PageFiles/95530/The-Sphere-Project-Handbook-20111.pdf > accessed 25 September 2018.

disaster-related provisions into existing treaties and by interpreting existing obligations to cover disaster situations. This practice is particularly evident in human rights law.

Whilst as yet the number of international human rights agreements that explicitly address disaster situations is limited,[191] there is evidence of the increasing practice of States and of the human rights treaty bodies to elaborate the interpretation of human rights obligations in the disaster context. It is clear now that human rights are understood to apply to situations of disaster just as they do any other, but interpretations of certain rights – namely the right to life and the right to an adequate standard of living – now also include disaster-specific elaborations. As Chapter 3 demonstrates, because of the various elaborations of their content in the disaster context, the right to life and the right to an adequate standard of living are the principal human rights that restrict an affected State's right to refuse in the context of peacetime disaster. The right to life,[192] for example, requires an affected State to take positive acts in times of disaster, meaning that State has the responsibility to mitigate the effects of disasters as an aspect of the guarantee to the right to life. What is more, because of the non-derogable nature of the right to life, the affected State could actually be required to accept international assistance to ensure that it meets its international obligations if

191 Article 11 of the CRPD (n 165) states: 'States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.' The ACRWC (n 166) and the Kampala Convention (n 176) also make specific references to disasters. ACRWC articles 23(4) and 25(2)(b) ensure that their provisions (concerning refugee and internally displaced children and separation from parents respectively) apply in the event of a range of disasters, including natural disasters and breakdown of social and economic order. The Kampala Convention, in proclaiming the importance of human rights for IDPs, acknowledges that disasters can have a 'devastating impact on human life, peace, stability, security, and development' (preambular para 5). See also ns 165 and 166.

192 The right to life has a basis in customary law as well as in article 6 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. Current parties: 172.

it is unable or unwilling to provide aid itself. Judicial interpretation of the right to life in the European context leads to this conclusion, so there could be an argument that this interpretation is limited in its geographical application (and its overall practical application considering that most disasters do not actually occur in Europe). Regardless, that the foundations for this interpretation to be applied in other regions have been set is significant.[193]

The right to an adequate standard of living demands considerably more of States in the disaster context. As the right to an adequate standard of living is realised through the protection of its constituent rights – namely the rights to food, housing, health, and water – affected States have obligations in relation to each of those constituent rights, and the elaboration of those rights in the disaster context by treaty bodies has been more extensive. The Committee on Economic Social and Cultural Rights (CESCR) (responsible for monitoring the implementation of the International Covenant on Economic Social and Cultural Rights (ICESCR)[194]), for example, has stressed that in relation to the right to food, States remain under an obligation to ensure the availability and accessibility of food even in times of disaster[195] (article 11(2) of the ICESCR commits States to taking individual measures as well as measures in

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193 It is not uncommon for regional human rights courts to rely on interpretations of human rights obligations from other regional instruments or courts, especially where the human rights issue concerned is not of special relevance to any one particular region. The European Court of Human Rights, for example, cited Inter-American standards in considering the right to life in the context of the use of embryos for scientific research. *Parrillo v Italy* App no 46470/11 (ECtHR, 27 August 2015); *Case of Artavia Murillo et al. (in vitro fertilization) v Costa Rica* (Preliminary Objections, Merits, Reparations and Costs) (28 November 2012) Inter-American Court of Human Rights (IACtHR) Series C No 257.

194 International Covenant on Economic Social and Cultural Rights (adopted 16 December 1976, entered into force 3 January 1976) 993 UNTS 3 (ICESCR). Current parties: 169.

195 'States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters'. CESCR, 'General Comment No. 12: The right to adequate food (art. 11)' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I), 55.

'international co-operation'[196] to ensure aspects of the right to food). In the context of international assistance, this could well mean that an affected State is under an obligation to accept offers of assistance where it is unable or unwilling to ensure the right to food itself.

That the interpretation of certain human rights obligations is being widened to include the refusal of aid is significant for present purposes, thus is returned to in detail in Chapter 3.

(c) Obligations of co-operation

A final area of law considered in this thesis is the international law of co-operation. Whilst States do not have a general duty to co-operate with each other *on all matters* and *at all times*, Chapter 4 demonstrates that it is widely accepted that States have a duty to co-operate on humanitarian matters under the UN Charter.[197] It is entirely possible, therefore, that the law of co-operation could have a bearing on an affected State's refusal of international assistance (recalling, of course, that international assistance is provided as a means of co-operating on humanitarian matters). As it stands, however, this link has not been made explicitly and whilst most States and scholars would likely agree that the provision of international assistance is an area in which international co-operation is expected, it is unclear whether there exists a strictly legal basis for such co-operation.[198]

196 ICESCR (n 194) art 11(2).
197 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).
198 This is analysed in Chapter 4.

The reason for the lack of clarity here is the fact that the nature, scope, and content of this more general duty to co-operate on humanitarian matters is subject to some debate. The aim of Chapter 4 is to elaborate those aspects of the duty such that it can be applied in the disaster context. As Chapter 4 demonstrates, it seems reasonable to conclude that whilst States are understood to be under a duty to co-operate in the disaster context, the co-operative actions demanded of that duty in any given situation are likely to vary. Whilst there are no specific co-operative actions that are obligated in all circumstances, then, Chapter 4 does confirm that for most States there will be an obligation to co-operate in the realisation of certain economic, social, and cultural rights under the ICESCR (i.e. those elaborated in Chapter 3) and in the much narrower context of the protection of persons with disabilities in the event of disaster under the CRPD.

Where the disaster situation in question threatens the enjoyment of fundamental human rights, the affected State's obligation to co-operate can be seen as a matter of customary international law in so far as there is a customary obligation to protect those rights (and in that case the precise actions to be taken remain, however, subject to the determination of the affected State as a sovereign). Practically speaking, this may be most disasters. Regardless of the actions that are required, it is significant that the law of co-operation speaks to the refusal of aid, and as such the obligations in relation thereto are returned to in detail in Chapter 4.

1.1.5 The debate over the rights and obligations of sovereignty

One of the reasons that the development of disaster law widely and rules on the acceptance and refusal of aid narrowly has been so disparate is because each normative advancement made has had to strike a balance between the rights and obligations of State sovereignty.

State, organisational, and scholarly positions in this debate are best understood as occupying various points on a spectrum. At one end of the spectrum are the views that State sovereignty entails a right on the part of all States to decide freely and without intervention from external actors the internal affairs of that State. Seen in this light, an obligation to accept assistance could only ever exist if the State had itself committed itself to such an obligation (for example in a treaty), but such a move in that direction would in any case be unlikely. This is because many States tending towards this end of the spectrum are clear that they see disaster relief as an internal affair that is not subject to international obligations of this nature. This is, in fact, the reason that China and Russia, among others, blocked suggestions at the UNSC that coercive measures should be used against Myanmar when it refused to accept aid in 2008.[199]

At the other end of the spectrum are those that see humanitarian needs as something to be prioritised over and above any allegedly outdated notions of State sovereignty. In a bold departure from the more Westphalian notions of sovereignty, some are of the view that in this increasingly humanitarian world (where the number of humanitarian treaties is rising and human welfare is increasingly protected through peremptory norms of international law), States – in fact – should be seen as having

199 See text to n 25.

obligations to protect their populations at all costs as a result of this sovereignty.[200] Under this 'sovereignty as responsibility' understanding, States do have an obligation to accept international assistance when they are unable or unwilling to provide the necessary assistance themselves (as was the case in Myanmar, for example).

Most, however, find themselves somewhere between these two extremes. France, for example, would be understood as being closer to the 'sovereignty as responsibility' end of the spectrum in the aftermath of Cyclone Nargis because it suggested coercive action from the UNSC, but – acknowledging the lack of legal basis for such – ultimately did not deliver aid in the absence of Myanmar's consent (notable considering it had the means to do so at the time, as its naval vessels were present outside Myanmar's territorial waters within days of the cyclone making landfall).

Existing international law, too, reflects this middle ground. As will become apparent throughout the thesis when the nature, scope, and content of the relevant primary obligations are elaborated, most articulations of rights and obligations in this area reflect the need to balance the rights and obligations of sovereignty. As has been mentioned, the ILC recognises that aid must be provided with the consent of the affected State (reflecting the traditional view of State sovereignty) but restricts that State's right to withhold its consent (its right to refuse) by requiring that such consent not be withheld 'arbitrarily' (a move that speaks more to the notion of 'sovereignty as

200 Proponents of 'sovereignty as responsibility' argue that sovereignty does not merely protect against interference; it also entails a responsibility for the welfare of those under its jurisdiction and control. Arguments of this nature arise especially in relation to African nations, where some like Deng and others argue that successive governments have engaged in internal and external conflicts with little or no regard for the impact on the domestic population. Francis Deng and others, *Sovereignty as Responsibility: Conflict Management in Africa* (Brookings Institution Press 1996). See also Georg Nolte, 'Sovereignty as Responsibility?' (2005) Proceedings of the Annual Meeting (ASIL), vol 99, 389-392; Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101(1) AJIL 99; Roberta Cohen and Francis M Deng, 'Sovereignty as Responsibility: Building Block for R2P' in Alex Bellamy and Timothy Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (OUP 2016).

responsibility'). Similarly, in human rights law, the few explicit interpretations of obligations on the refusal of aid stipulate that the affected State should (a weaker normative term in and of itself, also reflecting the delicate balance between the rights and obligations of sovereignty) only accept international assistance when it is unable or unwilling to provide the aid itself. That such obligations are conditional reflects – again – the balance that must be struck in order for States to be willing to create hard rules in this area.

Whilst this debate will be returned to in concluding Chapter 6, where future normative development and the balancing of these views is considered in more detail, there are three important implications that must be drawn out here. The first relates to the fact that as a result of these debates, the framing of this obligation is important and has consequences for the wider understanding of State obligations in this area. The second relates to the fact that – also as a result of these debates – there has been wide recognition that not all situations of a State refusing aid will be seen as problematic. Where a State is refusing aid for certain reasons (elaborated below), it is unlikely that an enquiry into the lawfulness of the refusal will result. Finally, the third relates to the simple fact that owing to (a) the disparate sources and overlaps of obligation in this area (elaborated in Chapters 2, 3, and 4) and (b) the divergent views on sovereignty, very few generalisations are able to be made about affected State obligations in respect of the refusal of aid. Each case must be assessed on its own merits, and all conclusions on obligations drawn throughout the thesis must therefore be understood in this light.

(a) Framing the obligation

That a State has an obligation to accept international assistance where it is unable or unwilling to provide adequate assistance itself is a view that accords with the 'sovereignty as responsibility' end of the spectrum mentioned above. That a State has a right to refuse international assistance irrespective of its ability or willingness to provide adequate assistance is a view that accords with the traditional sovereignty end of the spectrum. A more realistic view, however, and the one that accords with the majority of States and scholars in this area (elaborated in this chapter and elsewhere in the thesis) is that 'international law now makes possible a third way, in which the principle of sovereignty and non-interference can stand alongside a concern for populations who are neglected by their own government.'[201]

This middle ground option relies on careful articulation of the relevant obligations, and reflects the duality of sovereignty as reflected in Judge Álvarez's judgment in *Corfu Channel*: 'Sovereignty confers rights upon States and imposes obligations on them.'[202] In the present context, therefore, the 'third way' is an articulation that reflects the affected State's right to refuse international assistance (honouring the traditional view of sovereignty), but in a way that stresses its limited obligations in certain contexts (honouring the responsibility entailed by sovereignty). Put more succinctly, it is preferable to articulate affected State obligations in this regard as a *restricted right to refuse*. The core of the articulation is the 'right to refuse', but the adjective 'restricted' ensures that existing international law obligations in respect of the refusal of aid (and indeed any that might arise as a result of the ILC's work on the PPED topic) are accorded due importance. The remainder of the thesis adopts this

201 Heath (n 64) 427.
202 *Corfu Channel* (n 70) 43 (separate opinion of Judge Alejandro Álvarez).

articulation. As will become clearer in Chapter 6, any future normative development of rules on refusal is also likely to reflect this compromise.

(b) Enquiries into the lawfulness of a refusal

As explained above, not all cases of an affected State refusing international assistance will prompt enquiries as to the lawfulness of that refusal. This reflects the reality that any restrictions on the right to refuse depend on the circumstances of the actual or proposed refusal. Nowhere is there an exhaustive list of these circumstances and what responses thereto might entail; instead, there has been a piecemeal acknowledgement by States and scholars that certain instances of refusal are appropriate, even desirable. In the event that a State refuses because the aid is unsafe (as was the case with certain medical shipments to Bosnia and Herzegovina in the 1990s, for example[203]), an affected State's refusal is unlikely to be deemed unlawful (*ceteris paribus*). Similarly, if there is a reasonable suspicion that the aid is not being provided on the basis of the humanitarian principles of humanity, impartiality, neutrality, and independence (as Iran

203 Patrick Berckmans and others, 'Inappropriate Drug-Donation Practices in Bosnia and Herzegovina, 1992-1996' (1997) 338 New England Journal of Medicine 1472.

asserts is the case with Israeli aid that it has historically refused, for example[204]), then an affected State's refusal, again, is unlikely to be deemed unlawful (*ceteris paribus*).[205]

Less clear are situations in which a State refuses aid because it wants to be (or in any case wants to be seen as) self-sufficient. This was the case in Eritrea in 2007, for example, when President Afwerki refused emergency food shipments sent by, *inter alia*, the UN World Food Programme (WFP) because of his desire to see Eritrea 'stand on its own two feet'.[206] In 2018, India refused international assistance after devastating floods in Kerala for similar reasons, citing the country's 'longstanding policy of relying

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204 See, for example, Bethan McKernan, 'Iran-Iraq earthquake: Israeli offers of help to victims "turned down"' *The Independent* (London, 15 November 2017) <www.independent.co.uk/news/world/middle-east/iran-iraq-eathquake-latest-updates-israeli-offers-help-turned-down-benjamin-netanyahu-victims-aid-a8056076.html> accessed 23 August 2018.

205 A related question is whether the affected State is itself obligated to comply with the humanitarian principles in deciding whether to accept aid, and indeed whether that State would accordingly be obligated to provide reasons for its refusal (so as to facilitate assessment of its performance of the former obligation)? Whilst it is certainly desirable that this should be so, it is far from a straightforward assertion legally-speaking. Taking impartiality as one example, it is noteworthy that impartiality requires that aid is provided on the basis of needs alone, without discrimination. Are affected States thus required to ensure there is no discrimination in their choice of which offers to accept, assuming the prospective assisting actor would be able to meet needs? Practice would suggest that in certain instances, discrimination has been deemed acceptable (at least politically). The US, for example, refused an offer of medical support (principally doctors) from Cuba in the aftermath of Hurricane Katrina in 2005 owing to political tensions between the two States. It may be said, then, that the US discriminated against Cuba because of the latter's politics, something that does not accord with the humanitarian principle of impartiality. Yet the decision was seen as relatively uncontentious, calling into question the acceptability of discrimination in decision-making. Much more contentious would be discrimination on the grounds of religion. What legal norms prohibit an affected State refusing all assistance from predominantly Islamic States, for example? In this example, much would again turn on whether the affected State was able and willing to meet the needs of the affected population; if it was, such discrimination may go (relatively, at least) uncontested. These complex issues are returned to in part in Chapter 5, where the meaning of 'arbitrary' is considered in relation to the ILC's work on PPED, but they have also been considered in detail elsewhere. See, for example, Sandesh Sivakumaran, 'Arbitrary Withholding of Consent to Humanitarian Assistance' (2015) 64 International and Comparative Law Quarterly 501, 524-26.

206 'Eritrea aspires to be self-reliant, rejecting foreign aid' *LA Times* (Los Angeles, 2 October 2007) <www.latimes.com/world/la-fg-eritrea2oct02-story.html> accessed 25 September 2018.

on domestic resources'.[207] Where a State claims this is the reason for its refusal and it does actually manage to provide the aid itself, there will be little in the way of questions over the lawfulness of the refusal. But, as with Eritrea and India and several other examples, where the State cannot actually meet the needs itself (which would lead to devastating consequences for the affected population), its goal of self-sufficiency is likely to give rise to questions over the lawfulness of the refusal. This is an important point considering that it is rare for States to be able to deal exclusively and exhaustively with a major disastrous event. Even the US struggled to meet needs following Hurricane Katrina in 2005, and the US is considered one of the most highly developed States in the world.[208] Underlying most enquiries about the lawfulness of a refusal are situations in which the affected State is unable or unwilling to provide the assistance itself. More and more the notions of inability and unwillingness are finding their way into humanitarian dialogues, although – for now at least – it remains the case that such notions have not been entrenched in hard law rules.

(c) Case-by-case analysis

It may be clear at this point that owing to (a) the disparate sources and overlaps of obligation in this area (introduced earlier and elaborated in Chapters 2, 3, and 4) and (b) the divergent views on sovereignty, no generalisations are able to be made about

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207 See, for example, Ayesha Venkataraman, Suhasini Raj, and Maria Abi-Habib, 'After Worst Kerala Floods in a Century, India Rejects Foreign Aid' *New York Times* (New York City, 23 August 2018) <www.nytimes.com/2018/08/23/world/asia/india-kerala-floods-aid-united-arab-emirates.html> accessed 23 August 2018.

208 The US ranks tenth in the UN Development Programme's (UNDP) Human Development Index, which measures 'average achievement in three basic dimensions of human development: long and healthy life, knowledge and a decent standard of living.' UNDP, 'Human Development Index' <http://hdr.undp.org/en/indicators/137506> accessed 23 August 2018.

affected State obligations in respect of international assistance. Each case must be assessed on its own merits in consideration of the situation itself and the primary obligations applicable to the affected State concerned.

1.1.6 Summary observations on refusal in context

Any existing or future rules on refusal must be understood in the light of the complex history and present state of normative development in relation to the international legal regulation of disasters. This area of law is changing rapidly, and wider moves in the direction of the development of disaster law generally impact the development of rules on refusal more narrowly. In the shorter sections that follow, the impact of this context on research design is explained. The research question is elaborated in section 1.2, with the significance of the research detailed in section 1.3, the ultimate claim of the thesis elaborated in section 1.4, and the roadmap of the thesis presented in section 1.5.

1.2 Research Question

Despite the efforts of recent decades, it remains the case that States and scholars alike are divided on the extent to which international law restricts an affected State's right to refuse emergency humanitarian aid. States' views remain polarised, and for the most part scholars continue to tackle the question in a piecemeal and overlapping fashion, reflecting the historical approach to normative development. Ultimately, this means the topic is neither considered nor treated in a holistic manner. But in the light of the potential for the conclusion of a new international convention, there is now an opportunity to paint a clearer picture of an affected State's right to refuse. Taking that opportunity, this thesis probes the extent to which international law restricts an affected State's right to refuse emergency humanitarian aid by considering not only what exists in current international law, but also what contribution to the development of rules on refusal the ILC has made in its draft articles. Ultimately, the two-part question driving this research was: To what extent does existing international law condition an affected State's right to refuse,[209] and what is the potential for conclusion of a new international convention?

1.3 Significance of the Research

The costs of not addressing the questions over an affected State's right to refuse are concerning. This thesis addresses three concerns in particular.

Firstly, this thesis aims to inform a decades-long debate. It is clear that international law restricts the right to refuse to an extent, but the fact that to date there has been no comprehensive evaluation of how this is so means that there is a considerable gap in existing knowledge, thus the issue remains as pressing now as it has ever been.

209 It will become apparent in the following chapters that, for the most part, the obligations concerned condition (usually in a restrictive manner) the *exercise* of the right to refuse; they do not necessarily condition the right to refuse itself, which, as Chapter 2 demonstrates, has its basis in State sovereignty. Because of this, references throughout to 'restrictions on the right to refuse' (or similar) should be understood as referring to restrictions on the right to refuse or restrictions on the exercise of the right to refuse. Where it has been necessary to specify precisely whether it is the right or the exercise thereof that is at issue, those references have been made explicit in the text. Otherwise, the context will be determinative.

Secondly, the next stage of normative development on refusal depends on there being greater clarity on this issue. If a new international convention is drafted on the basis of the PPED draft articles in the current climate of confusion over, *inter alia*, draft article 13 (as demonstrated in Chapters 5 and 6), then it stands to reason that any new international convention must either risk failure like the 1927 IRU Convention and the 1984 Draft Convention before it, or it must abandon a provision on the right to refuse – something that, arguably, would limit the practical application and utility of the ILC's codification efforts.

Thirdly and finally, with or without a new international convention, those with a concern for human welfare – including States, organisations, and individuals (acting in various capacities) – will continue to search for ways to compel refusing States to accept international assistance when it is clear that affected populations are in need. Absent consensus on key legal rules like the lawful parameters of the right to refuse, responses to refusal are likely to remain confused and considerable humanitarian resources are likely to continue to be wasted in that confusion. Despite heated debates over legal bases for action, the 'never again' horrors of the 20th and 21st centuries (Rwanda, Serbia, Libya, and Myanmar to name but a few) continue to fuel proposals for humanitarian intervention, as was seen in the aftermath of, *inter alia*, Cyclone Nargis. A better understanding of the legal basis for responses to refusal will come from greater knowledge about any primary obligations that restrict an affected State's right to refuse. Only once the necessary knowledge is present can the international community encourage compliant behaviour from affected States and plan legitimate and lawful responses to alleged violations of the obligations restricting the right to refuse. Greater knowledge here, then, has a role to play – however small, relatively – in the preservation of international peace and security.

The central contribution of this thesis is in identifying whether and to what extent the existing rules of international law provide for restrictions on an affected State's right to refuse emergency humanitarian aid. This identification will not only enhance knowledge of the substantive obligations, but it will also contribute to the finding of more effective ways to secure humanitarian access in times of peacetime disaster.

1.4 Claim

In the chapters that follow, the areas of international law with a bearing on this question are identified and analysed in respect of the obligations therein that might serve as restrictions on the right to refuse. Those areas have been introduced above in section 1.1.4 and are restated in the roadmap in section 1.5 below. Ultimately, whilst demonstrating that the number and type of legal restrictions on the right to refuse are increasing, the thesis concludes that in the most pressing situations of refusal – like Myanmar – State sovereignty will prevail. The overall effectiveness of these restrictions, then, in their present form at least, may in fact be precluded by continuing sovereignty concerns. If a new international convention does arise as a result of the ILC's draft articles on PPED, and if greater clarity on the ILC's position on refusal (which, as Chapters 5 and 6 demonstrate is somewhat confused at present) leads to consensus in the international community, this might be the occasion on which the balance tips in favour of a view of sovereignty that demands protective actions of States when they find themselves unable or unwilling to furnish the necessary humanitarian aid themselves.

1.5 Structure of the Thesis

This introductory chapter has laid the foundations for the identification and analysis of international legal obligations in the following chapters. Chapter 2 considers State practice in the direct regulation of disasters in bespoke disaster treaties, the emergence of any customary international law rules, and relevant soft law. Chapter 3 considers the right to life and the right to an adequate standard of living, particularly the widening interpretations of those rights in the disaster context. Chapter 4 considers duties of co-operation principally derived from article 1(3) of the UN Charter, and scrutinises how relevant obligations restrict the right to refuse. The treatment of refusal by the ILC in its draft articles on PPED is then examined in Chapter 5. Chapter 6 concludes the thesis by assessing the potential for and of a new international convention and identifying areas for further normative development and research.

CHAPTER 2

DIRECT REGULATION OF REFUSAL

2.0 Introduction

Despite there being no 'overarching treaty'[1] addressing disaster-related matters (such as refusal) at the international level, State practice in developing bespoke rules on this subject has nonetheless been extensive.

Chapter 1 identified that the failures of the 1927 IRU Convention[2] and the 1984 Draft Convention[3] indicated – at the relevant times at least – that there lacked the necessary institutional support and commitment from States to successfully conclude comprehensive treaties on disasters, despite States' desire to, *inter alia*, 'render aid to each other in disasters, to encourage international relief by a methodical co-

1 Sandesh Sivakumaran, 'Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief' (2017) 28(4) EJIL 1097, 1097.

2 Convention Establishing an International Relief Union (adopted 12 July 1927, entered into force 27 December 1932) 35 LNTS 249 (IRU Convention). On precursors to the IRU Convention, see Chapter 1. See also Jiri Toman, 'International Disaster Response Law: Treaties, Principles, Regulations and Remaining Gaps' (2006) (Centennial Regional Meeting of ASIL Golden Gate University School of Law Sixteen Annual Fulbright Symposium on Current International Legal Issues, 7 April 2006) <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1332155_code625604.pdf?abstractid=1312787&mirid=1> accessed 5 July 2018.

3 UNDRO, 'Report of the Secretary-General to the United Nations General Assembly and Economic and Social Council' (18 June 1984) UN Doc A/39/267/Add.2; E/1984/96/Add.2, Proposed draft Convention on expediting the delivery of emergency relief (Draft Convention).

ordination of available resources, and to further the progress of international law in this field.'[4] Recall that where the 1927 convention failed owing to lack of participation and resources, the 1984 draft failed even to attract sufficient State support to reach conclusion.[5] Yet these failures did not discourage States from law-making in this area altogether; instead, they 'represented an important incentive to develop regional and subregional agreements'[6] that ultimately were either narrower in scope or of a non-binding nature.

The bulk of contemporary international law on disasters exists in sectoral or regional multilateral treaties, bilateral agreements, and soft law instruments, but customary law and non-binding texts nonetheless have roles to play.[7] As discussed below,[8] customary rules are relevant in so far as they provide the basis for the right to refuse in the principle of State sovereignty. This is an important consideration despite there otherwise being 'little by way of customary international law in the area.'[9] Non-binding texts are also instructive, but mostly in so far as they illustrate the wider context of State practices in this area and plug gaps in the hard rules. As products of extensive State practice and negotiation, these rules are critical to understanding not only existing obligations (in the case of binding rules) that might restrict an affected State's right to refuse, but also the potential for any new treaty-making activity in this area.[10]

4 IRU Convention (n 2) preamble.
5 See Chapter 1.
6 Andrea de Guttry, 'Surveying the Law' in Andrea de Guttry, Marco Gestri, and Gabriella Venturini (eds) *International Disaster Response Law* (Springer 2012) 34.
7 For a comprehensive survey of 'international disaster response law', see de Guttry (n 6) 4 ff.
8 See section 2.1.
9 Sivakumaran (n 1) 1105.
10 As Chapter 1 identified, any new international convention on the topic is likely to be inspired by the ILC's draft articles on PPED. ILC, 'Report of the International Law Commission on the Work of its 68th session' (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10, 13 ff (PPED draft articles, with commentaries). See further Chapter 5.

Section 2.1 demonstrates that customary international law should be seen as a starting point in the analysis of affected State obligations in respect of refusal because it provides for the right to refuse in State sovereignty. It is upon this foundation that much of the direct regulation of refusal in international law is based.

As for that direct regulation, it has already been mentioned that treaties feature prominently in the landscape of this contemporary international law on disasters.[11] Legal databases indicate that hundreds of treaties[12] on disasters or aspects thereof now exist, and that collectively they regulate a markedly diverse range of issues.[13] Plainly, the broader the definition of 'disaster', the greater the number of treaties with potential applicability.[14] These treaties cover various subject matters, which include fundamental concerns, such as the types of assistance to be offered in various disaster situations, as well as more technical concerns, such as the allocation of costs. As Special Rapporteur

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11 Many authors have remarked on the prominence treaties in disaster law. See, for example, de Guttry (n 6) 11-38; Emika Tokunaga, 'Evolution of International Disaster Response Law: Toward Codification and Progressive Development of the Law' in David D Caron, Michael J Kelly, and Anastasia Telesetsky (eds), *The International Law of Disaster Relief* (CUP 2014) 46 ff; Claire Clement, 'International Disaster Response Laws, Rules, and Principles: A Pragmatic Approach to Strengthening International Disaster Response Mechanisms' in David D Caron, Michael J Kelly, and Anastasia Telesetsky (eds), *The International Law of Disaster Relief* (CUP 2014) 67 ff; Sivakumaran (n 1) 1098 ff.

12 The ILC lists many treaties that are relevant to disasters (61 multilateral instruments and 104 bilateral instruments) in ILC, 'Protection of persons in the event of disasters - Memorandum by the Secretariat' (11 December 2007) UN Doc A/CN.4/590 (Memorandum by the Secretariat), add 2.

13 As Chapter 1 mentioned, several databases are available, the most prominent of which being 'Disaster Law Database' (*IFRC*) <www.ifrc.org/publicaciones/disaster-law-database/> accessed 22 May 2018. See also 'UN Treaty Collection' (*UN*) <http://treaties.un.org/> accessed 22 May 2018.

14 Recall from Chapter 1 that a disaster is defined by the ILC 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.' PPED draft articles, with commentaries (n 10) art 3. The ILC definition draws on the definitions in instruments considered in this chapter.

Eduardo Valencia-Ospina has put it: 'Protection and assistance activities undertaken in the event of disasters have generally been approached pragmatically.'[15]

Alongside these treaties are a number of soft law instruments that have served (and in many cases continue to serve) both as stop-gaps in the hard law on disasters and as triggers for its development.[16] Clement has summarised: 'a variety of actors, both state and non-state, have over time turned their attentions [sic] to exploring suitable means of addressing the perceived gaps in this field.'[17] Reliance on soft law for present purposes, however, has not been extensive. Whilst it is important to acknowledge the existence of relevant soft law and to consider its role in the broader subject, its impact on the issue of refusal is minimal. For one thing, there are no explicit references to refusal in soft law instruments, and for another the role of soft law appears to be much more relevant to encouraging compliant behaviour from the outset; once a State has decided on refusal, it is difficult to imagine a situation in which – present with or absent any applicable hard law rules – soft law would materially affect an affected State's exercise of its right to refuse where that State was refusing in the exercise of its sovereignty.

For the purposes of this thesis, then, the specific rules within binding agreements are crucial. The aim of this chapter is the determination of the extent to which those rules might restrict an affected State's right to refuse.

This determination, however, is not straightforward. Whilst the treaties examined do cover a range of topics in disaster response from initiation of assistance

15 ILC, 'Report by Special Rapporteur Eduardo Valencia-Ospina 2008/598' (2008) UN Doc A/CN.4/598, para 17.
16 Sivakumaran (n 1) 1102.
17 Clement (n 11) 67.

through to its termination, very few of the agreements actually speak directly to refusal. In fact, the only agreement containing explicit language on a State's right to refuse is the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, which is considered separately in section 2.2.[18] That being said, the agreements examined do contain other rules which are relevant to refusal more broadly. These are important, because even though they do not provide for rules on refusal explicitly, it remains the case that related obligations may actually be breached by an affected State's refusal. These other rules are examined in sections 2.3 to 2.6 (section 2.3 concerns the requirement of consent and the primary responsibility of the affected State; section 2.4, the rules on co-operation; section 2.5, the rules on privileges, immunities, and facilities; and section 2.6, the narrower issue of procedural rules and information sharing).

Illustrating how and the extent to which these treaty-based rules restrict an affected State's right to refuse requires an examination of the nature, scope, and content of the various obligations. As the following sections demonstrate, these characteristics of the rules vary considerably. In explaining these complex and at times overlapping obligations for affected States, it becomes much more apparent why human rights norms and the law of co-operation (examined later in Chapters 3 and 4 respectively) have come to bolster international law's restrictions on the right to refuse in a more generally applicable manner.

18 As discussed in more detail later, article 4(5) of the Convention provides that '[t]he requesting State Party shall retain the authority to reject all or part of any telecommunications assistance offered pursuant to this Convention in accordance with the requesting State Party's national law and policy.' Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (adopted 18 June 1998, entered into force 8 January 2005) 2296 UNTS 5 (Tampere Convention) art 4(5). Current parties: 49. Initiative of the International Telecommunications Union (ITU). Per article 12, the Tampere Convention is only open to Member States of the UN or the ITU.

Before moving onto the examination of these rules, however, note must be made of certain methodological considerations.

Firstly, it is important to stress that the nomination 'disaster treaty' that is used throughout this chapter, and indeed elsewhere in the thesis, is used to describe an international agreement[19] that has been concluded specifically for the purposes of addressing disaster issues. This should be contrasted with other agreements that contain disaster provisions, but largely have the purpose of regulating another subject, such as the protection of human rights or customs.[20]

Secondly, whilst it has been possible to survey and detail the multilateral disaster treaties relevant to this question here on account of their relatively small numbers (according to the IFRC's Disaster Law Database, there are as few as seven global treaties and six regional treaties relevant to this area), it is much more of a

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19 Article 2(1)(a) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) defines a treaty as: 'an 'international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. On the VCLT in general, see Paul Reuter, *La Convention de Vienne du 29 mai 1969 sur le droit des traités* (Colin Paris 1970) and Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984). Current parties: 116 (although see n 25 on the customary nature of the VCLT articles). For any agreements between States and international organisations or between international organisations, the definition is the same in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986) (1986) 25 ILM 543, art 2(1)(a).

20 The Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD), for example, is a human rights treaty that contains a disaster-related provision in article 11: 'States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.' Current parties: 177. Per article 45(2), the Convention is open to States and regional integration organisations. Similarly, the International Convention on the Simplification and Harmonization of Customs Procedures (adopted 18 May 1973, entered into force 25 September 1974) 950 UNTS 270 (Kyoto Convention) (revised 1999, entered into force 2006) is a customs treaty that contains two annexes on disaster-related issues (B.3 and J.5) that, *inter alia*, recommend that States exempt '[g]oods such as foodstuffs, medicaments, clothing and blankets sent as gifts to an approved charitable or philanthropic organization for distribution free of charge to needy persons by the organization or under its control'.

challenge to detail individually the full range of bilateral disaster treaties in existence (that same IFRC database identifies over one hundred bilateral treaties and other agreements, and many more are understood to exist between States but are not contained in accessible depositories).[21] As a result, caution must be exercised in how bilateral treaties are used to support wider arguments about the general nature of an affected State's right to refuse. The resultant methodological approach here has been to examine the multilateral and regional treaties to identify rules that might restrict the right to refuse – or indeed safeguard it (see sections 2.2 and 2.3) – and then to use the bilateral treaties as evidence that such rules also exist separately between certain States. Whilst uniformity across these bilateral instruments lacks in the broad sense,[22] there are some specific areas – co-operation being one[23] – where the extensive inclusion of certain rules in bilateral agreements might support the argument that those rules could

21 The IFRC, which has conducted several comprehensive studies on the emerging field of disaster law, identifies three 'waves' of bilateral treaty-making on disasters. The first wave, occurring in the 1950s, saw States create bilateral treaties in response to a single emergency. The US was particularly active in this respect. A 1956 food aid agreement (Exchange of Notes Constituting an Agreement between the United States of America and Haiti Relating To Emergency Relief Assistance (signed 28 December 1956) 279 UNTS 107) between the US and Haiti, for example, addressed the 'severe drought that has prevailed in the northern part of Haiti and the more recent floods in the south' and required Haiti to, *inter alia*, fulfil its responsibilities relating to 'port charges and inland transportation, free distribution, information and observation' as a means of facilitating the assistance. The second and third waves, occurring in the 1970s and 1990s respectively, saw States focus increasingly on long term agreements. As a result, a number of agreements with various purposes were created during this time to strengthen assistance between the States concerned. Many of those agreements contain clauses keeping them in force indefinitely, and as a result many from the 1970s-90s are still in force today. See David Fisher, 'Law and Legal Issues in International Disaster Response: A Desk Study' (*IFRC*, 2007) <www.ifrc.org/PageFiles/125712/113600-idrl-deskstudy-en.pdf> accessed 10 July 2018.

22 Tokunaga describes regulation as being 'dispersed' across these bilateral (and other) instruments. Tokunaga (n 11) 59.

23 The protection of disaster relief equipment is another area. On account of it not being relevant to discussions here, this customary rule as arising from the bilateral agreements is not considered in detail. For analysis thereof, see Lana M Ulrich, 'The Customary International Law Obligation to Protect Foreign Disaster Relief Personnel and their Equipment' (2015) 22(2) Willamette Journal of International Law and Dispute Resolution 343 (that article also draws on rules in IHL, which are not of concern here).

be crystallising into customary law. As mentioned, co-operation is one such rule, but that rule is not examined in detail here as it is analysed separately in Chapter 4.

Thirdly and finally, the examination of the nature, scope, and content of the relevant obligations – where embodied in treaty form – relies on rules of treaty interpretation.[24] These rules are largely reflected[25] in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT)[26] – the aptly designated 'treaty on

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24 On treaty interpretation, see Richard K Gardiner, 'The Vienna Convention Rules on Treaty Interpretation' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012); Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill 2014); Richard K Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015). See also Brian G Slocum, *Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation* (University of Chicago Press 2015).

25 The rules can be described as being 'reflected' in the VCLT because the rules in that instrument are generally presumed to be reflective of customary law. The ICJ has confirmed the VCLT rules' customary nature on several occasions. In the *Kasikili/Sedudu Islands Case*, for example, the ICJ applied articles 31 and 32 of the VCLT in spite of the fact that the treaty in dispute predated the entry into force of the VCLT (hence would ordinarily be caught by the provisions on non-retroactivity (art 4) in the same convention) and the fact that neither of the States concerned – Botswana nor Namibia – were actually party to the VCLT. *Kasikili/Sedudu Islands Case* (*Botswana/Namibia*) (Merits) [1999] ICJ Rep 1045 [18]. According to Mendelson, 'the Court tends to hold that [VCLT] provisions reflect customary law'. Maurice Mendelson, 'The International Court of Justice and the sources of international law' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (CUP 1996) 66. Owing to the rules' customary nature, Aust has stressed that there is rarely any need for heavy reliance on the VCLT (Anthony Aust, 'Vienna Convention on the Law of Treaties (1969)' Max Planck Encyclopedia of Public International Law (MPEPIL) (2006)). That being said, as well-established and extensively used articulations of those customary rules, reliance upon the VCLT articulations of those customary rules is useful in the present context.

26 Article 31(1) contains the fundamental rule of treaty interpretation: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' According to article 31(2), that context comprises, in addition to the text, preamble, and annexes, '(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty' and '(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.' Article 32 provides for supplementary means of interpretation: where the application of article 31 leads to a meaning that is ambiguous or obscure (art 32(a)) or leads to a result which is manifestly absurd or unreasonable (art 32(b)), recourse may be had to the supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. VCLT (n 19) arts 31 and 32.

treaties.'[27] The interpretative conclusions draw throughout this chapter rely on these provisions.

2.1 Customary Rules as a Starting Point

As Chapter 1 identified, questions concerning the lawfulness of a refusal arise because of the need to balance the rights of an affected State as a sovereign against the obligations of that State as a sovereign. Sovereign rights and obligations are matters of customary international law, and it is in this respect that customary rules play a crucial foundational role in the determination of how existing international legal rules regulate refusal.

The right to refuse can be seen as a derivative of the corollaries of State sovereignty. In Crawford's view, there are three such corollaries:

> (a) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there; (b) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (c) the ultimate dependence upon consent of obligations arising whether from customary law of from treaties.[28]

Crawford adds that: '[the] exercise of power is conditioned by international law, and compliance with those conditions is not a matter for the acting state alone.'[29]

These basic concepts frame the enquiry of this thesis. It was explained in Chapter 1 that States and scholars find themselves at various points on a spectrum

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27 This is a popular nomination, the use of which was no doubt cemented in Richard D Kearney and Robert E Dalton, 'The Treaty on Treaties' (1970) 65 AJIL 495.

28 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 447.

29 ibid 448.

when it comes to determining the parameters of lawful (or unlawful) refusal: on the one hand, there are those that see sovereignty as protecting the free exercise of the right to refuse, whereas others view sovereignty as providing for restrictions on the exercise of the right to refuse in the interests of the population subject to that sovereignty.[30] In this regard, one might summarise that the balance to be struck is one between the jurisdictional corollary of sovereignty and the obligational corollary of sovereignty. Of course, these two may not always be at odds. It may be the case, for example, that a refusing State is exercising its sovereignty to establish jurisdiction over a disaster-affected part of its territory (which in practical terms may manifest as that State making the decision that international assistance shall not be accepted for the population on that territory) whilst at the same time being in compliance with the relevant treaty-based or customary obligations to which it has consented (although, in Chapter 3 it is asserted that where the refusal of assistance threatens the enjoyment of fundamental human rights, a refusing State may be said to be in breach of its customary obligations to protect those fundamental rights).

As this thesis demonstrates, however, this situation is unlikely to arise in practice. It is apparent that today, States are increasingly bound by humanitarian norms that would prevent them from refusing outright any and all international assistance without being in contravention of some norm somewhere. Crawford's articulation above, therefore, strikes at the core of the enquiry here. Indeed, another way of articulating the research question identified in Chapter 1 is: In what ways does international law condition an affected State's right to refuse?

30 Compare, for example, the positions of China and Russia to those of France, the UK, and the US in relation to Myanmar's refusal after Cyclone Nargis in 2008. See Chapter 1, section 1.1.5.

The focus in the remainder of this chapter addresses this point in terms of the explicit rules found in the Tampere Convention,[31] and other rules as found in treaties and soft law.

2.2 Explicit Rules in the Tampere Convention[32]

As mentioned above, the Tampere Convention, which was concluded by the International Telecommunications Union (ITU) in 1998, is the only binding instrument that contains explicit language on refusal. Despite relatively low levels of participation thus far,[33] the Convention is recognised as 'an important multilateral instrument'[34] in the area of disasters, not least because it serves as a framework convention[35] as well as containing a series of substantive provisions.

One such substantive provision concerns refusal. In article 4(5), the Convention provides:

> The requesting State Party shall retain the authority to reject all or part of any telecommunications assistance offered pursuant to this Convention in accordance with the requesting State Party's national law and policy.[36]

31 Tampere Convention (n 18).
32 Tampere Convention (n 18).
33 The Convention has 49 parties. See n 18.
34 Phoebe Okawa, 'Principle 18: Notification and Assistance in Case of Emergency' in Jorge E Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (OUP 2015) 471, 485.
35 Tampere Convention (n 18) art 3(3): 'To facilitate [the use of telecommunication resources for disaster mitigation and relief], the States Parties may conclude additional multinational or bilateral agreements or arrangements.'
36 Tampere Convention (n 18) art 4(5).

In providing that the 'requesting State Party shall retain the authority to reject all or part of any telecommunications assistance offered', article 4(5) plainly recognises that an affected State has a high degree of freedom in the exercise of its right to refuse; indeed, the ordinary meaning of the word 'retain' in article 4(5) would suggest that the coming into force of the Convention would not remove or alter such authority (authority that, presumably, derives from the State Party's sovereignty[37]). Indeed, it may well have been the case that States involved in the negotiations understood that their sovereignty was protected as a matter of customary international law and that this treaty provision was merely to confirm that the treaty was not intended to modify that protection. This certainly seems an acceptable conclusion considering that treaties may reflect customary law in their provisions.[38]

It is unfortunate that the commentary[39] to the Tampere Convention lacks coverage of article 4 (the commentary does not make explicit why article 4 was not selected for commentary, but it may be because the provision was seen as a common

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37 This is just one example of why the customary rights and obligations of sovereignty are suited as 'starting points' in the analysis.

38 It has already been mentioned above (n 25) that the VCLT reflects certain customary rules. Another good example is article 51 of the UN Charter, which reflects the customary ('inherent' in the words of article 51) right of self-defence that – of course – predates the adoption of the Charter in 1945. Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 51.

39 There has been no official commentary to the Tampere Convention on account of there being no regular conference of parties nor a treaty body with authority to comment, yet comments on selected articles were commissioned by the organising committee of the International Conference on Emergency Communication (ICEC-06), Tampere, Finland, 19-20 June 2006. Since that time, the UN Office of Legal Affairs, Treaty Section, has reviewed the text of the first edition and the comments of that office were incorporated into the commentary in 2007. To date, this is the most authoritative commentary on those select articles. ITU, 'Annotated Text of Selected Articles of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (1998)' (2nd edn, ITU 2007) <www.itu.int/en/ITU-D/Emergency-Telecommunications/Documents/ET-OnlineToolkit/bp/provision%20of%20telecommunication%20resources%20for%20disaster%20mitigation%20and%20relief%20operations%20-%20tampere%20convention-rv2-annotated.doc> accessed 2 July 2018. For commentary, see Allison Rahrig, 'Love Thy Neighbor: The Tampere Convention as Global Legislation' (2010) 17(2) Indiana Journal of Global Studies 273; Okawa (n 34) 485-86.

– perhaps straightforward – provision in disaster treaties as well as being reflective of customary international law[40]) but, according to IFRC indications at least, one can reasonably conclude that the provision is aimed at ensuring 'respect for [S]tate sovereignty'.[41] In the present context as in any other:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.[42]

In enabling States Parties to exercise independent judgement in respect of offers of assistance, it is safe to say that article 4(5) is the clearest example of deference to State sovereignty as an existing principle of customary international law.[43]

Of particular interest in article 4(5), however, is the clause 'in accordance with the requesting State Party's national law and policy'. This aspect of article 4(5) could be read in three ways: one supports the idea that national law and policy enhances the right to refuse; two supports the idea that national law and policy might actually restrict the right to refuse; and three (which is not discussed in any further detail below[44]) supports the idea that the clause may be purely procedural in so far as it stipulates the body that has the legal authority to make determinations.

'[I]n accordance with…' is a dependent clause modifying the subject of the provision, 'the authority to reject'. Understood in this light, the 'ordinary meaning to

40 The customary protection of sovereignty is discussed above in section 2.1.

41 'Tampere Convention: Core Provisions and Benefits' (*IFRC*, March 2011) <www.ifrc.org/PageFiles/125738/Fact%20Sheet%20Tampere%20Convention.pdf> accessed 2 July 2018.

42 *Island of Palmas* (*Netherlands v United States of America*) (1928) Scott Hague Court Rep 2d 83, 838.

43 *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14 [212] (noting that the concept of sovereignty 'extends to the internal waters and territorial sea of every State and to the air space above its territory').

44 Although, see n 50 for an example of such procedural provisions.

be given to the terms'[45] would encourage an appreciation that such authority both derives from and has parameters set by national law and policy. In relation to the former, that the authority to reject (the right to refuse) derives from national law certainly makes sense considering the aforementioned prioritisation of State sovereignty. Indeed, it is plain that national laws reflect a State's exercise of its sovereign rights and obligations – national laws may be seen, to borrow Besson's words, as manifestations of the 'power to make autonomous choices.'[46] That being said, it is also reasonable to conclude that the clause may also have been included to enable States to place their own restrictions on the right to refuse, or the exercise thereof. In that latter case, national law may in fact set parameters for refusal.

Many States now have national laws and policies on disaster management that provide for various roles and responsibilities in the event of a disaster.[47] It is at least plausible that should a State wish to restrict its right to refuse on certain grounds, or indeed to restrict its right to refuse to comply with certain international obligations,[48] it may do so through its own national law and policy. Considering that States do this in many other areas of international law (in environmental law, for example, States often restrict their own freedoms through national law and policy to give effect to

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45 VCLT (n 19) art 31(1). See n 26.

46 Samantha Besson, 'Sovereignty, International Law and Democracy' (2011) 22(2) EJIL 373, 376.

47 Again, the IFRC Disaster Law Database is useful in this respect. At the time of writing, that database holds over 250 English-language copies of national laws and policies on disaster management or particular aspects thereof. With other languages included, that number increases to over 500 (although there may be duplications). Disaster Law Database (n 13).

48 Recall that parties to the CRPD (n 20) 'shall take … all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including … humanitarian emergencies and the occurrence of natural disasters.' If a State decides it appropriate, there is nothing to stop it from including in its national law provisions on the protection and safety of persons with disabilities such that it cannot refuse certain types of assistance in times of disaster (special evacuation equipment for persons with physical disabilities, for example).

international obligations[49]), it is not impossible for this to be the case, although given the present context, admittedly it is unlikely. Indeed, to this author's knowledge, no national disaster management laws or policies actually prevent a State from refusing assistance in any particular situation; rather most will provide that the authority of the State to request or accept offers of international assistance rests with a certain entity.[50]

On account of national laws being silent on rules on refusal, then, it seems reasonable that the inclusion of the clause 'in accordance with the requesting State Party's national law and policy' was another means of ensuring that the sovereignty of the affected State remained a core principle of any assistance operations conducted pursuant to the Convention. Owing to there being no commentary on article 4 and the fact that to this author's knowledge there have been no situations in which States have raised a (recorded) dispute over the meaning of article 4, this interpretation of article 4(5) is sustainable.

As the only multilateral convention to provide explicitly for the right to refuse, the Tampere Convention is unique in its extensive protection of affected State sovereignty. In the other treaties considered, that protection manifests in subtler ways.

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49 In India, for example, the national Biological Diversity Act (containing provisions on certain governmental acts that are prohibited to help preserve biodiversity) was implemented to give effect to obligations in the 1992 Convention on Biological Diversity, which India ratified in 1994. Biological Diversity Act, Act No 18 of 2003 (India); Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

50 An excellent example in this regard is the Cambodian Disaster Management Act 2015. Article 32 provides: 'In the event that the disaster extent is greater than the response capacity of the country, the Royal Government, upon the request of NCDM [National Committee for Disaster Management], shall appeal to the international community for emergency response and recovery assistance. Upon the commitment of international communities to provide assistance, NCDM could: (1) Declare the acceptance of international assistance. (2) Command the relevant authorities to cooperate and collaborate with donors and international response teams in the response operation. (3) Authorize the utilisation of international assistance to be delivered into the country under special rules, regulations and procedures. The recovery activities either under the grant or concessional loan shall comply with the legal procedures and effective regulations.' Law on Disaster Management 2015 (Cambodia) (*IFRC*) <www.ifrc.org/Global/Publications/IDRL/DM%20acts/Cambodia%20DM%20Law_English.pdf> accessed 2 July 2018.

2.3 The Requirement of Consent and the Primary Responsibility of the Affected State

2.3.1 Binding rules

The Tampere Convention is certainly the clearest example of deliberate preservation of affected State sovereignty by means of ensuring the right to refuse. But that Convention does not exist in isolation in that respect. The majority of disaster treaties surveyed here serve in some way to protect the affected State's sovereignty, just not by means of an explicit right to refuse as provided for by the Tampere Convention.

To preserve sovereignty through other means is not a new practice; indeed, the preservation of sovereignty has been a cornerstone of the international regime for disaster relief since its clear articulation in UNGA Res 46/182 in 1991:

> The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.[51]

Even before that resolution, and as Chapter 1 identified, both the IRU Convention and the Draft Convention protected the sovereign interests of States (the former through the requirement of consent and the latter explicitly).[52]

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51 UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182, guiding principle 3.

52 IRU Convention (n 2) art 4: 'Action … in any country is subject to the consent of the Government thereof.' Draft Convention (n 3) art 3(1)(a): 'Respect for the sovereignty of the Receiving State and non-interference in its internal affairs'.

For the most part, protection of sovereignty in contemporary disaster treaties manifests through provisions that either confirm the requirement of affected State consent or confirm the primary responsibility of the affected State (two provisions that are in many cases developed further in relation to particular activities that are to be understood as within the exclusive domain of the affected State – see sections 2.4 and 2.5). Both types of provision derive from the recognition of State sovereignty and both exist as means of protecting the affected State's autonomy in disastrous situations in which international condemnation of that State's actions (or inactions) could be forthcoming.[53] That States have been so vocal in ensuring that international agreements and resolutions do not interfere with their internal affairs is another confirmation of the dominance of this principle.[54]

The practice of including provisions on the requirement of consent and the primary responsibility of the affected State as a means of bolstering the preservation

53 That sovereign rights might be incompatible, to an extent at least, with the protection of human rights and human welfare more generally has been a concern of international lawyers for decades. Delbruck, for example, recognised that: 'the sovereign states remain the prime constituent elements of the international system, both politically and legally. Thus, the sovereign states not only are creating the international norms for the protection of human rights, but also are determining the process of their implementation – or nonimplementation – according to their sovereign will. Seen from this perspective, state sovereignty and the international protection of human rights appear to be incompatible.' Jost Delbruch, 'International Protection of Human Rights and State Sovereignty' (1982) 57(4) Indiana Law Journal 567, 67-68. In the present context, it should therefore be borne in mind that States, aware of the fact that their domestic disaster responses might be subject to considerable scrutiny and pressure, have ensured that they retain ultimately the autonomy to take any such actions they deem necessary in respect of their affected populations.

54 In the discussions for UNGA Res 46/182 (n 51), for example, States stood firmly behind the need to recognise their sovereignty. China, for example, argued that any assistance 'should be provided in full respect for the sovereignty of the recipient States, for otherwise it will be deprived of its intrinsic meaning' (UN Doc A/46/PV.39, 27). Similarly, France argued that '[h]umanitarian action respects sovereignty and State authority. It can in no way be used to intervene in affairs that are essentially under the authority of the nation.' (UN Doc A/46/PV.39, 72). Pakistan, too, emphasised that 'no attempt should be made to compromise national sovereignty when providing emergency assistance' (UN Doc A/46/PV.41, 24). For more State comments on Res 46/182, see Memorandum by the Secretariat (n 12) para 22, fn 75.

of sovereignty is evident in the Tampere Convention. There it has already been stated that there is an explicit recognition of State sovereignty in the 'authority to reject …' in article 4(5), but the protection of affected State sovereignty manifests also in the accompanying requirement that '[n]o telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State'[55] and the firm recognition of the 'right of a State Party, under its national law, to direct, control, coordinate and supervise telecommunication assistance provided under this Convention within its territory.'[56] Recognising, too, that a State may wish to exercise its sovereignty even when assistance has already been accepted, the Tampere Convention provides that: '[t]he requesting State Party or the assisting State Party may, at any time, terminate telecommunication assistance received or provided under Article 4 by providing notification in writing.'[57] The latter requirement that the affected State provide notification in writing may be seen as a form of restriction on the right to refuse (albeit a relatively weak one). As a procedural requirement, this is explored further in section 2.5 below.

Other instruments provide for sovereignty to be protected in this regard, and their provisions can be understood as relating to (a) the requirement of affected State consent, (b) the recognition of the primary responsibility of the affected State, and (c) other rules that speak to such consent or primary responsibility.

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55 Tampere Convention (n 18) art 4(5). There are no additional requirements in the Convention regarding the granting of consent.

56 ibid, art 4(8).

57 ibid, art 6.

(a) The requirement of affected State consent

> Consent is the expression of the will of the sovereign who, thereby, permits activities on its territory that may otherwise constitute violations of the principle of non-intervention. Consent, thus, also has a main role to play in the acceptance or refusal of humanitarian assistance in disasters. As a matter of international law, the affected State has a right to refuse an offer. However, this right is not unlimited.[58]

This paragraph from the Special Rapporteur's fourth report on the work of the ILC on PPED summarises the balance that the treaties concerned here have been tasked with striking in recent years. Whilst the agreements undoubtedly provide for obligations in respect of assistance as a means of fulfilling their goals of improving humanitarian responses,[59] it remains the case that consent plays a central role because of States' desires to see their sovereignty preserved even in the event of a disaster on their territories. As there is no general 'right of entry' into an affected State,[60] where States do seek to protect their sovereignty through enforcing the requirement of consent, the likely overall outcome is that – in a conflict between human need and the

58 ILC, 'Fourth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur' (11 May 2011) UN Doc A/CN.4/643 (SR Fourth Report 2011), para 52.

59 The preambles to many agreements are resolute in their aim of improving the protection of persons in the event of disasters. The Tampere Convention, for example, aims to 'to facilitate international cooperation to mitigate the impact of disasters' (Tampere Convention (n 18) preamble). Similar in this respect are the: Food Assistance Convention, which aims 'to improve the effectiveness, efficiency, and quality of food assistance in preserving the lives and alleviating the suffering of the most vulnerable populations, especially in emergency situations' (Food Assistance Convention (adopted 25 April 2012, entered into force 1 January 2013) 2884 UNTS, preamble); and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, which strives to meet the 'need for an international framework which will facilitate the prompt provision of assistance in the event of a nuclear accident or radiological emergency to mitigate its consequences' (Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (adopted 26 September 1986, entered into force 26 February 1987) 1457 UNTS 133 (Nuclear Assistance Convention), preamble).

60 Recall Chapter 1, section 1.0, and section 2.1 above.

autonomy of the affected State – the balance will be tipped in favour of the affected State, even if this means that the affected population suffers.

Several agreements at the multilateral (sectoral and regional) and bilateral levels confirm that the consent of the affected State is required.

At the global level, the Tampere Convention already mentioned requires the consent of the affected State,[61] as does the 2000 Framework Convention on Civil Defence Assistance (FCCDA). The FCCDA requires that '[t]he Supporting State shall send only those Civil Defence Units requested or accepted by the Beneficiary State'[62] (presumably where both the request for assistance and the acceptance thereof – with the 'or' indicating that an acceptance need not necessarily follow a request – would constitute the requisite consent). The 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Nuclear Assistance Convention) does not mention consent explicitly but does provide that assisting actors 'have the duty not to interfere in the domestic affairs of the requesting State'[63], which in practice could be realised by assisting actors providing assistance only with the consent of the affected State.

Regional recognition of the requirement of consent is especially strong, and many agreements at the regional level use the word 'consent' explicitly. Members of the South Asian Association for Regional Cooperation (SAARC), for example, have agreed that assistance 'shall only be provided upon the request and with the consent

61 Tampere Convention (n 18) art 4(5).

62 Framework Convention on Civil Defence Assistance (adopted 22 May 2000, entered into force 23 September 2001) 2172 UNTS 231 (FCCDA) art 4(a)(2).

63 Nuclear Assistance Convention (n 59) art 8(7).

of the affected Party.'[64] It is noteworthy here that assistance shall only be provided (a) upon the request *and* (b) with the consent of the affected Party. The 'and' here is important, as unless explicitly stated in an agreement, a mere request[65] for assistance will not amount to consent to such assistance owing to the customary nature of the requirement of consent.[66] This is something that the ILC recognised in its work on PPED when it considered the duty of a State to seek assistance where its national capacity was exceeded.[67]

Similarly, members of ASEAN have agreed – in an instrument that has been hailed among the world's best disaster law practice[68] – that '[a]ssistance can only be deployed at the request, and with the consent, of the Requesting Party, or, when offered by another Party or Parties, with the consent of the Receiving Party.'[69] Interestingly, the ASEAN agreement built upon pre-existing soft law on the topic that,

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64 SAARC Agreement on Rapid Response to Natural Disasters (signed 11 November 2011) (*SAARC*) <http://saarc-sec.org/uploads/digital_library_document/28_Rapid_response_to_Natural_disasters.pdf> accessed 17 April 2018 (SAARC agreement) art III(1). Member States of SAARC comprise: the Islamic Republic of Afghanistan, the People's Republic of Bangladesh, the Kingdom of Bhutan, the Republic of India, the Republic of Maldives, Nepal, the Islamic Republic of Pakistan, and the Democratic Socialist Republic of Sri Lanka.

65 There is an interesting question here as to whether – in the event that a request for assistance could amount to consent – a specific request (for a particular type of assistance or to a particular State, for example) would indicate the requisite consent more than a request articulated in a general manner (for assistance in general or to all States) would. This author is of the view that it would not, unless such 'predetermined' consent was entrenched in a binding agreement between the relevant parties.

66 See section 2.1.

67 Contrary to the wording in the SAARC agreement, the ILC decided that a duty to 'seek' assistance was more appropriate than a duty to 'request' such assistance, as in the latter case there may be an implication that consent to assistance is granted upon response to that request. Indeed, the Special Rapporteur considered 'that a duty to "seek" assistance implies a broader, negotiated approach to the provision of international aid' that would 'both [ensure] the protection of populations and individuals of concern, and [be] coherent with the core requirement of State consent'. SR Fourth Report 2011 (n 58), para 44.

68 Gabrielle Simm, 'Disaster Response in Southeast Asia: The ASEAN Agreement on Disaster Response and Emergency Management' (2016) Asian Journal of International Law 1.

69 ASEAN Agreement on Disaster Management and Emergency Response (adopted 26 July 2005, entered into force 24 December 2009) (*ASEAN*) <http://agreement.asean.org/media/download/20140119170000.pdf> accessed 2 July 2018 (ASEAN agreement) art 11.

inter alia, encouraged States to facilitate the delivery and distribution of relief supplies, principally by removing administrative hurdles involving personnel, equipment, vehicles, and other facilities.[70]

Another regional agreement between Members of the Association of Caribbean States (ACS) recognises – albeit more indirectly – the requirement of consent, and again links it to a request for assistance:

> The mobilization of the necessary resources for responding to natural disasters among the Contracting Parties shall always be done at the request of the affected Party and shall be done in accordance with the principles and norms of international law, and existing co-operation agreements, particularly with respect to sovereignty and self-determination of the affected Party.[71]

At the bilateral level, several agreements recognise the requirement of consent. In an agreement between Greece and Russia, for example, it is provided that '[a]ssistance shall be provided pursuant to a request', which confirms that the consent of the affected State is not granted solely by that State's participation in the treaty.[72] Similarly, an agreement between Austria and Jordan recognises several times that assistance is to be provided on the basis of a request (eleven of sixteen articles in that agreement make

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70 ASEAN Declaration on Mutual Assistance on Natural Disasters (signed 26 June 1976) (*IFRC*) <www.ifrc.org/docs/idrl/N81EN.pdf> accessed 2 July 2018.

71 Agreement Between Member States and Associate Members of the Association of Caribbean States for Regional Cooperation on Natural Disasters (adopted 17 April 1999, entered into force 14 March 2014) (*IFRC*) <www.ifrc.org/docs/idrl/I399EN.pdf> accessed 17 April 2018 2018, art 4(4). The ACS currently has twenty five members – Antigua and Barbuda, Bahamas, Barbados, Belize, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, Trinidad and Tobago, Venezuela and five associate members - Aruba, France (on behalf of French Guiana, Guadeloupe, and Martinique), the Netherlands Antilles, and Turks and Caicos.

72 Agreement between the Government of the Hellenic Republic and the Government of the Russian Federation on Co-operation in the Field of Prevention and Response to Natural and Man-Made Disasters, (adopted 21 February 2000) (*IFRC*) <www.ifrc.org/docs/idrl/I204EN.pdf> accessed 2 July 2018, art 7.

reference to a request or 'the requesting State'); again there is no presumption that consent to assistance has been granted by participation in the treaty.[73] In fact, as de Guttry identifies, the requirement that assistance is provided pursuant to the request of one of the States is common to almost all bilateral instruments. With the ultimate aim of the agreements being to improve co-operation ('between neighboring States' or 'between States far away from each other'[74]), the requirement of a request should be seen as a 'trigger' for the co-operative obligations that make up the bulk of such agreements: 'In all cases … the request of the affected State is essential for the activation of co-operation.'[75]

The examples of agreements in this section demonstrate that provisions explicitly or implicitly providing for a requirement of affected State consent are common in both multilateral and bilateral disaster treaties. This commonality supports the argument that in drafting disaster agreements, States are being proactive in protecting their sovereignty both in respect of ensuring that provisions on sovereignty are included (presumably a self-interested move) as well as conceding that States to whom they may in fact offer assistance in future may refuse assistance by means of withholding their consent to such, a situation that States know causes issues in humanitarian response but that nonetheless comes second to the core issue of the protection of sovereignty.

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73 Agreement between the Republic of Austria and the Hashemite Kingdom of Jordan on Mutual Assistance in the Case of Disasters or Serious Accidents (adopted 13 March 2004) (*IFRC*) <www.ifrc.org/docs/idrl/I649EN.pdf> accessed 2 July 2018 (Austria-Jordan agreement) arts 1-10 and 12.

74 de Guttry (n 6) 11.

75 ibid (n 6) 12.

(b) The primary responsibility of the affected State

> The affected State has the duty to take care of the victims of disaster in its territory and has therefore the primary responsibility in the organization, provision and distribution of humanitarian assistance. As a result, it has the duty to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses.[76]

Another means by which States protect their sovereignty in disaster agreements is in including therein provisions on the primary responsibility of the affected State. As with the requirement of consent, the primary responsibility of the affected State can be seen as a derivative of the affected State's sovereignty or as a means of ensuring its protection; unlike the requirement of consent, though, the primary responsibility of the affected State derives from a sovereign duty, not necessarily a sovereign right.[77] Respect of State sovereignty entails recognition of such primary responsibility, for if an assisting actor sought to usurp the affected State in that regard, it would necessary involve complaints of interference in the internal affairs of the affected State. A number of agreements recognise this primary responsibility.

The 2012 Food Assistance Convention requires that parties acknowledge the affected State's 'primary role and responsibility for the organization, coordination and implementation of food assistance operations'.[78] Similarly, the Nuclear Assistance Convention provides that 'the overall direction, control, co-ordination and supervision

76 Institute of International Law, 'Resolution on Humanitarian Assistance' Bruges Session (2 September 2003) (Bruges Resolution) art III(1). This is a non-binding instrument, but nonetheless an authoritative one in terms of the existing soft law on disasters, as it is relied upon heavily in the ILC's work on PPED. See, for example, SR Fourth Report 2011 (n 58) para 30 ff.

77 Bruges Resolution (n 76), noting '[t]he affected State has the duty to take care of the victims of disaster in its territory'.

78 Food Assistance Convention (n 59) art 2(b)(viii).

of the assistance shall be the responsibility within its territory of the requesting State'[79] – something that means all assisting actors 'have a duty to respect the laws and regulations of the requesting State'.[80]

At the regional level, recognition of the primary responsibility of the affected State is again widespread. Article III of the SAARC agreement develops the requirement of consent by specifying that '[e]ach affected Party shall have the primary responsibility to respond to disasters' and that '[t]he Requesting Party shall exercise the overall direction, coordination and control supervision of the assistance within its territory.'[81] Similarly, article 3 of the ASEAN agreement recognises: 'The sovereignty, territorial integrity and national unity of the Parties shall be respected' and that '[t]he Requesting or Receiving Party shall exercise the overall direction, control, co-ordination and supervision of the assistance within its territory.'[82] For Black Sea States, there is a similar obligation in their regional agreement on emergency assistance: 'The Competent Body of the Requesting Party shall coordinate, manage and supervise the activities of Assistance teams through their leaders.'[83] Those provisions are mirrored

79 Nuclear Assistance Convention (n 59) art 3(a).

80 ibid, art 8(7).

81 SAARC agreement (n 64) art III(1)-(2). This is confirmed in art IX of that instrument: '[t]he Requesting Party shall exercise the overall direction, coordination and supervision of the assistance within its territory.'

82 ASEAN agreement (n 69) art 3(1)-(2). The 'overall direction' part of that provision (art 3(2)) is repeated verbatim at article 12 of that instrument.

83 Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-Made Disasters (adopted 15 April 1998, entered into force 11 March 2003) <www.bsec-organization.org/documents/LegalDocuments/agreementmous/agr4/Documents/Emergencyagreement%20071116.pdf> accessed 2 July 2018 (BSEC agreement) art 8(1).

for State parties to the Inter-American disaster agreement[84] and the Kampala Convention (Africa).[85]

Again, as with the requirement of consent, several bilateral agreements contain provisions on the primary responsibility of the affected State. In the Austria-Jordan agreement already mentioned, for example, article 8(1) provides that: 'The co-ordination and management of rescue and relief operations is exclusively the responsibility of the authorities of the requesting state'.[86] Presumably, 'exclusive' responsibility may be read synonymously with 'primary' responsibility in other agreements owing to the object and purpose of the agreement, although technically the two are not the same thing: exclusive responsibility would suggest that the responsibility can only be held by the affected State, whereas primary responsibility suggests that other parties may have a secondary responsibility. Similar obligations exist in agreements between Spain and Portugal, where the focus there is on establishing a chain of command based on the primary responsibility of the affected State:

> The operations shall be directed by the authorities of the territory where the catastrophe takes place, nevertheless the assisting teams though acknowledging

84 'Unless otherwise agreed, the overall direction, control, coordination, and supervision of the assistance within its territory shall be the responsibility of the assisted state.' Inter-American Convention to Facilitate Disaster Assistance (adopted 7 June 1991, entered into force 16 October 1996) OAS Treaty Series A-54 (1991) (Inter-American agreement) art IV(a).

85 'States Parties shall bear the primary duty and responsibility for providing protection of and humanitarian assistance to internally displaced persons within their territory or jurisdiction without discrimination of any kind.' African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 22 October 2009, entered into force 6 December 2012) (Kampala Convention) <https://au.int/sites/default/files/treaties/7796-treaty-0039_-_kampala_convention_african_union_convention_for_the_protection_and_assistance_of_internally_displaced_persons_in_africa_e.pdf> accessed 2 July 2018, art 5(1).

86 Austria-Jordan agreement (n 73) art 8(1).

> their objectives and missions to the Chief of Expedition, will act under their original superiors.[87]

On account of the extensive recognition of the primary responsibility of the affected State, it is again confirmed that States have sought to recognise and ensure the protection of their sovereign rights through these treaties – something that necessarily comes at the cost of weaker restrictions on refusal. That this is favourable to States is evident in practice; many aid organisations are reluctant to hand over control of their operations to affected States, especially where there is little trust in the affected State's ability or willingness to distribute the assistance provided. This was the case in Haiti, for example, after the 2010 earthquake. There, in response to the cholera outbreak that killed over 9000 people, the UN announced a fund to assist the affected populations, yet aid organisations charged with carrying out the protection activities were hesitant to hand over control of that fund to the Haitian Ministries of Health and Environment because of concerns over lack of trust, incapacity, and corruption.[88] Even against the backdrop of these concerns, however, States have succeeded in having their primary responsibilities recognised in most disaster agreements.

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87 1993 Protocol between the Kingdom of Spain and the Portuguese Republic regarding technical co-operation and mutual assistance in the field of civil defense, art 3.7. Summary available at <www.fao.org/forestry/6721/en/> accessed 12 July 2018.

88 Richard Knox, 'Five Years After Haiti's Earthquake, Where Did the $13.5 Billion Go?' *NPR News* (Washington, DC, 5 January 2015) <www.npr.org/sections/goatsandsoda/2015/01/12/376138864/5-years-after-haiti-s-earthquake-why-aren-t-things-better?t=1530803323387> accessed 5 July 2018.

(c) Other provisions relevant to the sovereignty of the affected State

One remarkable feature of the treaties surveyed for this chapter is the fact that such treaties largely contain materially similar obligations but articulate those obligations in different ways. For that reason, it is important here to make note of other obligations that relate to the sovereignty of the affected State even if not articulated in respect of the requirement of consent and the primary responsibility of the affected State.

One such provision relates to the affected State's ability to terminate the assistance whenever it decides, which clearly strengthens the protection of the affected State's control over the assistance being carried out on its territory. Article 6 of the Tampere Convention[89] contains such a provision, as do other multilateral and bilateral agreements. The FCCDA, for example, stipulates that: '[t]he mission of the Civil Defence Unit of the Supporting State shall come to an end when the crisis for which it was sent is deemed to have ended, or when the Beneficiary State so requests, or the Supporting State so decides.'[90] Similarly, the Nuclear Assistance Convention recognises that: '[t]he requesting State … may at any time, after appropriate consultations and by notification in writing, request the termination of assistance received or provided'.[91] Again, these provisions introduce some procedural requirements, which are explored further in section 2.5 below.

Another recognition of sovereignty is articulated in the requirement that assisting actors respect the laws and customs of the affected State. The FCCDA, in a lengthy provision, states:

89 Tampere Convention (n 18). See text to n 57.
90 FCCDA (n 62) art 4(a)(f).
91 Nuclear Assistance Convention (n 59) art 11.

> All offers of assistance shall respect the sovereignty, independence and territorial integrity of the Beneficiary State as well as the principle of non-intervention in the internal affairs of this State and should be carried out with due respect for its ways and customs. Such assistance should not be viewed as interference in the internal affairs of the Beneficiary State.[92]

Similarly, the SAARC agreement requires that '[t]he sovereignty, territorial integrity and national unity of the Parties shall be respected'[93] and that '[m]embers of the assistance operation shall: … Respect and abide by all national laws and regulations of the Requesting Party.'[94] Finally, the ASEAN and BSEC agreements respectively mirror the SAARC agreement, stating that '[m]embers of the assistance operation shall respect and abide by all national laws and regulations'[95] (ASEAN) and that 'members of the assistance team are obliged to observe the state laws and rules'[96] (BSEC).

Ultimately, despite there being clear categories of rules that exist in disaster treaties to protect the sovereignty of the affected State, those rules are still recognised as being 'part and parcel of the international legal order … limitations may nevertheless be placed on [them].'[97] Some of those limitations are also present in the disaster treaties considered here. The remainder of the chapter focusses on rules on: co-operation; privileges, immunities, and facilities; and procedure and information sharing, all of which place some form of restriction on the affected State's right to refuse.

92 FCCDA (n 62) art 3(b).
93 SAARC agreement (n 64) art III(3).
94 ibid, art X(1)(b).
95 ASEAN agreement (n 69) art 13(2).
96 BSEC agreement (n 83) art 9(3).
97 SR Fourth Report 2011 (n 58) para 55.

2.3.2 Non-binding rules

It has already been mentioned above that guiding principle 3 of UNGA Res 46/182 stressed the importance of the requirement of consent: 'humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.'[98] Other soft law instruments tend to stress the primary responsibility of the affected State. Article III, paragraph 1, of the Bruges Resolution, for example, states that:

> The affected State has the duty to take care of the victims of disaster in its territory and has therefore the primary responsibility in the organization, provision and distribution of humanitarian assistance. As a result, it has the duty to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses.[99]

Demonstrably, the first sentence indicates that a State's primary responsibility derives from its duty to protect the population. The second sentence is interesting in so far as it acknowledges – albeit indirectly – the sovereignty of the affected State in relation to that State's prescriptive jurisdiction over crimes (the misappropriation of humanitarian assistance).[100]

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98 UNGA Res 46/182 (n 51), guiding principle 3. See also UNGA Res 63/141 (10 March 2009) UN Doc A/RES/63/141, fourth preambular paragraph: 'Emphasizing that the affected State has the primary responsibility in the initiation, organization, coordination and implementation of humanitarian assistance within its territory and in the facilitation of the work of humanitarian organizations'.

99 Bruges Resolution (n 76) art III(1).

100 See, generally, Crawford (n 28) 456-471.

The Guiding Principles on Internal Displacement (GPID)[101] are clear that the 'primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.'[102] The GPID do not explicitly require the consent of the affected State, but it is nonetheless apparent that such a requirement is presumed, firstly through stressing the primary responsibility of the affected State and secondly by noting that 'Consent [to offers of assistance] shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.'[103]

The IFRC's IDRL Guidelines[104] take a similar approach. Noting the requirement of consent explicitly, the Guidelines state: 'Disaster relief or initial recovery assistance should be initiated only with the consent of the affected State and in principle, on the basis of an appeal'[105] (mirroring UNGA Res 46/182 above). Unlike the requirement of consent in the Tampere Convention, however, the Guidelines go further in stipulating some procedural requirements or conditions for the request for assistance or acceptance and refusal thereof:

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101 The Guiding Principles identify rights and guarantees relevant to the protection of internally displaced persons (IDPs). The Principles 'reflect and are consistent with international human rights law' and 'restate the relevant principles applicable to the internally displaced, which are now widely spread out in existing instruments.' Furthermore, they 'apply to the different phases of displacement, providing … access to protection and assistance during displacement.' UN Commission on Human Rights, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add (GPID) Introductory Note, para 9. See also Walter Kälin, 'Guiding Principles on Internal Displacement' (2008) 38 Studies in Transnational Legal Policy 1 for the legal bases of each of the guiding principles.

102 GPID (n 101) principle 25(1).

103 ibid principle 25(2). The wording of principle 25(2) influenced the ILC in its drafting of draft article 13 on arbitrary refusal. See Chapter 5, section 5.2.2.

104 On the background and status of the IDRL Guidelines, see Chapter 1, section 1.1.3(b). 'IDRL Guidelines' (*IFRC*) <www.ifrc.org/what-we-do/disaster-law/about-disaster-law/international-disaster-response-laws-rules-and-principles/idrl-guidelines/> accessed 20 June 2018 (IDRL Guidelines).

105 ibid guideline 10(1).

> The affected State should decide in a timely manner whether or not to request disaster relief or initial recovery assistance and communicate its decision promptly. In order to make this decision, the affected State should promptly assess needs. Consideration should be given to undertaking joint needs assessments with the United Nations and other assisting humanitarian organisations.[106]

The IDRL Guidelines also stress the requirement of consent when the use of military assets for disaster relief is proposed.[107]

The Hyogo Framework for Action (HFA) 2005-2015[108] similarly provides that:

> [E]ach State has the primary responsibility for its own sustainable development and for taking effective measures to reduce disaster risk, including for the protection of people on its territory, infrastructure and other national assets from the impact of disasters.[109]

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106 ibid guideline 10(1). cf Tampere Convention (n 18) in n 53.

107 'Military assets should be deployed for disaster relief or initial recovery assistance only at the request or with the express consent of the affected State, after having considered comparable civilian alternatives. Prior to any such deployment, terms and conditions (including such issues as the duration of deployment, whether they must be unarmed or may be armed the use of their national uniforms, and mechanisms for co-operation with civilian actors) are to be agreed by the affected and assisting States.' ibid guideline 11. Other non-binding guidelines now exist to assist States in best practices when it comes to the use of military assets in disaster response. Whilst the leading guidelines on this topic, the 'Oslo Guidelines', broadly discourage the use of military assets in peacetime relief (mainly owing to the impact that the sight of military actors (especially foreign) has on civilian/affected populations) where there is a civilian alternative, they nonetheless provide an important set of principles for when military assets are used, including on legal facilities, customs, visas, and overflight permissions. OCHA, 'Oslo Guidelines: Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief' (*UN*, November 2007) <www.unocha.org/sites/unocha/files/OSLO%20Guidelines%20Rev%201.1%20-%20Nov%2007_0.pdf> accessed 26 August 2018.

108 The HFA 2005-2015, concerning disaster risk reduction, was endorsed by the UNGA in UNGA Res 60/195 (2 March 2006) UN Doc A/RES/60/195 after the 2005 World Disaster Reduction Conference. UNISDR, 'Hyogo Declaration on Disaster Reduction' (22 January 2005) A/CONF.206/6 and Corr 1, preamble.

109 ibid Part III, A, 13(b).

Finally, in the context of 'natural disasters'[110] specifically, the Inter-Agency Standing Committee (IASC) Operational Guidelines on the Protection of Persons in Situations of Natural Disasters[111] note: 'States have the primary duty and responsibility to provide assistance and protection to persons affected by natural disasters.'

2.4 Rules on Co-operation

2.4.1 Binding rules

According to the Special Rapporteur, '[t]he duty to cooperate shapes the legal framework within which the consent of the affected State manifests itself.'[112] Rules on co-operation exist as one form of restriction on the affected State's right to refuse. That being said, States disagree on whether the existence of a duty to co-operate in

110 This articulation is not used as extensively in contemporary disaster law and practice on account of the shift in understanding of causes of disastrous situations. See Chapter 1, section 1.0.1.

111 The IASC Guidelines were adopted as guidance for governments and organisations to 'promote and facilitate a rights-based approach to disaster relief.' Office of the High Commissioner for Human Rights (OHCHR), *Inter-Agency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disasters* (Brookings-Bern Project on Internal Displacement, January 2011) <www.ohchr.org/Documents/Issues/IDPersons/OperationalGuidelines_IDP.pdf> (IASC Guidelines), foreword.

112 SR Fourth Report 2011 (n 58) para 55.

this context would ever actually mean they had an obligation to accept international assistance.[113]

Provisions on co-operation are extensive in the disaster treaties surveyed. Whilst norms of co-operation in their more general sense are explored later in Chapter 4, it is interesting to note here how the treaties examined provide for co-operation in their specific treaty contexts. Although these contexts differ, and details of each context can be understood from the individual treaties themselves, one thing that they all have in common is the fact that co-operation is envisaged as occurring *after* a request for or offer of assistance has been made. Any restrictions on refusal, therefore, are likely only to apply to cases of refusal that occur after the assistance process has begun; they are unlikely to apply to cases where an affected State refuses any international assistance from the outset.

Provisions on co-operation are largely found in two forms: one as an explicit obligation, and the other as an objective of the instrument concerned.

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113 China (A/C.6/64/SR.20, para 24) 'cooperation … could in no way be construed as an obligation on the part of the disaster-affected States to accept relief'; Iran (A/C.6/64/SR.22, para 82) '[a]ccording to the principles of State sovereignty and non-interference in internal affairs the consent of the affected State was essential for international cooperation'; Myanmar (A/C.6/64/SR.21, para 3) 'the affected State should have sole competence to decide whether to request or accept international assistance. The suggestion that it should be made compulsory for it to cooperate with any particular organization was counterproductive and should be avoided.' Venezuela, (A/C.6/64/SR.21, para 42) 'While the principles of sovereignty and non-intervention could not justify denial of the victims' access to assistance, such assistance should not be provided without the prior consent of the State.' Compare those statements to, for example: Greece (A/C.6/64/SR.21, para 48) 'A State that was not in a position to provide assistance to and secure the rights of persons under its jurisdiction when a disaster occurred on its territory should not refuse adequate and effective humanitarian or other assistance from other States, subject to agreed modalities'; and Poland (A/C.6/64/SR.21, para 76) 'The principles of sovereignty and non-intervention should not be interpreted as allowing a State affected by a disaster to deny the victims access to assistance if it was unable to provide the goods and services required for the survival of its population. In such cases, the affected State should cooperate with other States and organizations willing and able to do so.'

In relation to the former, the Tampere Convention is again a leading example. Therein:

> [t]he States Parties shall cooperate among themselves and with non-State entities and intergovernmental organizations, in accordance with the provisions of this Convention, to facilitate the use of telecommunication resources for disaster mitigation and relief.[114]

In the case of the Tampere Convention, the scope of that obligation extends to co-operation with non-State entities and intergovernmental organisations as well as other States Parties.

This approach is mirrored in other instruments that identify other relevant parties with whom co-operation would be required in the event of a disaster. The Nuclear Assistance Convention, for example, identifies such a party by name: 'States Parties shall cooperate between themselves and with the International Atomic Energy Agency … to facilitate prompt assistance …'[115] and anticipates that the Convention might be used as a framework agreement in that respect: '[t]o facilitate such cooperation States Parties may agree on bilateral or multilateral arrangements'.[116]

Helpfully, some instruments also specify the type of co-operative actions that might be required. In the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation, article 7(1) provides that:

> Parties agree that, subject to their capabilities and the availability of relevant resources, they will co-operate and provide advisory services, technical support and equipment for the purpose of responding to an oil pollution incident,

114 Tampere Convention (n 18) art 3.
115 Nuclear Assistance Convention (n 59) art 1(1).
116 ibid art 1(2).

> when the severity of such incident so justifies, upon the request of any Party affected or likely to be affected.[117]

Some agreements also specify the levels at which such co-operation is expected. The 1994 UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, provides that such co-operation should be improved 'at subregional, regional and international levels'.[118] That instrument, too, provides for areas in which such co-operation is required: the 'better [focussing of] financial, human, organizational and technical resources where they are needed';[119] 'to ensure the promotion of an enabling international environment in the implementation of the Convention';[120] and 'the Parties shall seek full use and continued qualitative improvement of all national, bilateral and multilateral funding sources and

117 International Convention on Oil Pollution Preparedness, Response and Co-operation (adopted 30 November 1990, entered into force 13 May 1995) 1891 UNTS; 30 ILM 733 (Oil Pollution Preparedness Convention) art 7(1).

118 UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3(Desertification Convention) art 3(b). This obligation is mirrored in article 4(2)(e) of that same agreement: 'strengthen subregional, regional and international cooperation.'

119 ibid art 3(b).

120 ibid art 12.

mechanisms'.[121] Regional[122] and bilateral[123] instruments also reflect these various forms of co-operation.

Other instruments indicate an obligation of co-operation in respect of the objective of the instrument concerned. An objective of the Food Assistance Convention, for example, is: 'facilitating information-sharing, cooperation, and coordination'[124] and thus, parties should 'actively seek to cooperate, coordinate and share information to improve the effectiveness and efficiency of food assistance programmes'.[125] Similarly, the ASEAN agreement notes:

> The objective of this Agreement is to provide effective mechanisms to achieve substantial reduction of disaster losses in lives and in the social, economic and environmental assets of the Parties, and to jointly respond to disaster

121 ibid art 20(4).

122 Parties to the SAARC agreement (n 64), for example, should '[c]ooperate in developing and implementing measures for Disaster Risk Reduction … and the provision of mutual assistance.' (art IV(1)). Similarly, parties to the ASEAN agreement (n 69) 'shall, in the spirit of solidarity and partnership and in accordance with their respective needs, capabilities and situations, strengthen co-operation and co-ordination to achieve the objectives of this Agreement' (art 3) and 'co-operate in developing and implementing measures to reduce disaster losses including identification of disaster risk, development of monitoring, assessment and early warning systems, standby arrangements for disaster relief and emergency response, exchange of information and technology, and the provision of mutual assistance; (art 4(a)). Article 3 of the BSEC agreement (n 83) provides a vague reference to the obligation to co-operate ('The Parties shall co-operate…') and the Kampala Convention (n 85) relates its obligation of co-operation to the importance of protecting internally displaced persons ('States Parties shall cooperate with each other upon the request of the concerned State Party or the Conference of State Parties in protecting and assisting internally displaced persons.' (art 5(2)).

123 Bilateral treaties are aimed, primarily, at facilitating improved co-operation between States. As a result, there are a wide variety of co-operation obligations contained therein. In de Guttry's comprehensive survey of IDRL, two approaches to co-operation in the bilateral treaties are identified. First, there are agreements with 'a wide definition of the areas of co-operation' and secondly those 'with a narrow definition of the areas of co-operation'. For the former, areas include: 'risk assessment and reduction, damage and loss assessment, monitoring systems, education and training, emergency management and planning, study of the effects of megacities, engineering and social problems, technological information exchanges,' and for the latter, such areas include: 'treaties devoted only to the preparation of emergency operations in response to a specific disaster, or dealing only with the preparation and execution of projects of scientific and technical co-operation in the area of civil protection'. For examples, see de Guttry (n 6) 11-12.

124 Food Assistance Convention (n 59) art 1(c).

125 ibid art 2(b)(ii).

> emergencies through concerted national efforts and intensified regional and international co-operation.[126]

It is clear that the provisions on co-operation in existing disaster treaties vary in terms of their scope and content. Whilst some provide for obligations in a general manner, others specify the areas in which co-operation is required and modes of achieving it. This is significant in so far as an affected State's right to refuse is concerned. Demonstrably, however, no obligations of co-operation examined here state that to refuse assistance would be uncooperative. Yet this does not mean that co-operation norms do not restrict the right to refuse. Where a refusal would violate any of the other forms of co-operation identified throughout this section, there may well exist a material restriction on the right to refuse.

That the obligations of co-operation provided for by disaster treaties are so diverse calls into question whether any more general obligations of co-operation might apply to States such that co-operative obligations might in any case still restrict their right to refuse. This enquiry is returned to in Chapter 4.

2.4.2 Non-binding rules

Several non-binding guidelines stress the importance of co-operation in disaster response.

The GPID note that the authorities of the affected State 'shall endeavour to establish the fate and whereabouts of internally displaced persons reported missing,

126 ASEAN agreement (n 69) art 2.

and cooperate with relevant international organizations engaged in this task.'[127] The GPID also provide that '[t]he responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification',[128] which encourages a wider interpretation of the affected State's obligation to co-operate in so far as it notes humanitarian organisations (the Red Cross is one of the major international organisations to tackle family reunification) as well as States.

Interestingly, the IDRL Guidelines do not expressly require that the affected State co-operate with assisting actors. Rather, it takes the approach that assisting actors should co-operate with the affected State in recognition of its primary responsibility, and then only explicitly in the Annotations to the Guidelines.[129] This is an interesting articulation, not least because it shifts the focus of the obligation to co-operate to assisting actors as opposed to the affected State. That being said, and as Chapter 4 explains in more detail, co-operation is not a 'one way' activity, and reciprocity in co-operation is required in order for it to be achieved.[130] Ultimately, though, in the absence of any explicit language on the affected State's duty to co-operate, it can only be inferred from the IDRL Guidelines that such co-operation is required. In the absence of stronger language, this formulation serves only to support the primary role of the

127 GPID (n 101) principle 16(2).

128 ibid principle 17(3).

129 'In addition, consistent with paragraph 4 of UNGA Res 46/182, international actors should remain mindful in their activities of the primary role of the affected State, and therefore cooperate with relevant authorities in their efforts to coordinate, monitor and regulate assistance in a manner consistent with humanitarian principles.' 'Annotations to the Draft Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance' (*IFRC*, 26 October 2007) <www.ifrc.org/PageFiles/41203/annotations.pdf> (IDRL Annotations) 15. The IDRL Annotations are explanatory and have not been submitted to the International Conference of the Red Cross and Red Crescent for adoption.

130 See Chapter 4, section 4.2.3.

affected State, which, as mentioned above, was supported elsewhere in the Guidelines.[131] That being said, it may be the case that the IDRL Guidelines anticipate the provision as privileges, immunities, and facilities as the means of co-operation (see section 2.5.1 below).

The HFA adds to its provision on the primary responsibility of the affected State (see above) in stressing that disaster risk reduction requires international co-operation:

> At the same time, in the context of increasing global interdependence, concerted international cooperation and an enabling international environment are required to stimulate and contribute to developing the knowledge, capacities and motivation needed for disaster risk reduction at all levels.[132]

Finally, in its work on PPED, the ILC drew from the wider humanitarian context in citing a requirement of co-operation in article 3, paragraph 3, of the Declaration on the Right to Development.[133]

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131 See text to ns 104-107.

132 HFA (n 108) Part III, A, 13(b).

133 'States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and cooperation among all States, as well as to encourage the observance and realization of human rights.' UNGA, 'Declaration on the Right to Development' (4 December 1986) UN Doc A/RES/41/128. See also SR Fourth Report 2011 (n 58) para 36.

2.5 Rules on Privileges, Immunities, and Facilities

2.5.1 Binding rules

Another means by which the disaster treaties considered here restrict the right to refuse is in respect of the privileges, immunities, and facilities that the affected State is obligated to provide for assisting actors. Obligations on these subjects restrict the right to refuse because they speak to cases in which an affected State might accept aid for the sake of saving face or avoiding international condemnation, but later implement measures that – in effect – constitute a refusal. This was the case in Myanmar in 2008, for example, when eventual international pressure mounted such that aid was allowed into the country but the authorities made it near impossible for many humanitarian organisations to conduct their work, primarily by denying those organisations certain privileges, immunities, and facilities that would facilitate their operations.[134] Disaster treaties have come to include provisions that ensure such privileges, immunities, and facilities are provided.

The approach of many instruments in this area is to obligate States to provide such privileges, immunities, and facilities in a more general manner and then expand upon such a requirement in relation to the particulars of the treaty concerned. Again, the Tampere Convention is a leading example in this respect. That Convention requires that the affected State shall provide to assisting actors 'the necessary privileges,

134 See Chapter 1, section 1.0.

immunities, and facilities for the performance of their proper functions'[135] and that the requesting State Party

> shall provide, to the extent of its capabilities, local facilities and services for the proper and effective administration of the telecommunication assistance, including ensuring that telecommunication equipment brought into its territory pursuant to this Convention shall be expeditiously licensed or shall be exempt from licensing in accordance with its domestic laws and regulations.[136]

Moreover, '[t]he States Parties shall … reduce or remove regulatory barriers to the use of telecommunication resources for disaster mitigation and relief, including to the provision of telecommunication assistance'.[137]

General obligations relating to privileges, immunities, and facilities exist in the Nuclear Assistance Convention[138] and the FCCDA[139] at the global level, and at the regional level similar obligations exist but more detail tends to be provided. The SAARC agreement, for example, requires that affected States 'provide, to the extent possible, local facilities and services for the proper and effective administration of the assistance'[140]. In relation thereto, affected States shall 'designate entry points for supplies and expertise from Assisting Parties' to 'facilitate the utilization of [external relief] assets'.[141] The ASEAN agreement is similar in that respect, providing that '[e]ach

135 Tampere Convention (n 18) art 5(1).
136 ibid art 5(2).
137 ibid art 9.
138 'The requesting State shall afford to personnel of the assisting party and personnel acting on its behalf the necessary privileges, immunities and facilities for the performance of their assistance functions'. Nuclear Assistance Convention (n 59) art 8(1).
139 The 'Beneficiary State shall, within the framework of national law, grant all privileges, immunities, and facilities necessary for carrying out the assistance and shall provide protection for personnel and for property belonging to the Civil Defence Unit of the Supporting State.' FCCDA (n 62) art 4(a)(5).
140 SAARC agreement (n 64) art IX(2).
141 ibid art VI(4).

Party shall ensure according to their national legislation that the necessary measures are taken to mobilise equipment, facilities, materials, human and financial resources required to respond to disasters'[142] and that

> [t]he Requesting or Receiving Party shall provide, to the extent possible, local facilities and services for the proper and effective administration of the assistance. It shall also ensure the protection of personnel, equipment and materials.[143]

In this regard, the FCCDA speaks directly to practical measures that shall be taken: 'The Beneficiary State shall simplify and reduce to a minimum the administrative and customs formalities relating to the entry and stay of the Civil Defence Units which shall benefit from a temporary entry scheme.'[144]

Some other regional instruments include provisions on the principle of non-discrimination, which further restricts an affected State's right to refuse in so far as some affected States have tried to prevent assistance reaching certain populations.[145] The BSEC agreement is a good example of the requirement that assistance be provided without discrimination:

> The Requesting Party shall ensure unobstructed receipt and distribution of goods of assistance exclusively among the afflicted population. The Goods of assistance shall be distributed without any discrimination based on race, religion, language, political or other factors.[146]

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142 ASEAN agreement (n 69) art 10(1).

143 ibid art 12(2).

144 FCCDA (n 62) art 4(a)(3).

145 In Pakistan, for example, Dalit communities have faced extensive discrimination in disaster relief operations and development programmes. International Dalit Solidarity Network (IDSN), 'Discrimination in Humanitarian Assistance – the case of Pakistan' (IDSN, 3 September 2010) <https://idsn.org/wp-content/uploads/user_folder/pdf/New_files/Pakistan/Caste_discrimination_in_humanitarian_assistance_-_the_case_of_Pakistan.pdf> accessed 25 September 2018.

146 BSEC agreement (n 83) art 3(4).

The Kampala Convention is similar in this respect: 'States Parties shall take necessary steps to effectively organize, relief action that is humanitarian, and impartial in character, and guarantee security.'[147]

Another important aspect of providing the requisite privileges, immunities, and facilities is ensuring the protection of the humanitarian personnel deployed by assisting actors. This type of requirement restricts an affected State's right to refuse in so far as many States have achieved their refusal by making it too dangerous for aid workers to deliver the assistance.[148] The refusal is material, if not explicit. The SAARC agreement provides that the affected State 'shall also ensure the protection of personnel, equipment and materials brought into its territory by or on behalf of the Assisting Party for [assistance] purposes.'[149] Similarly, the Kampala Convention provides: 'States Parties shall respect, protect and not attack or otherwise harm humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons'.[150] For the member States of the Inter-American agreement, the standard required is one of 'best efforts':

> Unless otherwise agreed, the assisted state shall provide, to the extent of its capabilities, local facilities, and services for the proper and effective administration of the assistance. It shall also make its best efforts to protect personnel, equipment, and materials brought into its territory by or on behalf of the assisting state for such purpose.[151]

147 Kampala Convention (n 85) art 5(7).

148 Many aid workers were intimidated, threatened, assaulted, arrested, and imprisoned in some of the disasters referenced throughout this thesis. See, for example, Myanmar (Chapter 1, text to n 21) and Venezuela (Chapter 3, text to n 176).

149 SAARC agreement (n 64) art IX(2).

150 Kampala Convention (n 85) art 5(10).

151 Inter-American agreement (n 84) art IV(c).

As with other categories of obligations explored above, some instruments anticipate that they might serve as framework agreements in respect of privileges, immunities, and facilities. The Desertification Convention, for example, provides that States have an obligation to give effect to the provisions of the Convention by means of establishing 'strategies and priorities, within the framework of sustainable development plans and/or policies, to combat desertification and mitigate the effects of drought'[152] and providing 'an enabling environment by strengthening, as appropriate, relevant existing legislation and, where they do not exist, enacting new laws and establishing long-term policies and action programmes'[153]. Moreover, '[t]he Parties shall develop operational mechanisms … to avoid duplication, harmonize interventions and approaches, and maximize the impact of assistance.'[154] The Oil Pollution Convention also anticipates that 'necessary legal or administrative measures'[155] should be taken to realise the objectives of the Convention.

Borrowing from IHL,[156] the Kampala Convention provides standards for the provision of such privileges, immunities, and facilities, yet ultimately confirms the right

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152 Desertification Convention (n 118) art 5(b).
153 ibid art 5(e).
154 ibid art 14(2).
155 Oil Pollution Preparedness Convention (n 117) art 7(3).
156 Article 70(2) of Additional Protocol I requires that 'The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.' Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I) art 70(2). That rule is now incorporated into the ICRC's Customary Rules of IHL at Rule 55: 'The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.' 'Customary IHL: Rule 55' (*ICRC*) <www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55> accessed 4 July 2018.

of the affected State to prescribe technical arrangements in line with its primary responsibility:

> States Parties shall allow rapid and unimpeded passage of all relief consignments, equipment and personnel to internally displaced persons. States Parties shall also enable and facilitate the role of local and international organizations and humanitarian agencies, civil society organizations and other relevant actors, to provide protection and assistance to internally displaced persons. States Parties shall have the right to prescribe the technical arrangements under which such passage is permitted.[157]

Ultimately, rules stipulating that an affected State must or should provide the required privileges, immunities, and facilities restrict an affected State's right to refuse because they prevent – to an extent at least – the heavy burdens that many States have in the past put on assisting actors as a means of preventing them from carrying out assistance effectively. Similar in this regard are rules on procedure and information sharing, which are considered in penultimate section 2.6.

2.5.2 Non-binding rules

Again, non-binding instruments reflect the positions taken in the hard rules identified above. The GPID provide that: 'All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.'[158] The IDRL Guidelines similarly require that affected States provide such privileges, immunities,

157 Kampala Convention (n 85) art 5(7).
158 GPID (n 101) principle 25(3).

and facilities, but in several articles as opposed to one. Requirements on privileges, immunities, and facilities can be found in Part IV (concerning eligibility for legal facilities)[159] and Part V (concerning legal facilities for entry and operations).[160]

2.6 Rules on Procedure and Information Sharing

2.6.1 Binding rules

The final category of restrictions on the affected State's right to refuse as provided for by these treaties relates to procedural obligations and information sharing. In many instances of refusal, States give effect to their refusals through means that can be described as 'procedural'. For instance, when Myanmar rejected much of the aid that was offered to it in the aftermath of Cyclone Nargis, it did not always communicate its rejection directly; often, it simply failed to respond to offers of assistance at all, or at least failed to respond in a timely manner. As a result of situations like this, States have been more proactive in including procedural requirements in disaster treaties.

At the global level, the FCCDA provides that 'offers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time.'[161] Time requirements also exist in the Oil Convention, where States are

159 Guidance on eligibility for legal facilities exists in relation to: assisting States (guideline 13); assisting humanitarian organisations (guideline 14); and other assisting actors (guideline 15). IDRL Guidelines (n 104) Part IV.

160 Guidance on legal facilities for entry and operations exists in relation to: personnel (guideline 16); goods and equipment (guideline 17); special goods and equipment (guideline 18); transport (guideline 19); temporary domestic legal status (guideline 20); taxation (guideline 21); security (guideline 22); extended hours (guideline 23); and costs (guideline 24). ibid Part V.

161 FCCDA (n 62) art 3(e).

required to 'report without delay'.[162] The Desertification Convention also has a requirement that decisions are 'ma[d]e public'.[163] The Nuclear Convention states that the requesting State may terminate assistance 'at any time', provided that 'appropriate consultations' have taken place and that there has been 'notification in writing'.[164]

The regional level has similar requirements. The SAARC agreement provides that:

> Each Party to which an offer of assistance is directed shall promptly decide and notify the Assisting Party, directly under intimation to or through the Secretary General, whether it is in a position to accept the assistance offered, and of the scope and terms of such assistance.[165]

Article 11(5) of the ASEAN agreement is near identical to the SAARC agreement provision.[166] The SAARC agreement also adds the requirement of additional information:

> The Requesting Party shall specify the scope and type of assistance required and, where practicable, provide the Assisting Party with such details as may be necessary for that Party to determine the extent to which it is able to meet the request.[167]

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162 Oil Pollution Preparedness Convention (n 117) art 4(1)(a).
163 Desertification Convention (n 118) art 9(1).
164 Nuclear Assistance Convention (n 59) art 11.
165 SAARC agreement (n 64) art VIII(4).
166 'Each Party to which an offer of assistance is directed shall promptly decide and notify the Assisting Entity, directly or through the AHA Centre, whether it is in a position to accept the assistance offered, and of the scope and terms of such assistance.' ASEAN agreement (n 69) art 11(5).
167 SAARC agreement (n 64) art VIII(1). This is again mirrored in the ASEAN agreement, but with more detail on the requirement of consultations: 'The Requesting Party shall specify the scope and type of assistance required and, where practicable, provide the Assisting Entity with such information as may be necessary for that Party to determine the extent to which it is able to meet the request. In the event that it is not practicable for the Requesting Party to specify the scope and type of assistance required, the Requesting Party and Assisting Entity shall, in consultation, jointly assess and decide upon the scope and type of assistance required.' ASEAN agreement (n 69) art 11(2).

Information sharing is a critical component of the procedural obligations because many States have been able to refuse by withholding information about the disaster itself. To address those issues, States have created restrictions on the right to refuse in the form of information sharing requirements. The FCCDA, for example, provides that: 'The Beneficiary State shall provide all necessary information available relating to the situation, so as to ensure smooth implementation of the assistance, and shall provide timely notice of actions required.'[168]

The Nuclear Assistance Convention is similar in this respect, requiring that requesting States 'specify the scope and type of assistance required and, where practicable, provide the assisting party with such information as may be necessary for that party to determine the extent to which it is able to meet the request',[169] which evidently speaks to situations where the information from the affected State is required in advance of the offer being made by an assisting actor. That Convention's cousin – the 1986 Convention on Early Notification of a Nuclear Accident – also provides for obligations on how information is to be shared, for example by requiring that parties

> [f]orthwith notify, directly or through the International Atomic Energy Agency … those States which are or may be physically affected as specified in article 1 and the Agency of the nuclear accident, its nature, the time of its occurrence and its exact location where appropriate.[170]

Those States are also under an obligation to provide 'such available information relevant for minimizing the radiological consequences'.[171]

168 FCCDA (n 62) art 4(a)(1).
169 Nuclear Assistance Convention (n 59) art 2.
170 Early Notification Convention (n 156) art 2(a).
171 ibid art 2(b).

At the regional level, information sharing obligations are not as common, which may suggest that information sharing may be an activity with particular importance only in certain disaster contexts, such as the escape of nuclear materials (although that of course is not to suggest that information sharing is not important in others). The SAARC agreement does, however, provide that 'the Parties shall … share information if the disaster is likely to impact other Member State(s)'.[172]

2.6.2 Non-binding rules

The binding guidelines above require information sharing with other States and humanitarian organisations. The GPID depart from this in the sense that they require information to be shared with the population itself: 'adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation'.[173] The IDRL Guidelines, on the other hand, mirror the approach in the binding agreements in requiring that:

> In order to minimize transboundary impacts and maximize the effectiveness of any international assistance that might be required, all States should have procedures in place to facilitate the expeditious sharing of information about disasters, including emerging hazards that are likely to cause disasters, with other States and assisting humanitarian organizations as appropriate, including the United Nations' Emergency Relief Coordinator.[174]

172 SAARC agreement (n 64) art IV(2).
173 GPID (n 101) guiding principle 7(3)(b).
174 IDRL Guidelines (n 104) guideline 7.

2.7 Interim Conclusion

This chapter has demonstrated that there is a growing body of international law on the topic of disasters, seen not only in multilateral treaties – which are both sectoral and regional in their scope – but also an increasing corpus of bilateral treaties. Despite this increasingly rich body of law, though, there is only one explicit provision on refusal: article 4(5) of the Tampere Convention.

The approach of States instead has been to focus on the protection of sovereignty through the requirement of consent of the affected State and the recognition of the primary responsibility of the affected State, two provisions that support the freer exercise of the right to refuse. That these rules are corollaries of a customary principle – State sovereignty – bolsters their normative force in this respect.

Some restrictions are, however, present. Those relate mainly to limited duties to co-operate as well as requirements on the provision of privileges, immunities, and facilities and procedural requirements, including information sharing. Detailed rules in this regard are developing on a distinctively regional basis, with Asia leading in terms of regional agreements and Europe leading in terms of bilateral treaties.

In terms of the broader enquiry into existing international law rules on refusal, then, this direct regulation of refusal does not, at the present time at least, address refusal adequately. This is something that should be borne in mind in the drafting of a new international convention, and indeed it may be something that such a convention may seek to address. The existence of gaps in this direct regulation has meant that the – in general – more widely applicable rules of human rights law and the law of co-operation have gained in importance. These areas of law are examined in Chapters 3 and 4 that follow.

CHAPTER 3

THE RIGHTS TO LIFE AND TO AN ADEQUATE STANDARD OF LIVING

3.0 Introduction

In the past couple of decades, the human rights implications of disaster prevention, response, and recovery have come to form central concerns of lawmakers at the international, regional, and national levels. Numerous disasters worldwide have demonstrated that disasters do not provide States with an excuse for failing to fulfil their human rights obligations; rather they are a reason for States to be even more proactive in meeting them.

Disasters destroy the means by which individuals are able to provide for themselves and for vulnerable groups within their communities. More often than not, disasters constitute not only a threat to needs like nutrition, sanitation, housing and so on, but also a threat to life. That States have legal duties to protect populations from these threats in times of disaster is now widely accepted. The number of major human rights treaties that expressly apply in disasters, however, remains rather low; the

Convention on the Rights of Persons with Disabilities[1] and two African Union conventions[2] being the limited examples of those that do.

Yet the steady increase in other instruments, resolutions, and declarations that are applicable in disasters indicates that this may not be the case for very long. The ILC, for example, in preparing its draft articles on PPED (that, as explained in Chapter 1 and elaborated in Chapter 5, are likely to provide the basis of any new international convention on the matter) has several times stated the importance of State obligations to protect populations from threats posed by disasters. Indeed, at the outset of the work, the ILC stressed that '[e]xisting international human rights obligations lie *at the core* of the content of protection in the context of disasters'[3] and in its eventual draft articles, article 5 reads: 'Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law.'[4] That the United Nations Human Rights Council (UNHRC) dedicated a special session to the

1 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD). Article 11 on situations of risk and humanitarian emergencies states: 'States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.'

2 The African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49 (1990) (ACRWC) and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 22 October 2009, entered into force 6 December 2012) (Kampala Convention), two leading African human rights instruments, make specific references to disasters. ACRWC articles 23(4) and 25(2)(b) ensure that their provisions (concerning refugee and internally displaced children and separation from parents respectively) apply in the event of a range of disasters, including natural disasters and breakdown of social and economic order. The Kampala Convention, in proclaiming the importance of human rights for IDPs, acknowledges that disasters can have a 'devastating impact on human life, peace, stability, security, and development' (preamble).

3 ILC, 'Protection of persons in the event of disasters - Memorandum by the Secretariat 2007/590' (2007) UN Doc A/CN.4/590, 1 (emphasis added).

4 ILC, 'Report of the International Law Commission on the Work of its 68th Session' (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10, 15. The ILC's work is examined in detail in Chapter 5.

Haitian earthquake in 2010 is another key indication of this important parallel.[5] Recognition of such within the UN system has even reached the UNSC; in 2016, the UNSC extended the mandate for the UN Stabilization Mission in Haiti (MINUSTAH), partly in recognition of the need to continue to protect human rights following the earthquake.[6] Considering the customary status of some human rights – including the right to life, which is discussed below – it is little wonder that the protection and enjoyment of human rights in times of disaster has become such a priority.[7]

But it is not just within international organisations that these acknowledgements are being made; States on an individual basis, too, have made it clear that they understand human rights obligations to be just as relevant, if not more so, in times of disaster, and that their obligations (it is unclear whether moral or indeed legal) extend not only to their own populations but also to populations suffering the impact of disasters the world over. The UK, for example, has sustained funding to Myanmar in the years since Cyclone Nargis in 2008 in an attempt, *inter alia*, to ensure respect for the human rights of the disaster-struck population.[8] That States remain

5 UNHRC, 'Report of the Human Rights Council on its thirteenth special session' (2010) UN Doc A/HRC/S-13/2.

6 UNSC Res 2313 (2016) (13 October 2016) UN Doc S/RES/2313; UNSC, 'Report of the Secretary-General on the United Nations Stabilization Mission in Haiti' (31 August 2016) UN Doc S/2016/753. UNSC practice in this regard is, however, limited. For further discussion, see Milena Costas Trascasas, 'Access to the Territory of a Disaster-Affected State' in Andrea de Guttry, Marco Gestri and Gabriella Venturini (eds) *International Disaster Response Law* (Springer 2012) 221-249, 239.

7 That is not to suggest, however, that human rights – in general or in those particularly relevant to times of disaster – are absolute. As discussed throughout this chapter, there are important limits to their protection and enjoyment that apply in times of disaster just as in any other situation, (although, it is interesting that a disaster in and of itself may lead to derogation). See n 9 and section 3.1.1 below.

8 UK Department for International Development (DFID), 'Boost for Burma with New UK Funding' (*UK Government*, 28 August 2014) <www.gov.uk/government/news/boost-for-burma-with-new-uk-funding> accessed 8 April 2018.

under human rights obligations in times of disaster, then, is not in question.[9] Questions do arise, however, in respect of precisely what those human rights obligations require of affected States. Nowhere are these questions more troubling than in respect of refusal.

Refusal has the potential to affect the enjoyment of some human rights considerably more than others. The right to life and the right to an adequate standard of living (including the constituent or 'supporting' rights to food, housing, health and water) align closely to life-saving assistance activities whereby the affected population is provided with food, shelter, medical care, and safe drinking water. When that assistance is refused from external assisting actors, and especially where affected States cannot or will not provide the assistance themselves, these rights risk being violated.[10] This risk is especially high where some groups have historically faced discrimination, and as such the applicability of the principle of equality and non-discrimination is examined in section 3.0.1 below. That is not to say, of course, that other rights – the rights to education, to free speech, and to political participation, for example – are any less important in times of emergency. As the authors of the Brookings-Bern Project on Internal Displacement[11] have put it, when disasters strike, the individuals affected do not suddenly exist in a legal vacuum; they still 'live in countries with law, rules and

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9 There may, however, be scope for States to derogate from those obligations in certain circumstances. This is addressed below in section 3.1.1.

10 The likelihood of violation is especially acute considering the interdependence of these rights: the interdependence of the rights to life and food being a good example. See, for example, Emmanuel Decaux, 'Le droit à la vie et le droit à une alimentation suffisante' in Christian Tomuschat, Evelyne Lagrange, and Stefan Oeter (eds) *The Right to Life* (Martinus Nijhoff Publishers 2009) 317-350.

11 The Brookings-Bern (later Brookings-LSE) Project on Internal Displacement supported the mandate of the UN Special Rapporteur on the Human Rights of Internally Displaced Persons for over twenty years by providing research, advocacy, and monitoring activities. The Project's research and commentary is available online at <www.brookings.edu/about/projects/idp/research> accessed 8 April 2018.

institutions that should protect their rights.'[12] It follows, then, that the human rights that exist outside of disaster ought to be no more or less important in the event of disaster.[13] But whilst that may be true in a formal sense – and indeed whilst the mantra of the interdependence and indivisibility of rights[14] would encourage that understanding – it stands to reason that a change in circumstances might at least give rise to a shift in focus in terms of the human rights that are seen to be prioritised in any given situation, especially a situation where State resources to protect certain rights are under pressure. It is for these reasons that the rights to life and to an adequate standard of living are examined here, and it is the determination of what those rights require of States in respect of refusal (thus how those rights function as restrictions on a State's right to refuse) that is the central aim of this chapter.

The sections that follow present in detail the right to life and the right to an adequate standard of living in the disaster context, focussing in particular on the nature, scope, and content of the corollary obligations. A major focus is on human rights treaty bodies, particularly the Human Rights Committee (CCPR) and the CESCR, which have been instrumental in elaborating the content of those rights and the corresponding obligations. The analysis of these well-established rights is followed in the penultimate section by scrutiny of the so-called 'human right to humanitarian

12 Brookings-Bern Project on Internal Displacement, 'Human Rights and Natural Disasters: Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster' (*Refworld*, March 2008) <www.refworld.org/pdfid/49a2b8f72.pdf> accessed 8 April 2018.

13 For an operational analysis of the realisation of human rights during natural, see Erica Harper, *International Law and Standards Applicable in Natural Disaster Situations* (International Development Law Organization 2009).

14 The concept of interdependence and indivisibility escapes precise definition, but its essence is widely thought of as meaning that human rights are mutually reinforcing and equally important, thus rejecting the claim that there is a 'hierarchy of rights' or that certain rights are more important than others. Helen Quane, 'A further Dimension to the Interdependence and Indivisibility of Human Rights? Recent Developments Concerning the Rights of Indigenous Peoples' (2012) 25 Harvard Human Rights Journal 49, 50. See also, Theodor Meron, 'On a Hierarchy of International Human Rights' (1986) 80 AJIL 1.

assistance', which in recent years has gained considerable traction in scholarship and advocacy on human rights protection in disasters. Concluding that there is no conventional or customary basis for such a right, the chapter, ultimately, serves to illustrate relevant *lex lata* human rights law, and later will provide a basis upon which to compare the ILC's enunciation of the role of human rights in PPED in Chapter 5.

3.0.1 The principle of equality and non-discrimination

The principle of equality and non-discrimination is a 'fundamental rule of international human rights law'[15] and in that regard, its function may be seen not only as giving rise to a human right to equality and non-discrimination,[16] but also as being essential to an individual's enjoyment of the full spectrum of human rights. The focus of this chapter being the rights to life and to an adequate standard of living respectively in the context of refusal, it is the latter aspect of the principle's function that is of particular interest.

The basic guarantee of the principle of equality and non-discrimination is that all human beings are to enjoy equality before the law, free from discrimination. Precisely what 'equality' means and how discrimination is to be identified varies from case to case and will depend not only on the nature, scope, and content of the obligation, but also on the context within which any complaint is being made. In certain cases, international human rights law (IHRL) justifies or even requires

15 Vienna Declaration and Programme of Action (25 June 1993) UN Doc A/CONF.157/23, para 15.

16 The right to equality and non-discrimination may be found in numerous human rights instruments at the international level (general and specific) as well as in all major regional instruments. In respect of the right to be free from discrimination on the grounds of race, sex, and religion in particular, that may be seen as a matter of customary international law. For a fuller account of the sources of the right to equality and non-discrimination, see Daniel Moeckli, 'Equality and Non-Discrimination' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2014) 160-61.

discrimination of States. As such, there is no 'blueprint' for what may constitute a violation of the principle of equality and non-discrimination in the context of refusal just as in any other; instead, it is preferable to outline some general guidance on the fundamental obligation of States to ensure equality and non-discrimination and to underscore that the rights to life and to an adequate standard of living cannot be enjoyed by affected populations unless the affected State is also meeting its obligation to ensure equality and non-discrimination.

'[A]n array of constitutional and international instruments'[17] give effect to principle of equality and non-discrimination. Particularly relevant to this chapter are the Universal Declaration of Human Rights[18] (UDHR), the International Covenant on Civil and Political Rights[19] (ICCPR), and the ICESCR[20] (the second and third being based heavily on the first). The UDHR recognises that '[a]ll human beings are born free and equal in dignity and in rights' and as such that

> [e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[21]

Similar provisions exist in the ICCPR and the ICESCR. The ICCPR requires, *inter alia*, that

17 Evadné Grant, 'Dignity and Equality' (2007) 7 Human Rights Law Review 299, 300.

18 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

19 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

20 International Covenant on Economic Social and Cultural Rights (adopted 16 December 1976, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

21 UDHR (n 18) arts 1 and 2. See also art 7: 'All are equal before the law and are entitled without any discrimination to equal protection of the law.'

> [e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[22]

The ICESCR is comparable in this regard.[23]

Demonstrably, these provisions identify prohibited grounds of distinction, and it is important to note that an affected State's obligations will vary (although perhaps not much materially, in this case) depending on the grounds identified – and crucially the manner in which they are identified – in the relevant instruments. The UDHR provides both a general guarantee of equality in articles 1 ('All human beings…') and 7 ('All are equal…') as well as an open-ended list of prohibited grounds of distinction in article 2 ('such as…'). This, too, is the approach taken in the ICCPR.[24] These instruments leave up to the relevant authorities the ultimate determination of which grounds of distinction are acceptable in any given circumstance, and in that regard could provide the basis for significant protections. The ICESCR, however, presents a *prima facie* exhaustive list of prohibited grounds, suggesting a more limited degree of protection:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without

22 ICCPR (n 19) art 2(1). Relevant provisions also exist in arts 3 and 26.

23 ICESCR (n 20) art 2(2): 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' See also art 3.

24 See, for example, article 2(1): 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' ICCPR (n 19) art 2(1).

> discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[25]

That 'other status' is included does, however, give the relevant authorities scope to include additional grounds within the prohibition as appropriate, which in practice may serve to counterbalance the exhaustivity of the list otherwise provided by the article.[26]

In the context of refusal, it is significant that the applicable instruments cast a wide net of protection. Indeed, it is reassuring that where groups have been discriminated against in the context of emergency humanitarian aid – for example, women,[27] Dalits,[28] or African-Americans[29] – the groups impacted have identities that align readily with the prohibited grounds.

It is significant, too, that IHRL prohibits direct *and* indirect discrimination, as both are common in the disaster context. Direct discrimination occurs where a person is treated less favourably than another in comparable circumstances because of one or more of the prohibited grounds. This type of discrimination was seen, for example, in relation to Dalit communities in Pakistan's disaster responses (see above and section 2.5.1 above). Indirect discrimination, on the other hand, occurs when otherwise equal treatment has a disproportionate outcome for a group identified in relation to one or more of the prohibited grounds. This was seen, for example, in relation to African-

25 ICESCR (n 20) art 2(2).

26 The CCPR, for example, in relation to article 26 of the ICCPR (n 19) has deemed 'other status' to include 'age' (*Schmitz-de-Jong v The Netherlands*, CCPR/C/72/D/855/1999 (16 July 2001)) and 'marital status' (*Danning v The Netherlands*, CCPR/C/OP/2 (9 April 1987)) that are not otherwise provided for in the list of prohibited grounds of distinction.

27 On gender-based discrimination in relief, see Harper (n 13) 71-83.

28 See section below. See also OHCHR, *Equality in Aid: Addressing Caste Discrimination in Humanitarian Response* (*UN*, September 2013) <www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/PostDisaster/InternationalDalitSolidarityNetworkReport.pdf> accessed 25 September 2018.

29 See section 3.1.3 below.

American communities in the United States' response to Hurricane Katrina in 2005 (see above and section 3.1.3 below). Indirect discrimination is certainly more common in situations of refusal, with women and people with disabilities especially facing – often considerable – differences in outcome when it comes to disaster relief.[30] Again, that both types of discrimination are prohibited means that the principle of equality and non-discrimination is, on the face of it at least, able to serve as a broad restriction on the right to refuse.

That discrimination may be justified in certain circumstances, however, means that the principle may not serve so straightforwardly as a restriction in practice. Courts and human rights treaty bodies accept that it is inevitable that States classify groups of people in some situations and that it may actually be desirable that they should do so. How, then, might justifications arise in the context of refusal?

Upon identification of a *prima facie* case of direct or indirect discrimination – which in situations of refusal is most likely to involve a group being denied access to relief (directly or indirectly, intended or unintended[31]) – courts and treaty bodies will look to establish whether there was a justification for the discrimination. Tests for such vary depending on the jurisdiction,[32] but for the most part concern whether the

30 That aid distribution policies so often focus on the heads of households, for example, has led to women suffering indirect discrimination (formally a man or a woman may be a head of household, but more often than not it is men that are treated as the heads in practice). Similarly, persons with disabilities face considerable problems with physical access to relief, despite being entitled to relief on an equal basis as persons without disabilities. See Harper (n 13) 71-83 (women) and 84-93 (persons with disabilities).

31 IHRL prohibits discrimination whether intended or unintended, whereas some domestic legal systems (for example, the US (see *Washington v Davis* 426 US 229 (1976))) require that complainants prove discriminatory intent.

32 For an overview, see Moeckli (n 16) 167-70.

discrimination pursued a legitimate aim and whether it was proportionate[33] (mirroring the requirements for limitations to human rights laid out in section 3.1.1 below). In disaster situations, an affected State may easily seek to justify its differential treatment because of concerns over public order, as this is one justification recognised as legitimate in limitation permissibility tests.[34] Usually more difficult for a State to establish is that the differential treatment was proportionate. In this case, Moeckli identifies that a

> wide range of factors may need to be considered … including the suitability of a distinction to achieve the aim pursued, the availability of alternative means, and the question of whether the disadvantage suffered by the affected individuals or groups is excessive in relation to the aim.[35]

Proportionality engages a deeper analysis of the balance to be struck between the interest alleged to be protected by the discrimination and the rights of the individuals subject to that discrimination. As a result, there are no reasons automatically categorised as 'proportionate'. That said, the CCPR in *Gueye v France* was clear that administrative inconvenience or the possibility of administrative abuse – which is highly likely to arise in times of disaster – would not render discrimination proportionate.[36]

33 'A difference of treatment … must not only pursue a legitimate aim: [an article] is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.' *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Belgian Linguistics Case) (No 2)* (1968) 1 EHRR 252, 284 [10].

34 On the permissibility of limitations, see section 3.1.1 below, particularly n 68.

35 Moeckli (n 16) 167.

36 *Gueye v France*, CCPR/C/35/D/196/1985 (3 April 1989) [9.5]: 'In the Committee's opinion, mere administrative inconvenience or the possibility of some abuse … cannot be invoked to justify unequal treatment.'

The realities of disaster situations, then, may mean that justifications are more readily available to affected States in times of disaster, and this calls into question whether and to what extent the principle of equality and non-discrimination might serve as a restriction on the right to refuse in practice. That is not to say that courts and human rights treaty bodies would be willing to afford affected States an unrestrained freedom in this regard; it remains the case that because situations of refusal raise concerns over the enjoyment of fundamental human rights, the standard of scrutiny of any claimed justifications would be strict.[37]

A final note should be made on the possibility that courts and human rights treaty bodies may actually *require* – as a matter of law – that a State discriminates for the purposes of achieving real equality. That this is so is attributable to the widening scope of the principle from a 'strictly formal' notion of equality towards 'a much broader notion' one.[38] Because discrimination is so often deep-rooted in the machinery of the State, there has emerged recognition of a duty to take positive action to achieve equality. This duty seeks to ensure that structural discrimination in the legislative, administrative, judicial, and other key branches of the State is avoided or remedied by requiring deliberate positive action. Encouragingly, States have undertaken action of this nature in the disaster context. In Indonesia, for example, the government has prescribed minimum housing standards so as to ensure equality in the enjoyment of the right to adequate housing (discussed in detail below in section 3.2.2(b)), the parity

37 Justifications involving fundamental human rights tend to engage a higher degree of scrutiny than those that concern economic or social policy. See, for example, *Dudgeon v UK* (1981) 4 EHRR 149 [52].

38 Titia Loenen, 'Towards a Common Standard of Achievement - Development in International Equality Law' (2001) Acta Juridica 197, 197.

of which was being skewed owing to the involvement of multiple humanitarian relief agencies and organisations.[39]

In theory, the principle of equality and non-discrimination provides a robust framework of protection for groups within affected populations. The basic obligations of affected States in relation to the principle require that States treat all individuals within the affected population in an equal manner, and that they ensure that particular protected groups within affected populations do not experience a disproportionately different outcome in protection of their rights when it comes to disaster relief. In practice, however, there may be barriers to the full enjoyment of the principle given the realities of disaster situations; indeed, those realities may well lead to the conclusion that discrimination is justified, something that ultimately affects the ability of the principle of equality and non-discrimination to serve as a restriction on the right to refuse. That said, it remains the case that as a matter of general principle, affected States should be ensuring that equality is realised in disaster response, particularly when it comes to the rights most at risk in situations of disaster. Those rights – namely the rights to life and to an adequate standard of living – are accordingly examined in the sections that follow.

3.1 The Right to Life

In order to understand how the individual's right to life restricts an affected State's right to refuse, it must be established what the right to life requires of States in the

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39 On the efficacy of the post-disaster housing regulations in Aceh, Indonesia, see Florian Steinberg and Pieter Smidt (eds), *Rebuilding Lives and Homes in Aceh and Nias, Indonesia* (Asian Development Bank 2010).

disaster context. The nature and scope of the affected State's obligations in respect of the right to life are important in so far as they indicate broader restrictions for the affected State; the non-derogable nature of the right to life, for example, means that even in times of public emergency (i.e. disaster)[40] the State will remain under its obligations to protect the right to life. But what is crucial is the *content* of the right, as that is what indicates more precisely what is required of States in times of disaster, such that in the event that a State fails to meet those requirements, the lawfulness of the refusal may be called into question. As section 3.1.2 below demonstrates, some aspects of the content of the right can be described as 'general' in so far as they apply in times of disaster as any other times, and some 'specific' in so far as they have been developed by international courts and treaty bodies specifically in relation to disasters.

3.1.1 Nature and scope of the obligation

The right to life is a norm of customary international law[41] and has several conventional bases. Article 6(1) of the ICCPR, reflecting article 3 of the UDHR[42] provides that

40 Until recently, human rights jurisprudence tended to refer to 'public emergencies' as opposed to 'disasters', a consequence no doubt of the former being the wording of article 4(1) of the ICCPR (n 19): 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation'. For these purposes, there is no material difference between the terms 'public emergency' and 'disaster'. See also Chapter 1 regarding the definition of 'disaster'.

41 In considering the legal status of the right to life, Nigel Rodley has summarised, '[t]here can be little doubt that the right to life is a rule of customary international law' though its jus cogens character is less certain. Nigel S Rodley, 'Integrity of the Person' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2014) 185.

42 UDHR (n 18) art 3 provides: 'Everyone has the right to life, liberty and security of person.'

'[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'[43]

At the international level, the right to life can also be found (in very similar wording) in the 1989 CRC[44] and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers Convention).[45] At the regional level, it can be found (again, in very similar wording) in the: 1948 American Declaration of the Rights and Duties of Man;[46] 1950 European Convention on Human Rights (ECHR);[47] 1969 American Convention on Human Rights;[48] 1981 African Charter on Human and Peoples Rights;[49] 1990 Cairo Declaration on Human Rights in Islam;[50] 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women;[51] 2000 Charter

43 ICCPR (n 19) art 6(1). On the ICCPR generally, see Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: cases, materials, and commentary* (3rd edn, OUP 2013).

44 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 6. Current parties: 196.

45 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (Migrant Workers Convention) art 9.

46 American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992) art I.

47 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR) art 2.

48 American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 4.

49 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 4.

50 Cairo Declaration on Human Rights in Islam (adopted 5 August 1990) UN Doc A/CONF.157/PC/62/Add.18 (1993) [English translation], art 2.

51 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (adopted 9 June 1994, entered into force 5 March 1995) 33 ILM 1534 (1994) art 4(a).

of Fundamental Rights of the European Union;[52] and the 2004 Arab Charter on Human Rights.[53]

Human rights have certain special characteristics, some of which have a bearing on the nature and scope of the right to life in the disaster context.[54] One key characteristic is that human rights entail the duties to respect, protect, and fulfil on the part of the affected State. In relation to the right to life, this particular characteristic is especially relevant to the content of the obligation, and therefore it is considered separately in section 3.1.2. Another key characteristic of treaty-based human rights is that – in general – they may be subject to reservations, limitations, and derogations.[55] The customary right to life, however, (as with other customary rights) is not subject to reservations, limitations, and derogations in the same way, and – as the following paragraphs demonstrate – this has important implications for the scope of the affected State's obligations in the disaster context.

52 Charter of Fundamental Rights of the European Union (26 October 2012) 2012/C 326/02, art 2.

53 Arab Charter on Human Rights (adopted 22 May 2004, entered into force 16 March 2008) 12 IHRR 893 (2005) art 5.

54 That human rights obligations possess such a special nature is something that can be traced to their early development, especially the fact that they grew from the general corpus of public international law and could not, at the outset at least, rely on their own systems and logic for their operation. As one author has summarised: 'When human rights lawyers sought to internationalize the human rights project in the middle of the twentieth century, they had no choice but to draw on the body of law existing at the global level.' Frédéric Mégret, 'Nature of Obligations' in Moeckli, Shah, and Sivakumaran (n 41) 96. On the history of human rights, see, for example: Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press 2004); Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009).

55 For a broader account of how limitations and derogations affect obligations in times of disaster, see Emanuele Sommario, 'Limitation and Derogation Provisions in International Human Rights Law Treaties and their Use in Disaster Settings' in in Flavia Zorzi Giustiniani and others (eds) *Routledge Handbook of Human Rights and Disasters* (Routledge 2018).

Ordinarily, reservations[56] are means by which States are able to limit the scope of their obligations under treaties, assuming they are permissible under article 19[57] of the VCLT; per Joseph and Castan, 'a reservation renders the reserved provisions non-binding.'[58] In the human rights context, however, reservations are subject to a strict regime of permissibility, not least because they 'dilute the effectiveness of treaties.'[59]

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56 The VCLT defines a reservation as a: 'unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a Treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the Treaty in their application to that State.' Vienna Convention on the Law of Treaties (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331 (VCLT) art 2. In 1993, the ILC undertook work on reservations to treaties, led by Professor Alain Pellet, adopting its Guide to Practice on Reservations to Treaties at its sixty-third session in 2011. See ILC, 'Report of the International Law Commission on the Work of its 63rd session' (26 April – 3 June and 4 July – 12 August 2011) UN Doc A/66/10. The topic of reservations to human rights treaties was considered earlier in the work, demonstrating the importance of the topic. Ultimately, the ILC concluded that the VCLT regime applied generally to human rights treaties as any others (rejecting, in the words of Milanovic and Sicilianos, the '"human rights are special" argument') but encouraged treaty-specific arrangements. See Marko Milanovic and Linos-Alexander Sicilianos, 'Reservations to Treaties: An Introduction' (2013) 24(4) EJIL 1055; Alain Pellet, 'The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur' (2013) 24(4) EJIL 1061. See also Martin Scheinin, 'Reservations by States under the ICCPR and Its Optional Protocols' in Ineta Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004).

57 'A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.' VCLT (n 56) art 19. Not all States have ratified the VCLT, which makes it important to note that article 19 is considered to reflect customary international law, as are other articles in the VCLT. See further Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 6-15 (on the VCLT) and 125-161 (on reservations). See also n 25 in Chapter 2.

58 Joseph and Castan (n 43) 886.

59 ibid.

In General Comment[60] 24 (2001),[61] the CCPR sets forth additional requirements to article 19's 'object and purpose' test, including that a reservation cannot apply to a norm of customary international law (and *a fortiori* a norm of peremptory character).[62] Whilst General Comment 24 has proven somewhat controversial (firstly, France, the UK, and the USA have submitted formal observations on the General Comment[63] to,

60 It is important here to note the legal nature of General Comments as issued by human rights treaty bodies. General Comments are produced as the result of a wide participatory process that includes States, international and non-governmental organisations, and other stakeholders from across geographical, cultural, religious, and similar contexts. The General Comments are not binding on States, but they are highly authoritative when it comes to the interpretation of respective treaty-based rights, which is why they prove instrumental in measuring and evaluating a State's implementation of human rights. General Comments speak both to the contextual interpretation of a treaty under art 31(2) of the VCLT (n 56), because the protocol establishing the CCPR is an instrument related to the treaty (art 31(2)(b)), and to the interpretation of a treaty by subsequent practice under art 31(3). In relation to the latter point, the ICJ in the *Whaling in the Antarctic* (*Australia v Japan; New Zealand intervening*) [2014] ICJ Rep 226 is instructive. In considering decisions by the International Whaling Commission, which is the treaty body for the International Convention for the Regulation of Whaling (adopted 2 December 1946, entry into force 10 November 1948) 161 UNTS 72, the ICJ noted that 'the functions conferred on the Commission have made the Convention an evolving instrument' [45] and that despite the Commission's decisions being non-binding, 'they are adopted by consensus or by a unanimous vote, [thus] they may be relevant for the interpretation of the Convention' [46]. These statements can be applied *mutatis mutandis* to the treaty bodies considered here. For more on the nature of General Comments under the CCPR and the CESCR (the two committees most relevant to this chapter), see: Torkel Opsahl, 'The Human Rights Committee' in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press 1992) 369–443; Philip Alston, 'The Committee on Economic, Social and Cultural Rights' in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press 1992) 473–508; Anne F Bayefsky (ed*), The UN Human Rights Treaty System in the 21st Century* (Kluwer The Hague 2000); Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (CUP 2000) 245–68.

61 CCPR, 'General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) (HRTB Compilation, Vol I) 210. For commentary, see Catherine Redgwell, 'Reservations to Treaties and Human Rights Committee General Comment No. 24 (52)' (1997) 46(2) ICLQ 390; Elena A Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties' (1999) 17(2) Berkeley Journal of International Law 277; Konstantin Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights' (2002) 13(2) EJIL 437; Akbar Rasulov, 'The Life and Times of the Modern Law of Reservations: The Doctrinal Genealogy of General Comment No. 24' (2009) 14(1) Austrian Review of International and European Law 103.

62 General Comment 24 (CCPR) (n 61) 212.

63 Observations by France on General Comment 24 (1997) 4 IHRR 6; Observations by the United Kingdom on General Comment 24 (1995) 3 IHRR 261; Observations by the United States on General Comment 24 (1996) 3 IHRR 265.

in effect, distance themselves from certain understandings put forward by the CCPR, and secondly, as Joseph and Castan identify, the ILC's guidelines[64] on the topic 'do not entirely endorse General Comment 24'[65]), it is at least acceptable to say that, as a norm of customary international law, the right to life should not be subject to reservation by States.

Limitations[66] are another means by which a State may, in prescribed circumstances, restrict the scope of its obligations. Limitations to the right to life are stipulated within the key provisions of the treaties, but for the most part they only concern killings by law enforcement officials and the death penalty;[67] no international instrument stipulates limitations that apply by virtue of there being a disaster. Even if States attempted to introduce limitations to the right to life in times of disaster, they would likely be barred from doing so owing to permissibility requirements: a limitation

64 ILC (n 56); Pellet (n 56).

65 Joseph and Castan (n 43) 886.

66 Limitations are 'provisions indicating that a given right is not absolute but may be adapted to take account of a state's need to protect public safety, order, health or morals, or national security.' Philip Alston and Ryan Goodman, *International Human Rights: Text and Materials* (OUP 2013) 160.

67 See, for example, ICCPR (n 19) art 6(2).

must be prescribed by law, in pursuance of a legitimate aim, and necessary in a democratic society.[68]

A final note on the nature of the right to life concerns derogations. Derogations justify a State's suspension of its performance of certain human rights obligations, or parts of obligations, in times of emergency.[69] The right to life, however, is *non-derogable*, which means that an affected State will not be afforded any flexibility in its protection of that right, even in times of *most serious public emergency*.[70] That this is the case has been confirmed by the CCPR in the opening paragraphs of General

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68 Exact permissibility requirements, and the wording thereof, vary between instruments and jurisdictions. The UDHR (n 18) contains a general limitations clause in article 29(2), whereas the ICCPR (n 19) provides for limitations in respect of certain provisions. The ICCPR in article 12, for example, limits the right to liberty of movement and freedom to choose his [or her] residence, with paragraph 3 providing that: 'The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'. Requirements have also been elaborated by international courts. See, for example, *The Word 'Laws' in Article 30 of the American Convention on Human Rights*, IACtHR Series A No 6 (9 May 1986) and *Sunday Times v UK* (1979-80) 2 EHRR 245 [49] on 'prescribed by law', and *Handyside v UK* (1979-80) 1 EHRR 737 [48] on 'legitimate aim'. For more detail, see Mohamed Elewa Badar, 'Basic principles governing limitations on individual rights and freedoms in human rights instruments' (2003) 7(4) International Journal of Human Rights 63. As with other areas of international law, national idiosyncrasies are to be expected. See, for example, June M Ross, 'Limitations on Human Rights in International Law: Their Relevance to the Canadian Charter of Rights and Freedoms' (1984) 6(2) HRQ 180.

69 In respect of the ICCPR, derogations are provided for in article 4. For a broader account of derogations, see: Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 215. For an examination of derogations and states of emergency between 1997 and 2007, see Emilie M Hafner-Burton, Laurence R Helfer, and Christopher J Fariss, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' (2011) 65 International Organization 673.

70 'Most serious public emergency' is a phrase used by the CCPR to denote that some public emergencies may be seen as more serious than others, but this does not create a hierarchy or separate category of public emergencies that may be regulated differently by the derogations regime. CCPR, 'General Comment No. 29: Article 4: Derogations during a state of emergency' in HRTB Compilation, Vol I (n 61) 234, 236. For commentary on General Comment 29, see n 75 below.

Comments 6 (1982)[71] and 14 (1984)[72] on the right to life:[73] '[The right to life] is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation'[74] and in General Comment 29 (2001)[75] on derogations in times of emergency:

> The proclamation of certain provisions of the [ICCPR] as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 [the right to life] and 7).[76]

71 CCPR, 'General Comment No. 6: Article 6 (Right to life)' in HRTB Compilation, Vol I (n 61) 176. General Comments 6 (1982) and 14 (1984) are relatively short documents, together consisting of no more than three pages, and as individual documents, they have not been subject to extensive academic commentary. Rather, references to these General Comments in scholarship appear in texts of a broader focus, usually on the right to life. See, for example, the many references to the General Comments in Joseph and Castan (n 43) 166-214.

72 CCPR, 'General Comment No. 14: Article 6 (Right to life)' in HRTB Compilation, Vol I (n 61) 188.

73 At the time of writing, the CCPR has released an advanced unedited version of General Comment 36 on the right to life, which will, upon final adoption, replace General Comments 6 (1982) and 14 (1984) on the right to life. In relation to the point in the text to this note, the language in General Comment 36 mirrors that in the earlier General Comments: 'Article 6 recognizes and protects the right to life of all human beings. It is the supreme right from which no derogation is permitted even in situations of armed conflict and other public emergencies' (para 1). Importantly for this chapter, General Comment 36 contains recommendations for States on disaster management as a means of protecting the right to life, which is relevant for the discussions that follow in section 3.1.3. For the advanced unedited version, see CCPR, 'Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights – Right to life.' <www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf> accessed 8 April 2018.

74 General Comment 6 (CCPR) (n 71) and General Comment 14 (CCPR) (n 72).

75 General Comment 29 (CCPR) (n 70). The leading commentary is Sarah Joseph, 'Human Rights Committee: General Comment 29' (2002) 2(1) Human Rights Law Review 81. See also P Gandhi, 'The Human Rights Committee and Derogation in Public Emergencies' (1989) 32 German Yearbook of International Law 323; Clémentine Olivier, 'Revisiting General Comment No. 29 of the United Nations Human Rights Committee: About Fair Trial Rights and Derogations in Times of Public Emergency' (2004) 17(2) Leiden Journal of International Law 405.

76 General Comment 29 (CCPR) (n 70) 237.

Finally, it is worth noting that where derogations to an article under the ICCPR (e.g. to article 6 on the right to life considered here) are not permitted, reservations to that article are also likely not to be permitted.[77]

That States understand that they cannot subject the right to life to reservations and that they cannot limit or derogate from the right to life in times of emergency is important precisely because it confirms that the *scope* of the State's duties in respect of the right to life extend even to times of emergency. This confirms that the right to life will, in every situation of disaster, impose some form of restriction on an affected State's right to refuse. It is the interpretation of the content of that right, however, that indicates in more detail how this is so.

3.1.2 The content of the right to life in the disaster context

As mentioned in section 3.1.1 above, one of the special characteristics of human rights is that they entail the tripartite obligation to respect, protect, and fulfil.[78] This characteristic is critical for understanding the content of the right to life because it indicates, as demonstrated below, that affected States must take *positive* action to protect it.

77 Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff Publishers 1995) 188.

78 Henry Shue developed this understanding in the 1980s, but it has since been adopted widely and informed the interpretation of various human rights. See Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1980); James W Nickel, 'How Human Rights Generate Duties to Protect and Provide' (1993) 15(1) HRQ 77; Inga Winkler, 'Respect, Protect, Fulfill: the Implementation of the Human Right to Water in South Africa' in Philippe Cullet and others (eds), *Water Governance in Motion: Towards Socially and Environmentally Sustainable Water Laws* (CUP 2010). The first General Comment to adopt this trichotomy explicitly was General Comment 12 (1999). See CESCR, 'General Comment No. 12: The right to adequate food (art. 11)' in HRTB Compilation, Vol I (n 61) 55.

As the UN Office of the High Commissioner for Human Rights (OHCHR) has summarised:

> The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.[79]

The duty to respect is perhaps the most straightforward of these three, and in general is understood as the obligation not to interfere with the enjoyment of rights.[80] In practice, this means that States should not take measures that may lead to the violation of any particular right, and they should refrain from deliberate violation of rights. The duty to protect requires more of States in so far as it requires that States are proactive in the prevention of violations by third parties. Sensibly, this duty is limited and States will not be responsible for all violations of rights by all third parties, but it does mean that States could be held to account in certain instances where they have failed to protect individuals. In *Velásquez Rodríguez,* for example, the Inter-American Court of Human Rights (IACtHR) found Honduras responsible for the forced disappearance of an activist, not because the State was directly responsible for the disappearance, but 'because of the lack of due diligence to prevent the violation or to respond to it as required by [law]'.[81] Finally, the duty to fulfil requires of States that they take measures to achieve the greater enjoyment of rights, usually by enacting legislation that gives

79 OHCHR, 'International Human Rights Law' (*UN*) <www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> accessed 8 April 2018.

80 Shue (n 78); Nickel (n 78); OHCHR (n 79).

81 *Velásquez Rodríguez v Honduras* (Merits), IACtHR Series C No 4 (29 July 1988), [172] and [176].

domestic effect to international obligations. To bolster these undertakings, the CCPR has stated that 'judicial, administrative and educative and other appropriate measures'[82] must also be taken, not just legislative ones. The duty to fulfil is particularly important in respect of measures that States are required to take to protect economic and social rights, as highlighted in section 3.2 below. These three strands provide the general skeleton of the content of the obligation.

International courts and the treaty bodies have, however, elaborated on disaster-specific aspects of the obligation. Jurisprudential development of the content of the obligation appears strongest in Europe, where a relatively recent ruling of the European Court of Human Rights (ECtHR) both confirmed the above understanding – that the right to life establishes positive obligations on the part of the State to take action to protect the lives of those within its territory in times of disaster – and elaborated further on some aspects of the content of the obligation. Owing to its factual relevance and importance in establishing specific rules for disasters, this case warrants a more detailed examination.

In 2008, the ECtHR considered positive and procedural obligations resulting from the right to life in the disaster context in *Budayeva and others v Russia*.[83] The case concerned the town of Tyrnauz in southern Russia. Mudslides are common in the region, and evidence collected since 1937 suggests that these mudslides occasionally hit Tyrnauz. Authorities built a retention collector in 1965 and a retention dam in 1999

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82 CCPR, 'General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' in HRTB Compilation, Vol I (n 61) 243.

83 *Budayeva and others v Russia* App nos 1533/02, 21166/02, 20058/02, 11673/02, and 15343/02 (ECtHR, 20 March 2008). For commentary, see Kristian Cedervall Lauta and Jens Elo Rytter, 'A landslide on a mudslide? Natural hazards and the right to life under the European Convention on Human Rights' (2016) 7(1) Journal of Human Rights and the Environment 111.

to protect the town's population. The retention dam was seriously damaged by mud and debris on 20 August 1999. On 17 January 2000, the Prime Minister was warned that the coming season presented an increased risk of mudslides in the region. At the time, reconstruction of the dam was not feasible, and as such it was decided that observation posts would be established to warn the population of the threat of an impending mudslide. This decision was never implemented. From 18 to 25 July 2000, Tyrnauz was hit by a series of mudslides and heavy flooding, during which time eight people died, including the First Applicant's husband, Vladimir Budayeva, and the lives of many more were threatened.

The ECtHR confirmed that the right to life entails positive obligations on the part of the State, even in times of disaster. In respect of these positive obligations, the Court held that States must establish legislative and administrative frameworks to deter any threat to the right to life.[84] Whilst the scope of the obligation does depend on the type and origin of the threat and the extent to which it can be mitigated, it was clearly stated that the obligation applies to imminent, clearly identifiable, natural hazards, especially those which recur and affect a distinct area developed for human habitation.[85] Further, in respect of procedural obligations arising from the right to life, the Court held that legislative and administrative frameworks must be properly implemented.[86] Authorities administering these frameworks must: (a) ascertain the circumstances under which the incident took place and any shortcomings in the operation of the regulatory system; and (b) identify State officials or authorities involved in the chain of events.[87] Where lives are lost, the judicial system must conduct

84 *Budayeva* (n 83) [129].
85 ibid [137].
86 ibid [13].
87 ibid [142].

an independent, impartial investigation that ensures appropriate penalties are applied to those who are responsible for failure of these legislative and administrative frameworks.

The Court held that the Russian Federation violated its positive obligation to the protect the right to life under article 2 of the ECHR[88] by failing to establish legislative and administrative frameworks to deter any threat to the right to life, and by failing to provide an adequate judicial response following alleged infringement of the right to life.[89] This was so despite the wide margin of appreciation afforded to the State, and despite acknowledgment that available resources may have posed an issue.[90] As the Court put it, there is 'a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence from threats to the right to life.'[91] In that respect, the Court envisioned '[a] regulatory framework, land-planning policies and specific safety measures implemented at the material time in Tyrnauz for deterring natural hazards'[92] as being within the range of positive actions that Russia should have taken. Despite Russia's submissions regarding a mud-retention dam and a mud-retention collector,[93] the Court concluded that 'there was no justification for the authorities' omissions in implementation of the land-planning and emergency relief policies in the hazardous area'.[94]

In relation to the present issue of how the right to life might restrict an affected State's right to refuse, this conclusion is significant. If one takes the essence of the

88 ECHR (n 47).
89 *Budayeva* (n 83) [159-60] and [195].
90 ibid [134-35].
91 ibid [128-29].
92 ibid [156].
93 ibid.
94 ibid [158].

Court's argument – that affected States have a responsibility to mitigate the effects of disasters as an aspect of the right to life – then it would not be an unfounded departure to apply this to refusal.[95] Whilst there may be a distinction to be drawn between the preventative measures outlined by the Court and the response measures entailed by international assistance, the crux of the argument is the same (and in any case, having the necessary legal, policy and institutional frameworks in place to be able to accept international assistance is in and of itself a preventative measure[96]).

The provision of emergency humanitarian aid is one of the main ways in which the effects of disasters can be mitigated, and nowhere is aid more important than in situations where the disaster poses a threat to or is already destroying life. If a State cannot provide adequate aid itself, as part of its obligation to protect the right to life it must take positive action to obtain it, a direct means of doing so would be the acceptance of aid from assisting actors. This consequence seems even more appropriate in consideration of the potential for failure of any planned or existing domestic legislative and administrative frameworks that might be put into place. Indeed, in *Budayeva*, it cannot have been the case that there were no legislative or

95 Recall the explanation in Chapter 1, section 1.1.5(b), that States would only ever be considered bound to accept *bona fide* aid.

96 The IFRC has taken a leading role in guiding States on disaster preparedness, and in its IDRL Guidelines (recall from Chapter 2 that the guidelines are non-binding, but were unanimously adopted by the State parties to the Geneva Conventions and intended to inform the development of national law), it exhorts frameworks that 'adequately address the initiation, facilitation, transit and regulation of international disaster relief and initial recovery assistance' and 'allow for effective coordination of [such relief].' 'IDRL Guidelines' (*IFRC*) <www.ifrc.org/what-we-do/disaster-law/about-disaster-law/international-disaster-response-laws-rules-and-principles/idrl-guidelines/> accessed 20 June 2018 (IDRL Guidelines). In its Annotations on the IDRL Guidelines, the IFRC notes that '[legal, policy, and institutional] frameworks should … adequately address the initiation … of international disaster relief' and that 'systems should be in place … to heighten the effectiveness of international assistance' 'Annotations to the Draft Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance' (*IFRC*, 26 October 2007) <www.ifrc.org/PageFiles/41203/annotations.pdf> (IDRL Annotations) 22, 25.

administrative frameworks in place at all in the years leading up to the disaster, as at least a decade earlier, the Ministry of the Russian Federation for Civil Defence, Emergencies and Disaster Relief had made a series of statements in its report to the CCPR that pertained to measures taken for the protection of the right to life in disasters.[97] Evidently, those measures, had they indeed been put in place, were ultimately considered by the Court to have been inadequate to have protected the right to life in the disaster-struck region.[98] One can reasonably presume, therefore, that had Russia accepted external aid sufficient to protect the lives of the affected population in this case, (for example, had it accepted any offers – solicited or unsolicited – of communications equipment to ensure adequate warnings) the Court may not have actually found the State to be in violation.

As it stands, treatment by international courts of the right to life in disasters is otherwise rather limited. To this author's knowledge, there have been only a handful of cases concerning the obligations of States in times of disaster since *Budayeva*, and they add relatively little to the matter other than serving to confirm the main findings in that case.[99] It is important to stress that none of these cases concerned the issue of whether it was unlawful for an affected State to refuse, but *Budayeva* did set important precedent in terms of what measures might be expected of affected States in times of

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97 CCPR, 'Fourth period reports of States parties due in 1993, Addendum, Russian Federation' (27 September 1994) UN Doc CCPR/C/84/Add.2, para 74.

98 The Court considered Russia not to have taken any local measures until the day of the disaster. *Budayeva* (n 83) paras 156, 159.

99 The ECtHR found a violation of ECHR (n 47) art 2 in *Kolyadenko and others v Russia* App nos 17423/05, 20534/05, 20678/05, 24283/05, and 35673/05 (ECtHR, 28 February 2012) for very similar reasons to the judges in *Budayeva*, which is perhaps to be expected given that four of the seven judges in the Chamber in *Budayeva* were also in the Chamber in *Kolyadenko*. *Viviani and others v Italy* App no 9713/13 (ECtHR, 16 April 2015) also concerned State obligations in times of disaster, but was dismissed owing to non-exhaustion of domestic remedies. See also Mirko Sossai, 'States' Failures to Take Preventative Action and to Reduce Exposure to Disasters as a Human Rights Issue' in Giustiniani and others (n 55).

disaster, which in any case has relevance for the issue of refusal. Unfortunately, this paucity of consideration of refusal by international courts has not been remedied in a satisfactory way by the CCPR, but there is nonetheless utility in considering its contributions thus far. The CCPR's (indirect) treatment of refusal – and, crucially, the effect it has had on elaborating the content of the obligation in disasters – is accordingly examined in the next section.

3.1.3 The CCPR and refusal

Human rights treaty bodies – such as the CCPR and CESCR considered in this chapter – elaborate the content of obligations in two primary ways: firstly, by issuing General Comments (detailed above[100]) and secondly, through the reporting procedure. Every State party to the ICCPR, for example, is required to submit an initial report one year after ratification, and again whenever the CCPR requests thereafter (usually every four years).[101] During the reporting procedure, the CCPR receives information from the State and others (for example, academics and non-governmental organisations (NGOs)) and sends a List of Issues to the State for its response. Having considered the material, the CCPR then issues Concluding Observations, which assess existing implementation of the ICCPR by the State and recommend ways that implementation can be improved.[102] The Concluding Observations are not binding on States, but are

100 See n 60.
101 ICCPR (n 19) art 40.
102 On the reporting procedure of the CCPR, see Yogesh Tyagi, *The UN Human Rights Committee: Practice and Procedure* (CUP 2011) 151-324.

nonetheless persuasive.[103] What is more, courts, including national ones, will often rely upon the various committees' interpretations of rights in rendering their (binding) judgments.[104] For this reason, it is critical to understand how the committees have elaborated the content of relevant obligations.

As mentioned earlier,[105] the CCPR has finalised its first reading of a new General Comment on article 6 of the ICCPR. General Comment 36[106] was adopted by the CCPR at its 120th session in July 2017. Whilst the final version of General Comment 36 is yet to be adopted, the CCPR has released an advanced unedited version that contains important language on the link between the protection of the right to life and disasters. This is significant in and of itself because neither General Comment 6 (1982) nor General Comment 14 (1984) – detailed in the paragraphs below – contain any general language on disasters at all (as the following paragraphs demonstrate, there

103 Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (CUP 2016) 201. See also Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law 905, 905-06.

104 Cerone submits that the use of General Comments 'demonstrates that these treaty body products aid in developing a more complete picture of international human rights obligations.' He cites the UK and South Africa as just two examples of national courts using treaty body material. In *RT & KM (among others) v Secretary of State* [2012] UKSC 38, the UK Supreme Court used CCPR 'jurisprudence spanning several decades' to determine a series of asylum cases involving Zimbabwean nationals. In South Africa, the work of treaty bodies 'may be used as tools of interpretation' where human rights issues are concerned, according to judges in *S v Makwanyane and another*, 1995 (3) SA 391 (CC). John Cerone, *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 37-9.

105 See n 73.

106 As a result of its recent release in July 2017, at the time of writing, there has not been extensive periodical analysis or critique of General Comment 36. Several online articles have, however, emerged, principally in relation to the death penalty in the USA and the right to life in armed conflict. See Nader Diab, 'Guest Post: The ACHPR's New General Comment on the Right to Life–A Missed Opportunity for the Prohibition of the Death Penalty?' (*Opinio Juris*, 27 January 2016) <http://opiniojuris.org/2016/01/27/guest-post-3/> accessed 8 April 2018; Vito Todeschini, 'The Right to Life in Armed Conflict: Reflections on the Human Rights Committee's Draft General Comment 36' (*SIDIBlog*, 21 December 2017) <www.sidiblog.org/2017/12/21/the-right-to-life-in-armed-conflict-reflections-on-the-human-rights-committees-draft-general-comment-36/> accessed 8 April 2018.

is nonetheless relevant language in so far as positive measures are concerned, especially in relation to malnutrition and epidemics). General Comment 36 stresses that

> [t]he duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may eventually give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.[107]

As examples of these 'general conditions', the CCPR lists situations such as 'industrial accidents', 'pollution of the environment', 'life-threatening diseases', 'widespread hunger and malnutrition' and 'extreme poverty and homelessness',[108] all of which fall into the definition of 'disaster' as outlined in Chapter 1. Critical, too, for these purposes, is the fact that the CCPR also gives examples of short- and long-term measures that are called for in protecting the right to life, including: 'measures designed to ensure access by individuals to essential goods and services such as food, water, shelter, health-care, electricity and sanitation' and 'the bolstering of effective emergency health services and emergency response operations'. Perhaps most significantly, the CCPR states that

> States parties should also develop, when necessary, contingency plans and disaster management plans designed to increase preparedness and address natural and man-made disasters, which may adversely affect enjoyment of the right to life, such as hurricanes, tsunamis, earthquakes, radio-active accidents and massive cyber-attacks.[109]

107 General Comment 36 (CCPR) (n 73), para 30.
108 ibid.
109 ibid.

Clearly, these situations and measures have direct relevance to the issue of refusal, and it is significant that the CCPR has gone as far as to recommend that States develop disaster preparedness and management plans, important components of which are procedures for the acceptance and distribution of international assistance where appropriate.[110] What the CCPR will do with the adoption of the final version of General Comment 36 is elaborate critical aspects of the content of the right to life in the disaster context. Until that time, however, General Comments 6 (1982) and 14 (1984) remain instructive as to how the CCPR guides States as to the implementation of their obligations on the right to life. Those two General Comments are examined in the paragraphs that follow.

General Comments 6 (1982) and 14 (1984) concern the right to life, but of the two, the former is most instructive in relation to State obligations in times of peacetime disaster (the latter concerns the implications of the development of nuclear weapons). In General Comment 6 (1982), the CCPR stresses that:

> The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.[111]

Refusal can be – and often is – one such circumstance in which a person may be deprived of his or her life by the authorities. The practical consequences of a State's refusal will often include, for example, the lack of available food or medicine, which have particularly important roles to play in sustaining life during and in the aftermath of disasters. Thus, per the CCPR's statement, refusal as one such circumstance must

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110 IFRC (n 96). See also Annalise Creta, 'Integrating Human Rights into Disaster Management: Normative, operational and methodological aspects' in Giustiniani and others (n 55).

111 General Comment 6 (CCPR) (n 71) 177.

be controlled and limited strictly. Practically, this could mean that States should only refuse aid in limited circumstances; they cannot be considered free to do so at will. Furthermore, the CCPR stresses that:

> the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.[112]

This wording clearly has some relevance to situations of refusal, which (a) do not discriminate in terms of age and thus can pose a risk to life to infants as well as older individuals and (b) often causes malnutrition and epidemics.[113] If a State were faced with a situation where a disaster has caused food shortages and disease, clearly it would be expected to take 'all possible measures'. Primarily, these measures would be domestic, as the affected State has the primary responsibility for protecting life in its territories,[114] but in the event that domestic measures were inadequate or non-existent, 'all' measures would extend to international measures. Under this interpretation, then,

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112 ibid.

113 Disasters often lead to disease-outbreaks or exacerbate the spread of existing epidemics. In the aftermath of severe flooding and landslides in the Philippines in 2008, for example, Samar province officials declared a state of calamity in response to reports of increasing numbers of typhoid cases, triggering a national emergency health response from the government. Government of the Philippines, 'Philippines: Samar health officials lauded for quick response to suspected typhoid cases' (*ReliefWeb*, 13 March 2008) <https://reliefweb.int/report/philippines/philippines-samar-health-officials-lauded-quick-response-suspected-typhoid-cases> accessed 8 April 2018. See also John Watson, Michelle Gayer, and Maire Connolly, 'Epidemics after Natural Disasters' (2007) 13(1) Emerging Infectious Diseases 1.

114 As explained above, in particular in Chapter 2, section 2.3, no matter how calamitous the disaster, the affected State is understood – as result of its sovereignty – to have the primary responsibility for protecting life in its territories, and thus the primary responsibility for any relief efforts. That responsibility, however, can be and often is delegated to international or national humanitarian organisations. In the 2004 Indian Ocean Tsunami, for example, responsibility for food relief was delegated by several affected States to the WFP. WFP, 'WFP Situation Report on the Tsunami Crisis in the Indian Ocean Region' (*ReliefWeb*, 4 November 2005) <https://reliefweb.int/report/indonesia/wfp-situation-report-tsunami-crisis-indian-ocean-region-friday-4-nov-2005> accessed 8 April 2018.

it would appear that international assistance falls within the range of measures that the CCPR deems the affected State should take to protect the right to life. Admittedly, this basis is weak in normative terms, and is unlikely serve as a legal basis for a claim of unlawful refusal in and of itself, (not least because the CCPR states that 'it would be desirable' for all possible measures to be taken, rather than framing that sentiment in words with greater normative force), but – as stated above – these elaborations are nonetheless important for understanding how the right to life conditions an affected State's right to refuse. How, then, has the CCPR ensured that such understandings find practical application through the reporting process?

To date, there are few examples of the CCPR considering explicitly the link between the right to life and disasters in State reports. Rather than inferring from this that disasters are not a matter of concern for the CCPR, it could just be that the reporting timeline has not yet fallen in the aftermath of a disaster, such that disasters have not been particularly high on the human rights agenda of any particular State. Or it may be because States have simply not submitted reports on time for the concerns to be timely. Pakistan, for example, was due to submit its initial report to the CCPR in October 2011, but it did not actually submit the report until October 2015.[115] In 2010, catastrophic flooding in Pakistan affected an estimated 20 million people, and whilst the Pakistani Army was commended for its actions, other State actors were heavily criticised: politicians were accused of withholding aid to certain populations unless they were guaranteed votes in elections, and authorities were also accused of setting up Potemkin villages to assure the media and senior management of international

115 CCPR, 'Consideration of reports submitted by States parties under article 40 of the Covenant, Initial reports of States parties due in 2011, Pakistan' (24 November 2015) UN Doc CCPR/C/PAK/1.

organisations and NGOs that aid delivery was effective. Meanwhile, the affected population was left fighting for their lives, with poor or no access to domestic and international assistance.[116] These major concerns were never raised in the CCPR reporting process that followed in 2017.[117]

It may be the case that owing to the delay between the due date of the report and the actual receipt of the report, the CCPR chose to focus on contemporary human rights concerns in the case of Pakistan. Whether this is so is, of course, only speculation; it could equally be for other reasons, such as inadequate evidence or weak legal frameworks. The case was different, however, when the CCPR considered the US' implementation of the ICCPR in the aftermath of Hurricane Katrina in 2005.

Considering, *inter alia*, article 6 of the ICCPR on the right to life, the CCPR requested information from the US on its protection of life during and after Hurricane Katrina in its 2006 reporting cycle.[118] Despite the fact that the US did not mention anything at all about Hurricane Katrina in its report (which came three months after Katrina struck), in its Concluding Observations, the CCPR drew attention to the fact that African-American communities in particular were not provided with adequate assistance during and after the disaster, which raised concerns not only with the right to life, but also with the right to equal treatment before the law and the right to be free from discrimination (articles 2 and 26). The CCPR recommended that '[t]he State party should review its practices and policies to ensure the full implementation of its

116 Nathaniel Gronewold, 'After the Pakistan Floods, Why Relief Help Was Slow to Arrive' (*Scientific American*, 16 October 2010) <www.scientificamerican.com/article/in-pakistan-floods-scale/> accessed 8 April 2018.

117 CCPR, 'Concluding Observations of the Human Rights Committee – Pakistan' (23 August 2017) UN Doc CCPR/C/PAK/CO/1.

118 CCPR, 'List of Issues to be Taken up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America' (26 April 2006) UN Doc CCPR/C/USA/Q/3, para 16.

obligation to protect life … in matters related to disaster prevention and preparedness, emergency assistance and relief measures'[119] but did not go as far to say explicitly what those measures were, and indeed certainly did not say that the US should have accepted international assistance in this regard, despite a key component of 'disaster prevention and preparedness, and emergency assistance and relief measures' surely involving accepting *bona fide* offers of international assistance where domestic capacity is exceeded.

Whilst it is disappointing from a humanitarian perspective that courts and the CCPR have fallen short of explicitly requiring that States accept appropriate offers of aid where they are unable to protect the right to life themselves, it is nonetheless an important observation in so far as it reveals the current limitations of human rights obligations – particularly the right to life, it would seem – in restricting an affected State's right to refuse. Evidently, it is desirable that the courts continue to elaborate the content of the obligations entailed by the right to life in the manner of the ECtHR in *Budayeva*, but the fact that they are quiet on the salient point – that States are failing in their duties to respect, protect, and fulfil the right to life by refusing international assistance when it could ensure the protection of life – demonstrates that these institutions may be electing to be reserved in this manner. In the advanced unedited version of General Comment 36, for example, the CCPR could have mentioned the serious threat posed to the right to life by refusal in certain circumstances or been more explicit about the fact that disaster management plans ought to include parts on the acceptance and refusal of assistance (as authoritative institutional guidance on the

119 CCPR, 'Concluding Observations of the Human Rights Committee – United States of America' (15 September 2006) UN Doc CCPR/C/USA/CO/3, para 26.

matter dictates[120]), but it did not. Perhaps this is because there are, as yet, no conventional or customary norms explicitly requiring an affected State to accept aid to protect the right to life when it is unable or unwilling to provide the aid itself, and thus for courts or the CCPR to require acceptance, even in limited circumstances, would risk push-backs from States who might see such a requirement as an infringement on their sovereignty. If this is the case, this is a major argument in favour of a new international convention on PPED, as such a convention could elaborate more clearly an affected State's obligations in relation to the refusal of aid, including as a matter of the protection of the right to life. This once again stresses the importance of the ILC's work in this respect and brings into focus how critical it will be for the ILC to garner convincing State consensus on the matter, which, as Chapter 5 demonstrates, is presently lacking.

As for the right to life and refusal, what all this means for now is that the foundations appear to have been laid for unlawful refusal on the basis of the violation of the right to life, especially with the advent of General Comment 36, but there is a long way to go before courts and human rights treaty bodies are more forthcoming in their judgments and recommendations to States. Much more restrictive on an affected State's right to refuse is the right to an adequate standard of living, which is examined in the next section.

120 IFRC (n 96).

3.2 The Right to an Adequate Standard of Living

3.2.1 Nature and scope of the obligation

Article 11(1) of the ICESCR, reflecting article 25(1) of the UDHR,[121] states:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.[122]

The right to an adequate standard of living is particularly relevant in the context of disasters because its component rights (the rights to food, housing, health, and water) correspond to the goods and services that most often constitute emergency humanitarian aid. As one author has remarked: 'While the right to life may indicate some minimal right to assistance, economic and social rights create the legal space for individuals to demand the full range of humanitarian aid.'[123]

121 UDHR (n 18) art 25(1): 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care…'.

122 ICESCR (n 20) art 11. On the ICESCR generally, see Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press 1998); Ben Saul, David Kinley, and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (OUP 2014).

123 J Benton Heath, 'Disasters, Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission' (2011) 43 NYU Journal of International Law and Politics 419, 439. Note that Heath worked as an assistant to Special Rapporteur Eduardo Valencia-Ospina from 2009-10 at the ILC.

The importance of this right is confirmed by the understanding of it being an elaboration of article 1 of the UDHR,[124] which embodies the spirit of the whole human rights regime. Because an 'adequate standard of living' has never been defined by the instruments that guarantee it as a right, the elaborations of these component rights become determinative of its content. The content of these rights is examined in detail below in section 3.2.2.

Unlike the right to life, which is a civil and political right, the right to an adequate standard of living is a right of an economic and social character and is subject to progressive realisation. Article 2(1) of the ICESCR reads:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[125]

That a State is to realise rights 'to the maximum of its available resources' suggests, self-evidently, that rights are to be *realised progressively*; in other words, they are not rights that, on the whole, correspond to obligations with immediate effect.[126] Although, some rights such as the right to health examined below do have elements that are to be realised immediately; as Giacca confirms, 'the [CESCR] and scholars have pointed out that not every aspect of a particular right is subject to the progressive qualifier.'[127]

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124 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' As Eide writes, '[a] life in dignity requires an adequate standard living.' (emphasis added) See Asbjørn Eide, 'Adequate Standard of Living' in Moeckli, Shah, and Sivakumaran (n 41) 196.

125 ICESCR (n 20) art 2(1).

126 See Ellen Nohle and Gilles Giacca, 'Economic and Social Rights in Times of Disaster: Obligations of Immediate Effect and Progressive Realisation' in Giustiniani and others (n 55). On art 2(1) generally, see Saul and others (n 122) 133-63.

127 Gilles Giacca, *Economic, Social and Cultural Rights in Armed Conflict* (OUP 2014) 25.

In the disaster context, progressive realisation is important. On the face of it, progressive realisation might suggest that an affected State could escape its obligations by virtue of the available resources being over-burdened or destroyed altogether. But, being aware of the position of vulnerability that this could compound for already vulnerable and potentially vulnerable groups, the CESCR has stressed that even in the event of disaster, States are under an obligation to ensure that they have taken all measures available to them, which will include 'international assistance'.[128] In other words, in order for an affected State to meet its obligations under the right to health, for example, the State has to prove that it has used the resources available to it, which means that either the State has to provide the necessary facilities, goods, and services itself or it has to demonstrate that it has sought international support in such an endeavour in the event that it cannot provide the necessary minimum standards itself (discussed below). This conclusion is significant because it means that if a State is unable to meet its minimum obligations under the right to an adequate standard of living and it further demonstrates that it is unwilling to utilise the available resources

128 ICESCR (n 20) art 2(1). The CESCR in General Comment 3 stresses that States are under an obligation to fulfil the rights enshrined in the ICESCR as expeditiously as possible, despite 'the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time … reflecting the realities of the real world and the difficulties involved for any country in ensuring [their] full realization.' CESCR, 'General comment No. 3: The nature of State parties' obligations (art. 2, para. 1, of the Covenant)' in HRTB Compilation, Vol I (n 61) 9.

provided by co-operation with the international community (i.e. if it is unwilling to accept *bona fide* international assistance), then that State may violate its obligations.[129]

As with the right to life, what is critical for the purposes of determining how the right to an adequate standard of living restricts the affected State's right to refuse is that the content – both general that would in any case apply to disasters and specific that has been elaborated specially for the disaster context – is ascertained. The sections that follow examine these relevant aspects of the content of the right to an adequate standard of living, but necessarily have to do so in relation to each constituent right: the rights to food, adequate housing, health, and water respectively. Whilst the focus again is on the interpretations of the rights by the CESCR, the rights do appear in other conventions and thus any relevant supporting statements by other treaty bodies are mentioned accordingly.

129 Cautious language is used here because there has been some debate as to whether the drafters of art 2(1) really sought to place States under an obligation to engage in international assistance. For Saul and others (n 122), 'the Covenant, the Committee and the relevant Special Rapporteurs talk mainly in hope rather than expectation' (967) but the authors do acknowledge that momentum behind the obligatory nature of art 2(1) has been gathering in recent years, especially in respect of State obligations in humanitarian contexts. It should be noted, however, that these comments – whilst appearing general in nature – only really arose because of the possibility that art 2(1) might be read as implying an extraterritorial duty on the part of third States to provide international assistance, which is not at issue here. For more on third State obligations in this regard, see Lawrence Gostin and Robert Archer, 'The Duty of States to Assist Other States in Need: Ethics, Human Rights, and International Law' (2007) 35(4) The Journal of Law, Medicine, and Ethics 526; Costas Trascasas (n 6); Emilie Ellen Kuijt, *Humanitarian Assistance and State Sovereignty in International Law: Towards a Comprehensive Framework* (Intersentia, Cambridge, 2015) 307-410.

3.2.2 The content of constituent rights in the disaster context

(a) The right to food

A number of international conventions recognise the right to food. Article 11(1) of the ICESCR explicitly mentions food as a component of an adequate standard of living, and article 11(2) further provides – in recognising 'the fundamental right of everyone to be free from hunger' – that States Parties are to take measures individually and through international co-operation to improve methods of, *inter alia*, distribution of food and to ensure an equitable distribution of world food supplies in relation to need.[130] The right appears, too, in the Convention on the Elimination of All Forms of Discrimination Against Women[131] (CEDAW) and the CRC[132] in relation to the particular needs of women and children.

The CESCR has in General Comment 12 (1999)[133] clarified that 'the right to adequate food is realized when every man, woman and child, alone or in community

130 ICESCR (n 20) art 11(2). See also Saul and others (n 122) 867-924.

131 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 12(2). See also Committee on the Elimination of Discrimination Against Women (CmEDAW), 'General recommendation No. 24: Article 12 of the Convention (women and health)' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9 (Vol. II) (HRTB Compilation, Vol II), 358-65.

132 CRC (n 44) arts 24(2)(c), 27(1), 27(3).

133 CESCR, 'General Comment No. 12: The right to adequate food (art. 11)' in HRTB Compilation, Vol I (n 61) 56. For commentary, see George Kent, *Freedom from want: the human right to adequate food* (Georgetown University Press 2005); Sven Söllner, 'The "Breakthrough" of the Right to Food: The Meaning of General Comment No. 12 and the Voluntary Guidelines for the Interpretation of the Human Right to Food' (2007) 11(1) Max Planck Yearbook of United Nations Law Online 391; Francesco Seatzu, 'The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Food/El Comité de Derechos Económicos, Sociales y Culturales y el Derecho a una Alimentación adecuada' (2011) 27 Anuario Español de Derecho Internacional 571; Saul and others (n 122) 868 ff.

with others, has physical and economic access at all times to adequate food or means for its procurement'.[134] The CESCR stressed that the realisation of the right to adequate food requires: 'the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture' and the 'accessibility' of adequate food, which includes economic accessibility ('personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised') and physical accessibility.[135] Before examining these two aspects of the right in more detail in the disaster context, though, it must be stressed that the right to adequate food in article 11(1) is distinct from the right to be free from hunger in article 11(2). The latter ensures that minimum daily nutritional meets are met and that the survival of the person is ensured, whereas the former goes further and requires that such food is also 'adequate' in terms of quality, quantity and cultural acceptability.[136]

It would appear, then, that States are under an obligation to make appropriate food available in a quantity and quality sufficient to satisfy dietary needs and to ensure that food is economically and physically accessible. In most disaster situations where individuals' means to provide for themselves (the means to buy food being a significant

134 General Comment 12 (CESCR) (n 133). This access requirement is reflected too in General Recommendation 24 (CmEDAW) (n 131) 359, and is raised as an issue in relation to children in CmRC, 'General comment No. 6: Treatment of unaccompanied and separated children outside their country of origin' in HRTB Compilation, Vol II (n 131) 441-66, and CmRC, 'General comment No. 9: The rights of children with disabilities' in HRTB Compilation, Vol II (n 131) 497-519, although the references to international assistance therein are either non-existent or weaker than those in the CESCR's General Comments, explored throughout this section.

135 ibid 57.

136 UN Food and Agriculture Organization (UNFAO), *The Right to Adequate Food in Emergencies* (UN 2002).

component of that) have been destroyed, one way of meeting these obligations is for the State to provide the food to the affected population itself at no cost.[137] Recall that States parties are required to take measures individually and through international co-operation to improve methods of, *inter alia*, distribution of food and to ensure an equitable distribution of world food supplies in relation to need.[138] States are, therefore, to take measures individually (i.e. to provide the food themselves) *and* to co-operate internationally to ensure that world food supplies (presumably those supplies declared available by other States in offers of assistance) are distributed according to need. As Chapter 1 identified, sovereignty is often the barrier to the claim that States *must* or even *should* accept assistance, but it would seem an acceptable balance can be struck with sovereignty in this regard: if a State is able to provide the food itself, there is no reason to meet the needs of the population through international co-operation, thus if the State does not want to accept international assistance, that decision is unlikely to cause concern. Where that State cannot provide the food itself, however, there remains the obligation to co-operate internationally to ensure that the available supplies reach those in need. This aspect of the right to food is, therefore, critical: where an affected State cannot respect, protect, and fulfil the right to food, the refusal of international assistance could be seen as a violation of that State's obligations.

137 This understanding is reflected in some national jurisprudence. In the *People's Union for Civil Liberties v Union of India*, 28 November 2001, Petition (Civil) No. 196/2001, for example, the Supreme Court of India found the State to be in violation of the right to food, as implied in the Constitution of India, because of its failing to provide food aid to millions suffering from severe drought. The decision was remarkable in so far as the Court ordered the State to deliver the relief at no cost to the population, and made specific recommendations as to how it should be distributed. See Colin Gonsalvez, P Ramesh Kumar, and Anup Kumar Srivastava (eds) *Right to Food* (2nd edn, Human Rights Law Network New Delhi 2005) 404-21.

138 ICESCR (n 20) art 11(2).

(b) The right to adequate housing

Often one of the most visible effects of disasters is the destruction of property, particularly homes. The right to adequate housing is also an important component of the right to an adequate standard of living, and it is reflected in a number of instruments,[139] including, of course, article 11(1) of the ICESCR.

General Comment 4 (1991)[140] is central to understanding the specific obligations of a State in respecting, protecting, and fulfilling the right to adequate housing under the ICESCR.[141] The CESCR notes that

> [w]hile adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in *any particular context*.[142]

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139 At the international level, these include: UDHR (n 18) art 25; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 21; International Labour Organization (ILO), C117 Social Policy (Basic Aims and Standards) Convention (adopted 22 June 1962, entered into force 23 April 1964) art 5(2); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD) art 5(e)(iii); ICCPR (n 19) art 17; CEDAW (n 131) arts 14(2) and 15(2); CRC (n 44) arts 16(1) and 27(3); ILO, C169 Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) arts 14, 16 and 17; Migrant Workers Convention (n 45) art 43(1)(d); and CRPD (n 1) arts 9 and 28. As with the right to food, the right to housing is reflected as a concern in other treaty bodies statements, although again there is little or no reference to international assistance. See General Comment 24 (CmEDAW) (n 131); General Comment 6 (CRC) (n 134); General Comment 9 (CRC (n 134).

140 CESCR, 'General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)' in HRTB Compilation, Vol I (n 61) 11. For commentary, see Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart Publishing 2013) 17-31; Raquel Rolnik, 'The Human Right to Adequate Housing in Post-Disaster Contexts' in Giustiniani and others (n 55). See also Bret Thiele, 'The Human Right to Adequate Housing: A Tool for Promoting and Protecting Individual and Community Health' (2002) 92(5) American Journal of Public Health 712.

141 Hohmann argues that General Comment 4 (n 140) is 'certainly the most widely cited statement of the content of the right [to housing]'. Hohmann (n 140) 20.

142 General Comment 4 (CESCR) (n 140) 12. Emphasis added.

These aspects include: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.[143]

Of these requirements, two are particularly relevant to disasters. The CESCR has confirmed that emergency housing is a form of *legal tenure*, and that States parties should take immediate measures aimed at conferring legal security of tenure upon affected populations who lack such protection.[144] '[V]ictims of natural disasters' are also considered a 'disadvantaged group' for the purposes of having adequate housing, which means that adequate housing should not only be made *accessible*, but that the group should be 'ensured some degree of priority'.[145] Furthermore, the CESCR stresses that 'housing law and policy should fully take into account the special housing needs of [victims of natural disasters]'.[146]

Critically, General Comment 4 (1991) stresses that '[t]o the extent that any such steps are considered to be beyond the maximum resources available to a State party' – as States often claim in relation to disasters – 'it is appropriate that a request be made as soon as possible for international co-operation in accordance with articles 11(1), 22 and 23 of the Covenant'.[147] The wording of this statement is interesting, as the CESCR does not go as far as to require that a State makes a request for international co-operation, but it does indicate that to do so would ensure compliance with the Covenant under article 11(1) ('The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of

143 ibid 12-13. See also Hohmann (n 140) 21-29.
144 General Comment 4 (CESCR) (n 140) 12.
145 ibid 13.
146 ibid.
147 ibid 14.

international co-operation based on free consent.'), article 22 (regarding 'the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant') and article 23 (noting 'that international action … includes … the furnishing of technical assistance … in conjunction with the Governments concerned'). Read together, and in consideration of the object and purpose of the Covenant,[148] these articles appear to place States under an obligation to engage in international co-operation in the event that they are unable to respect, protect, and fulfil the right to adequate housing themselves.[149]

Finally, effective monitoring of the right to adequate housing is stressed as an obligation of immediate effect (i.e. not subject to progressive realisation, as explained above). In order for a State to satisfy its obligations under article 11(1), it must have 'taken whatever steps are necessary, either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction.' For Rolnik, this obligation – which entails an obligation to assess tenure rights – is especially important for the protection of already vulnerable groups (particularly women and those (already) living in poverty).[150] These obligations are particularly relevant to the early stages of a disaster, where an affected State may be offered assistance by external assisting actors in conducting needs assessments to

148 ICESCR (n 20) preamble, particularly 'the ideal of free human beings enjoying freedom from fear and want' and 'the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms'.

149 That being said, practical issues may arise from the fact that the seven requirements are 'overwhelmingly complex' (Hohmann (n 140) 31), which ultimately may affect the extent to which – in practice – the affected State's right to refuse is restricted.

150 Rolnik (n 140).

ensure the appropriate distribution of aid.[151] If a State is unable to conduct the assessments itself and it refuses international assistance in that regard, it may breach its obligations under article 11(1) of the ICESCR.

(c) The right to health

Stressing that health is a 'matter of daily concern' and 'our most basic and essential asset,' the OHCHR has recognised that the 'right to health is a fundamental part of our human rights and of our understanding of a life in dignity'.[152] Considered the 'central instrument of protection of the right to health', the ICESCR recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' in article 12.[153] Article 12 requires that 'steps … be taken by the States Parties to the present Covenant to achieve the full realization of this right,' including the 'prevention, treatment and control of epidemic, endemic, occupational and other diseases' and the 'creation of conditions which would assure to all medical service and medical attention in the event of sickness,' two activities central to effective humanitarian response.[154]

151 OCHA is often one of the first entities to offer to conduct needs assessments in the immediate aftermath of disasters. OCHA, 'Coordination Tools: Needs Assessment' (*UN*) <www.unocha.org/legacy/what-we-do/coordination-tools/needs-assessment> accessed 8 April 2018. Medical teams are often quick to follow. See Anthony Redmond, 'Needs assessment of humanitarian crises' (2005) 330 British Medical Journal 1320.

152 OHCHR, 'The Right to Health – Fact Sheet No. 31' (*UN*) <www.ohchr.org/Documents/Publications/Factsheet31.pdf> accessed 8 April 2018.

153 The right is also recognised in other instruments, including the: CERD (n 139) art 5(e)(iv); CEDAW (n 131) arts 11(1)(f), 12 and 14(2)(b); CRC (n 44) art 24; Migrant Workers Convention (n 45) arts 28, 43(e), and 45(c); and CPRD (n 1) art 25. See General Comment 24 (CmEDAW) (n 131) and CmRC, 'General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)' (17 April 2013) UN Doc CRC/C/GC/15.

154 ICESCR (n 20) art 12(1), 12(2)(c), and (d).

Again, the CESCR has been instrumental in understanding a State's obligation to respect, protect, and fulfil the right to health under the ICESCR in the disaster context. In General Comment 14 (2000),[155] the CESCR is quick to stress that the right to health does not, and indeed *cannot*, place States under an obligation to ensure that individuals within its territory are healthy; rather it places States under an obligation to ensure that individuals enjoy 'a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health,' having due regard to 'both the individual's biological and socio-economic preconditions and [the] State's available resources.'[156] Crucial, too, is the fact that

> [t]he Committee interprets the right to health, as defined in article 12(1), as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing.[157]

In order to achieve this, the CESCR identifies availability, accessibility, acceptability and quality as the four components of a State's obligation under the right to health.[158]

Availability requires that 'functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party.' This requirement does give due regard to the State's

155 CESCR, 'General Comment No. 14: The right to the highest attainable standard of health (art. 12)' in HRTB Compilation, Vol I (n 61) 79. For commentary, see John Tobin, *The Right to Health in International Law* (OUP 2012); Paul Hunt and Gunilla Backman, 'Health systems and the right to the highest attainable standard of health' (2013) 10(1) Health and Human Rights Journal 81 (note that Paul Hunt was the first UN Special Rapporteur on the right to health); Thérèse Murphy, *Health and Human Rights* (Hart Publishing 2013); Saul and others (n 122) 977-1083.

156 General Comment 14 (CESCR) (n 155).

157 ibid 80.

158 ibid.

developmental level, which may be compromised significantly in times of disaster, but there remains the obligation that those facilities and suchlike are at least in existence.[159]

Further, the requirement of accessibility means that whatever services are available must be available to everyone on the basis of non-discrimination and 'within safe physical reach for all sections of the population, especially vulnerable … groups'. This is to include determinants of health, such as safe and potable water. What is more, those services must be 'affordable to all';[160] the implication for affected populations being that those services could be provided for free, and – read in conjunction with the rest of the Covenant – it would appear that if the State is unable to provide those services free itself then it stands to reason that an affected State might be expected to co-operate internationally to ensure that economic accessibility.

That services are acceptable means that all health facilities must be respectful of medical ethics and culturally appropriate.[161]

Finally, that services meet the requirement of quality means that the goods and services must be 'scientifically and medically appropriate and of good quality', which requires, '*inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.'[162] This last requirement is especially important given the number of cases in which affected

159 ibid.
160 ibid 81.
161 ibid.
162 ibid.

populations have been furnished with medicines that are out of date or otherwise inappropriate.[163]

Of all the elements of the right to health,[164] the right to prevention, treatment and control of diseases under article 12(2)(c) is perhaps the one that is imperative in times of disaster. As the CESCR has confirmed,

> [t]he right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations.[165]

As with other rights under the ICESCR, 'States parties have a joint and individual responsibility … to cooperate in providing disaster relief and humanitarian assistance in times of emergency.'[166] Saul and others note that international assistance is a 'vital source' of healthcare for many States, and that – as expressly provided for in article 2(1) and implicitly in article 12 – Member States have 'a responsibility to render such assistance'.[167] Murphy concurs, explaining that the right to health entails a duty on the part of the State to engage in international assistance and co-operation.[168] In the

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163 Patrick Berckmans and others, 'Inappropriate Drug Donation Practices in Bosnia and Herzegovina, 1992-1996' (1997) 337(25) The New England Journal of Medicine 1842; Rafal Hechmann and Anne Bunde-Birouste, 'Drug Donations in Emergencies, the Sri Lankan Post-tsunami Experience' (2007) The Journal of Humanitarian Assistance <https://sites.tufts.edu/jha/archives/54> accessed 8 April 2018; 'Most tsunami drug donations were useless and dangerous' *The Sunday Times Online* (London, 25 February 2007) <www.sundaytimes.lk/070225/News/106news.html> accessed 8 April 2018.

164 The right to health has four elements: under article 12.2(a), the right to maternal, child, and reproductive health; under article 12.2(b), the right to healthy natural and workplace environments; under article 12.2(c), the right to prevention, treatment, and control of diseases; and under 12.2(d), the right to health facilities, goods, and services.

165 General Comment 14 (CESCR) (n 155) 82.

166 ibid 88.

167 Saul and others (n 122) 1034.

168 Murphy (n 155) 97. See also M Sepúlveda Carmona, 'The Obligations of "International Assistance and Cooperation" under the International Covenant on Economic, Social and Cultural Rights: A Possible Entry Point to a Human Rights based Approach to Millennium Development Goal 8' (2009) 13 International Human Rights Journal 86.

context of children's health, the Committee on the Rights of the Child (CmRC) has made this point explicitly:

> States have individual and joint responsibility, including through United Nations mechanisms, to cooperate in providing disaster relief and humanitarian assistance in times of emergency. In these cases, States should consider prioritizing efforts to realize children's right to health, including through appropriate international medical aid; distribution and management of resources, such as safe and potable water, food and medical supplies; and financial aid to the most vulnerable or marginalized children.[169]

As with the rights to food and housing explored above, if an affected State refuses international assistance when that assistance is the means of ensuring the right to health, it may breach its obligations under article 12 of the ICESCR.

(d) The right to water

Water, which has been described by the OHCHR as 'indispensable to sustain life and health, and fundamental to the dignity of all',[170] has been the subject of some debate in the human rights field. As Chávarro puts it, '[d]espite the essential role that water plays for survival and human development, the recognition of the human right to water was slow and in some cases controversial.'[171] Some States and scholars are of the view that there is a separate human right to water, whereas others recognise the right to

169 General Comment 15 (CmRC) (n 153), para 88.

170 OHCHR, 'The Right to Water – Fact Sheet No. 35' (*UN*) <www.ohchr.org/Documents/Publications/FactSheet35en.pdf> accessed 8 April 2018, 1.

171 Jimena Murillo Chávarro, *The Human Right to Water: A Legal Comparative Perspective at the International, Regional and Domestic Level* (Intersentia, Cambridge, 2015) 341.

water as an element of other human rights, such as the rights to life, food, and health.[172] This has some implications for the topic at hand.

The debate can be explained in part by the fact that the right to water does not enjoy explicit articulation in conventions as do other rights; rather it is referenced as *part of* other rights, namely the right to an adequate standard of living and the right to health. The CRC, for example, provides in article 24 on the right to health that States Parties shall take appropriate measures to combat disease and malnutrition through, *inter alia*, the provision of 'clean drinking-water'.[173] CEDAW, on the particular problems faced by rural women, requires that 'States Parties shall take all appropriate measures … to ensure to such women the right … to enjoy adequate living conditions, particularly in relation to … water supply'.[174] The CRPD in article 28 provides that States Parties 'recognize the right of persons with disabilities to an adequate standard of living' and 'shall take appropriate steps … to ensure equal access by persons with disabilities to clean water services'.[175] Recognition of a right to water does appear to be widening, but until such a time as its existence is less controversial, any complaint

172 On the right to water, see Stephen C McCaffrey, 'The Human Right to Water' in Edith Brown-Weiss, Laurence Boisson de Chazournes, and Nathalie Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (OUP 2005) 93–115; Eibe Riedel and Peter Rothen (eds), *The Human Right to Water* (Wissenschafts-Verlag 2006); Chávarro (n 171). See also Stephen C McCaffrey, 'A Human Right to Water: Domestic and International Implications' (1992) 5 Georgetown International Environmental Law Review 1; Peter H Gleick, 'The Human Right to Water' (1999) 1 Water Policy 487; Laurence Boisson de Chazournes, *Freshwater in International Law* (OUP 2013) 147-75. India is one such State that views the right to water as being a component of the right to life. See, for example, *Attakoya Thangal v Union of India* (1990) (High Court of Kerala): 'The right to life is much more than a right to animal existence and its attributes are manifold, as life itself. … The right to sweet water and the right to free air are attributes of the right to life, for these are the basic elements which sustain life itself.' Similar language is found in *Laxmi Mandal v Deen Dayal Harinagar Hospital et al* [2010] INDLHC 2983 in relation to the right to adequate food (which, as mentioned, is sometimes understood to include water) as a component of the right to life.

173 CRC (n 44) arts 24(2)(c). See also CmRC, 'General comment No. 7: Implementing child rights in early childhood' in HRTB Compilation, Vol II (n 131) 477.

174 CEDAW (n 131) art 14(2) and 14(2)(h). See also General Comment 24 (CmEDAW) (n 131) 364 on the obligation of States to take all appropriate measures to ensure, *inter alia*, water supplies.

175 CRPD (n 1) art 28(1) and 28(2)(a).

regarding the refusal of water aid specifically will likely have to be articulated in relation to another (better established) right, such that a denial of water assistance would constitute a violation of the right to life, food, or health, for example.

3.2.3 The CESCR and refusal

As with the right to life, the content of the obligations enshrined in the right to an adequate standard of living have been elaborated by human rights bodies, but only the CESCR has done so in any depth in relation to disasters. The sections above demonstrate the level of detail that the CESCR has gone into in respect of particular aspects of the right to an adequate standard of living in General Comments, and those aspects are central to what is required of States in relation to international assistance where it is the only available means of fulfilling the rights. But, again, it is important to examine how the CESCR has ensured that those theoretical protections have impact on the ground, and for that reason it is crucial to scrutinise the interactions between the CESCR and States.

In 2014, the CESCR considered the impact of the (ongoing) severe economic crisis in Venezuela on the enjoyment of the rights contained in the ICESCR, especially the right to food and the right to health. Human rights advocates have been especially vocal in their analyses of the human rights situation in Venezuela, especially since 2014 when the situation with food and medicine shortages became severe. The influential international non-governmental organisation, Human Rights Watch (HRW), for example, was especially critical of the Maduro administration's failings:

> The Venezuelan government's response to date has been woefully inadequate. Authorities deny the existence of a crisis. They have not articulated or implemented effective policies to alleviate it on their own, and have made only

> limited efforts to obtain international humanitarian assistance that could significantly bolster their own limited efforts.[176]

These issues have been compounded by the fact that, in 2016, the already-unwilling President Maduro was successful in requesting that the country's Supreme Court block an opposition-led motion to facilitate international assistance, and the fact that, over the years, aid workers have been (and continue to be) detained for providing or attempting to provide assistance to those in need.[177]

In response to evidence like this, the CESCR asked in its List of Issues for information on food scarcity and the steps that Venezuela was taking to address it.[178] Whilst Venezuela has made a public commitment to economic, social, and cultural rights, the failure of existing food schemes and the fact that Maduro still refuses to accept any international assistance to assist with food scarcity[179] has led the CESCR to recommend that Venezuela take the necessary measures to ensure the right to food.[180] Like the CCPR and the right to life, however, the CESCR fell short of saying that Venezuela should accept international assistance to ensure such protection, reflecting once again the fact that treaty bodies have to take care in giving States instructions that might be criticised as encroaching on their sovereignty. That being said, the CESCR

176 'Venezuela's Humanitarian Crisis: Severe Medical and Food Shortages, Inadequate and Repressive Government Response' (*HRW*, 24 October 2016) <www.hrw.org/report/2016/10/24/venezuelas-humanitarian-crisis/severe-medical-and-food-shortages-inadequate-and> accessed 8 April 2018.

177 Supreme Tribunal of Justice, Venezuela, Decision of 13 June 2016 <http://historico.tsj.gob.ve/decisiones/scon/junio/188165-460-9616-2016-16-0500.HTML> accessed 8 April 2018 (in Spanish). On the arrest of aid workers, see Tamara Taraciuk Broner, 'Why Jonatan Diniz was Lucky' (*HRW*, 10 January 2018) <www.hrw.org/news/2018/01/10/why-jonatan-diniz-was-lucky> accessed 8 April 2018. The situation in Venezuela is ongoing.

178 CESCR, 'List of issues in relation to the third periodic report of the Bolivarian Republic of Venezuela' (19 December 2014) UN Doc E/C.12/VEN/Q/3.

179 HRW (n 176); Broner (n 177).

180 CESCR, 'Concluding observations on the third periodic report of the Bolivarian Republic of Venezuela' (6 July 2015) UN Doc E/C.12/VEN/CO/3, para 26.

has in the General Comments explored above confirmed that the 'necessary measures' include international co-operation and assistance, so again there could be a case for implicit recommendations in this regard. This was confirmed in relation to the right to food, for example, when the CESCR noted that Venezuela must 'take all measures' and directed the State's attention to General Comment 12 (1999), which stresses that States must seek to obtain 'international support to ensure the availability and accessibility of the necessary food.'[181]

Whilst the CESCR is similar to the CCPR in how it recommends international assistance as a measure to be taken to protect rights, the CESCR differs from the CCPR in respect of the range of situations that it entertains as problematic when it comes to refusal. One of the ways by which States can (indirectly) refuse is by preventing the affected population from accessing the aid in the first place. This is something that the CESCR raised concerns about in relation to Thailand's treatment of refugees and migrants who arrive into Thai territory by boat. In its Concluding Observations for the 2015 session, the CESCR stated that it was 'concerned at reports that migrants and refugees … were left without access to emergency assistance after being denied the possibility to disembark their vessels, leaving them stranded at sea',[182] which it claimed raised an issue with articles 2 and 10 of the ICESCR. The CESCR called on Thailand

> to redouble its efforts, including through strengthened international and regional cooperation, to ensure that the economic, social and cultural rights, including access to water, food and medical assistance, of all migrants and refugees arriving on boats are protected and to stop boat 'push-backs'.[183]

181 General Comment 12 (CESCR) (n 133) 59.
182 CESCR, 'Concluding observations on the combined initial and second periodic reports of Thailand' (19 June 2015) UN Doc E/C.12/THA/CO/1-2, para 16.
183 ibid.

Whilst article 10 relates more to the protection of the family, article 2 relates to the Convention's other articles on the right to an adequate standard of living in so far as it obligates States to 'take steps, individually and through international assistance and co-operation … to [achieve] progressively the full realization of the rights recognized in the present Covenant by all appropriate means.'[184] To reiterate, 'all appropriate means' includes international assistance and co-operation (in general, and as required by the individual rights considered above).

That the right to an adequate standard of living has been developed much more considerably than the right to life in key respects means that it restricts to a greater extent an affected State's right to refuse. The exact ways in which these two rights restrict an affected State are summarised in the Interim Conclusion below, but before doing so, it is necessary to examine one further issue relating to how human rights might restrict an affected State in situations of disaster, and that is the so-called 'human right to humanitarian assistance.'

3.3 A Human Right to Humanitarian Assistance?

Having elaborated the right to life and the right to an adequate standard of living in the preceding sections and shown how they may require States to accept international assistance in certain circumstances, the enquiry might sensibly turn to whether there exists a 'human right to humanitarian assistance'.

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184 ICESCR (n 20) art 2(1).

Momentum built considerably behind calls for the recognition of a right to humanitarian assistance in the 1990s, the UN International Decade for Natural Disaster Reduction.[185] Recognising that international frameworks dealt inadequately with major disasters and gave no indication as to how to respond to States that refused assistance from other nations in those times (a good example in the early 1990s being Iran's refusal to accept much-needed external assistance from certain nations after an earthquake devastated its Gilan province[186]), claims arose that disaster victims were to be considered to have a legal right, indeed a *human* right, to humanitarian assistance. For some, this was as a result of the increasing advocacy around 'third-generation' human rights, which promote, *inter alia*, social equality.[187] For others, the existence of such a right might help to combat resourcing problems in the humanitarian sector; with a concerning percentage of humanitarian operations going un- or under-funded, a human right to humanitarian assistance might provide the impetus for donors to meet calls for funding out of a sense of obligation, not charity.[188]

As the remainder of this section shows, whatever the source of the claim that the right exists (or in any case should exist), its reception has not been straightforward.

185 UNGA Res 44/236 (22 December 1989) UN Doc A/RES/44/236.

186 With over 50,000 killed, 135,000 injured, and a 20,000-square-mile area in Zanjan and Gilan provinces destroyed, Iran's domestic response capacity was ultimately exhausted by the earthquake, yet it refused much-needed assistance from Israel and South Africa on political grounds, which the international community exhorted Iran to put aside for the purposes of disaster relief. Office of US Foreign Disaster Assistance, 1990 Annual Report (*United States Agency for International Development (USAID)* 1990) <http://pdf.usaid.gov/pdf_docs/PNABL085.pdf/> accessed 8 April 2018.

187 See, for example, Philip Alston, 'A third generation of solidarity rights: Progressive development or obfuscation of international human rights law' (1982) 29 Netherlands International Law Review 307, 308.

188 In 2015, for example, not a single UN appeal for funding for disasters was met in full, and appeals in relation to major disasters like the Bohol earthquake and Typhoon Haiyan (which were widely publicised) were under-funded by as much as 50%. Marlies Hesselman, 'A Right to International Humanitarian Assistance in Times of Disaster: Fresh perspectives from international human rights law' in Giustiniani and others (n 55).

Some scholars argue that a right to humanitarian does exist whereas others are not convinced, and where its existence is agreed upon, some are confident of the source and content of such a right whereas other remain uncertain.[189] That being said, the matter is simplified somewhat by the fact that, in general, scholars do agree that the basis of such a right is (at this present time, at least) not provided for in treaty law.[190] Instead, the debate concerns whether customary international law provides such a basis, and whether – in the event that it does not – the term 'right to humanitarian assistance' maintains utility in any case as an umbrella term for the rights already examined in this chapter. In the remainder of this section, these two views are scrutinised in turn.

3.3.1 The customary status of a human right to humanitarian assistance

Despite a number of scholars treating the matter since the 1990s, it is widely acknowledged that 'the existence of the right to humanitarian assistance under customary international law remains problematic.'[191] For a customary right to humanitarian assistance to exist, there must be evidence of State practice in the

189 Compare, for example, Jakovljević, 'the right to humanitarian assistance is implied in the entire system of basic human rights' (Boško Jakovljević, 'The right to humanitarian assistance – Legal aspects' (1987) International Review of the Red Cross No 260 469, 471) to Dinstein, '[i]t is impossible to assert, at the present point, that a general right of humanitarian assistance has actually crystallized in positive international law' (Yoram Dinstein, 'The right to humanitarian assistance in peacetime' (2000) 53(4) Naval War College Review 77, 77).

190 Such a right is at least not provided for in a general sense; recall the limited treaty exceptions in n 1 and n 2. See Jakovljević (n 189) 471; Rohan Hardcastle and Adrian Chua, 'Humanitarian assistance: towards a right of access to victims of natural disasters' (1998) International Review of the Red Cross No 345 589, 590; David Fisher, 'Domestic regulation of international humanitarian relief in disasters and armed conflicts: a comparative analysis' (2007) 89(866) International Review of the Red Cross 345, 347.

191 Rohan Hardcastle and Adrian Chua, 'Victims of Natural Disasters: The Right to Receive Humanitarian Assistance' (1997) 1 International Journal of Human Rights 35, 36-37

provision of such assistance and the requisite *opinio juris*, which would confirm that States provided such assistance on the basis that the victims of the disaster held a right to such assistance.[192] In other words, the assistance should not have been provided by States on the basis of charity, but instead of the basis of a sense of legal obligation.

Evidence of State practice of the provision of humanitarian assistance is of course plentiful and dates back centuries, and it is widely agreed that this requirement is readily fulfilled. For Hardcastle and Chua, two authors who have considered this question at length, the requisite State practice was confirmed[193] in the Preamble to the 1984 Draft Convention on Expediting the Delivery of Emergency Relief ('the international community has willingly rendered assistance in individual cases of disaster response and continues to do so wherever necessary'[194]) and numerous examples of domestic legislation that supports humanitarian assistance provision in this manner.[195] That the requirement of State practice can easily be satisfied, then, is uncontentious.

The requirement of *opinio juris* is, however, more complicated. Exactly how to 'prove' *opinio juris* remains a somewhat contentious issue, but in the past certain

192 For some, including D'Amato, it is not actually possible to know the reason or 'intention' behind State decisions. Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press 1971). cf Maurice Mendelson, 'Subjective Element in Customary Law' (1995) 66 BYIL 177.

193 Hardcastle and Chua (n 191) 37-39.

194 UNDRO, 'Report of the Secretary-General to the United Nations General Assembly and Economic and Social Council' (18 June 1984) UN Doc A/39/267/Add.2; E/1984/96/Add.2, Proposed draft Convention on expediting the delivery of emergency relief (Draft Convention), preamble.

195 As mentioned above, the IFRC maintains a reliable database of disaster related instruments (binding and non-binding), including domestic law of States relevant to disaster response. See 'Disaster Law Database' (*IFRC*) <www.ifrc.org/publicaciones/disaster-law-database/> accessed 22 May 2018.

indicators have become (more or less) accepted,[196] and while there is no hierarchy between these indicators,[197] the existence of treaties providing for such a norm is one of the more persuasive ones.[198] In this case, and concurring with that view, the absence of a global treaty on humanitarian assistance has been taken as a sign that the requisite sense of legal obligation among States is lacking,[199] and this author is sceptical that (a)

196 In 2012, the ILC decided to include the topic 'Formation and evidence of customary international law' (since 2013, 'Identification of customary international law') into its long-term programme of work. The work has thus far led to several Draft conclusions, the most significant here being Draft conclusion 11 'Evidence of acceptance of law', which in para 2 notes: 'The forms of evidence include, but are not limited to, statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of Government legal advisors, official publications in fields of international law, treaty practice and action in connection with resolutions of organs of international organizations and of international conferences.' ILC, 'Report of the International Law Commission on the Work of its 66th Session' (5 May-6 June and 7 July-8 August 2014) UN Doc A/69/10, 240.

197 ibid Draft conclusion 8 'Weighing evidence of practice'.

198 That treaties evidence custom is a complex assertion, and one that has been treated in scholarship elsewhere (see end of this note) and by the ICJ. Treaty norms do not automatically become custom, but they may nonetheless evidence custom, especially where the treaty is intended to clarify existing customary norms through codification (as was largely the case with the VCLT, for example, as noted in Chapter 2, n 25) or where the treaty might seek to crystallise a new customary norm. Whilst this does lead to an apparent overlap in sources of obligation (Alvarez summarises this well, remarking that many treaty conferences are 'international law-making fora for the purposes of not one but two potential sources of international obligation … [treaties and] codified custom.' José E Alvarez, *International Organizations as Law-makers* (OUP 2005) 390), it nonetheless confirms that by exercising their consent to be bound to a treaty containing such a norm, States can also indicate the requisite *opinio juris* for the recognition of that norm as customary. Boyle and Chinkin confirm that for the ICJ in the *North Sea Continental Shelf cases*, 'the court accepted that a normatively worded provision of a multilateral treaty could contribute to the formation of a new rule of customary law if the subsequent practice of a sufficiently widespread and representative selection of non-parties conformed to the treaty and there was additionally evidence of *opinio iuris*' but that its approach in *Nicaragua* was 'subtly different'. In the *Nicaragua case*, the ICJ reiterated that 'the shared view of the parties as to the content of what they regard as the rule is not enough. The court must satisfy itself that the existence of the rule in the *opinio juris* of states is confirmed by practice.' Boyle and Chinkin go on to confirm that this practice need not be 'perfectly' consistent. The bottom line here is that whilst treaties as evidence of *opinio juris* is one of the more persuasive indicators, it is nonetheless a subject to be approached with caution. See *North Sea Continental Shelf cases* (*Germany v Denmark and the Netherlands*) [1969] ICJ Rep 3 [77]; *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14 [184]; Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 234-35. See also Richard R Baxter, 'Multilateral Treaties as Evidence of Customary International Law' (1965-66) 44 BYIL 275; Yoram Dinstein, 'The Interaction between Customary International Law and Treaties' in Yoram Dinstein, *Collected Courses of The Hague Academy of International Law: Vol 322* (Martinus Nijhoff 2006) 243-428.

199 Hardcastle and Chua (n 191) 39.

the increasing focus on the protection of rights in the operational context,[200] (b) the body of bilateral and multilateral treaties on humanitarian assistance currently in existence,[201] or (c) the fact that a new convention (one based on the ILC's work on PPED) is being considered by States, will be sufficient to plug this gap.

The language used by States and organisations may also indicate the existence of *opinio juris*.[202] UNGA resolutions are informative here: in the late 1980s and early 1990s, when the UNGA concerned itself increasingly with disasters, the term 'donor' was used prolifically, with that language being consistent with the ordinary use of the term, which implies that the States 'donating' were doing so out of a sense of charity and not legal obligation.[203] Nowadays, the term 'donor' is used less often in respect of emergency assistance, with the terms 'assisting States' or 'sending States' being employed more often in institutional literature.[204] That those contemporary terms indicate any more of a sense of legal obligation than 'donor', however, is doubtful, as the adjectives 'assisting' or 'sending' merely describe the role of the State, not the basis upon which it is undertaking such a role. It would appear, then, that the lack of a global

200 That States are providing assistance as a means of protecting rights is increasingly apparent in the operational context. Walter Kalin, Representative of the UN Secretary General on the Human Rights of Internally Displaced Persons, noted this in his foreword to Harper (n 13) 9: '[A]ssistance traditionally has focused upon the delivery of life-saving aid … less attention was paid to ensuring that the rights of affected populations were upheld. Today, however, it is broadly accepted that the need to protect the rights of vulnerable groups must inform all stages of the rehabilitation process – from early recovery through to longer-term reconstruction and development.'

201 As Chapter 2 demonstrated, the treaties that do exist vary considerably in terms of their parties, object and purposes, and provisions, and none provide explicitly for a right to humanitarian assistance of the nature envisioned here. Reliance on that body of treaties as evidence of States' sense of legal obligation on this particular right, then, would be baseless. For an up to date list of bilateral and multilateral treaties, see Disaster Law Database (n 195).

202 ILC (n 196).

203 For example, UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182; UNGA Res 42/22 (13 December 1994) A/RES/42/22.

204 The ILC, for example, has used these terms throughout its work on PPED. See, for example, ILC, 'Preliminary report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur' (5 May 2008) UN Doc A/CN.4/598, 150, 152, 154.

treaty providing for a right to humanitarian assistance and the language used by States and organisations in relevant fora indicate that the requisite *opinio juris* does not exist. For certain scholars, however, the matter does not end there.

Where some scholars have suggested that there may be evidence of *opinio juris* is in the existence of established human rights relevant to humanitarian assistance, namely the rights to life and to an adequate standard of living, as identified above. For Hardcastle and Chua, the requisite *opinio juris* can be 'derived from a number of basic human rights including the rights to life, health, food, clothing and shelter.' The authors continue:

> Given that these rights are to be granted in every situation, they should be recognised in natural disasters when they are seriously threatened or violated. What flows from this is that there is a right to humanitarian assistance in times of natural disaster.[205]

The same is true for Jakovljević, who writes: 'the right to humanitarian assistance is implied in the entire system of basic human rights.'[206]

That States are bound to respect, protect, and fulfil established rights that are relevant to humanitarian assistance should not, however, lead to the conclusion that a *de novo* right to humanitarian assistance exists. Materially, that may be the effect, but the existence of these established rights cannot, in and of itself, serve as evidence as the requisite *opinio juris*. This conclusion is rendered stronger by the fact that many States that are party to the ICCPR and the ICESCR have entered into bilateral or multilateral treaties with one another where they have had the opportunity to draft a

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205 Hardcastle and Chua (n 191) 39.
206 Jakovljević (n 189) 471.

de novo right to humanitarian assistance into conventional law, and still they have not done so. Austria and Jordan, for example, did not include a right to humanitarian assistance in their bilateral assistance treaty,[207] and both are parties to the ICCPR and the ICESCR (with Austria ratifying both treaties on 10 September 1978, and Jordan ratifying both treaties on 28 May 1975). Indeed, certain States – including Brazil, Chile, Ethiopia, India, Mexico, Nicaragua, Pakistan, Peru, and Sudan – have even indicated in UNGA discussions that State sovereignty and the principle of non-interference might preclude the recognition of a right to humanitarian assistance altogether.[208]

In this author's view, the more authoritative (although not conclusive) indicators of *opinio juris* in this context are those related to treaties and language, as explained above. It may indeed be the case that evidence of *opinio juris* is increasing, especially with increasing numbers of bilateral and multilateral treaties translating the charitable act of assistance into a legal one, but that can only mean at most that a right to humanitarian assistance can be said to be crystallising (thus, does not yet have any concrete legal effect).

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207 Agreement between the Republic of Austria and the Hashemite Kingdom of Jordan on Mutual Assistance in the Case of Disasters or Serious Accidents (adopted 13 March 2004) (*IFRC*) <www.ifrc.org/docs/idrl/I649EN.pdf> accessed 2 July 2018.

208 These States made their comments in the discussions leading to influential UNGA Res 46/182 (n 203), which has provided a basis for UN action on disasters since the 1990s (as outlined in Chapter 1). It should be noted, however, that a (arguably preferable) view is that a distinction should be drawn between 'the right to receive assistance per se and the right of international agencies to cross borders to provide that assistance' (Peter Walker, 'Victims of natural disaster and the right to humanitarian assistance: A practitioner's view' (1998) International Review of the Red Cross No 325 611, 614), where only the latter ought to pose concerns about sovereignty.

3.3.2 The 'right to humanitarian assistance' as an umbrella term

If such a right does not exist in customary international law (at least not yet), then there still remains the question of whether there is any use in employing the term 'right to humanitarian assistance' at all? Creta is one author that has claimed that there is, but only in so far as the term can be used as a means of identifying other legal protections available in times of disaster.[209] In other words, some argue that there is utility in adopting the term 'right to humanitarian assistance' because such a term indicates a set of obligations (namely the rights to life, food, housing, health, and water) that compel affected States to provide assistance in one form or another, thus a 'right' to humanitarian assistance can be said to exist in practice if not strictly in law.

This view, however, can also be scrutinised. If there is indeed a need for a short-hand term to indicate which rights or protections might be relevant in times of disaster (a task that is complicated by the fact that States and international organisations continue to fall short of full consensus on this point, as demonstrated by the interactions between States and the treaty bodies explored earlier), then surely it makes more sense for the term to be one such as 'assistance rights' as opposed to one that suggests the existence of a separate or *de novo* right that, as yet, has not actually been established in law? If 'right to humanitarian assistance' remains in use as an umbrella term in this fashion, then in the long run it will only complicate matters, leading to more confusion for humanitarian actors. This is a particularly important concern considering the new international convention that may be drafted on the basis

209 Annalisa Creta, 'A 'Human' Right to Humanitarian Assistance in Disaster Situations? Surveying Public International Law' in de Guttry, Gestri, and Venturini (n 6) 353.

of the ILC's draft articles on PPED, a significant component of which is expected to relate to humanitarian assistance.[210]

3.3.3 Summary

This section has considered arguments for the existence of a 'human right to humanitarian assistance'. The core of these arguments is that the right exists under customary international law because there is sufficient State practice and evidence of the requisite *opinio juris*. The latter part of this argument is problematic. Where some authors – like Hardcastle and Chua (writing together) and Jakovljević – have claimed that the requisite *opinio juris* can be derived from the existence of other basic human rights (principally the rights to life and an adequate standard of living), in this author's view, the fact that these other rights exist does not provide an adequate basis for the claim that a *de novo* right to humanitarian assistance exists. True as it may be that humanitarian assistance is an activity that can ensure that those other basic rights are realised, it cannot be said that a right to such assistance exists because of that fact. Indeed, an important question that has not been addressed anywhere in detail is whether the recognition of a right to humanitarian assistance is strictly necessary given the increasing tendency of human rights bodies to interpret more established and indeed some customary international human rights in a way that explicitly stresses their importance in times of disaster. Seen in that light, it may be the case that affected populations' access to assistance in times of disaster is already strengthened by the

210 As Chapter 5 demonstrates, there is considerable confusion over whether the ILC's draft articles on PPED actually recognise a separate or *de novo* human right to humanitarian assistance. See Chapter 5, section 5.3.1.

widened interpretation of existing rights (by international courts and treaty bodies, for example, as explored above), and therefore that the recognition of a new right would not actually make any useful contribution. If that continues to be the case in future, then the second issue looked at in this section – whether there is utility in the maintenance of the 'right to humanitarian assistance' as an umbrella term – is rendered moot.

3.4 Interim Conclusion

To determine what the rights to life and to an adequate standard of living require of States in respect of refusal, and thus to understand how those rights function as restrictions on a State's right to refuse, was the central aim of this chapter. In order to make that determination, the rights were examined with particular attention paid to the elaborations of the content of the obligations in the disaster context by the CCPR and the CESCR. Much more limited were judicial elaborations, with *Budayeva* and *Kolyadenko* remaining two of the very few cases to treat the issue in the specific context of disasters. To complete the examination of *lex lata* human rights law, this chapter also considered arguments as to the existence of a 'human right to humanitarian assistance', eventually concluding that it does not form part of existing human rights law on disasters, but that it may crystallise in time. What this chapter has made clear, therefore, is that the right to life and the right to an adequate standard of living exist as the principal human rights that restrict an affected State's right to refuse in the context of peacetime disasters. That said, the principle of equality and non-discrimination serves a critical function in the enjoyment of human rights, including the rights to life and to an adequate standard of living, and as such an elaboration of affected State obligations in this regard was provided as an antecedent matter in section 3.0.1.

As mentioned throughout, the treaty bodies (and to a much more limited extent, international courts) have been instrumental in elaborating the content of the duties to respect, protect, and fulfil the rights at issue.

It is clear that the right to life entails positive obligations on the part of the affected State, not just negative ones, such that an affected State has the responsibility to mitigate the effects of disasters as an aspect of the guarantee to the right to life. Principally, these positive obligations entail the creation of legislative and administrative frameworks to deter any threat to the right to life. In the context of emergency humanitarian aid specifically, these networks could include domestic legislation and administrative procedures that address the availability (domestic and external) and distribution of such aid, such that 'effective deterrence from threats to the right to life'[211] is achieved. In the event that an affected State cannot meet this aspect of the obligation itself, it remains under an obligation to take positive measures to ensure the right to life because the right is non-derogable, which could mean that the affected State is required to accept offers of external aid to ensure that it meets its international obligations. A point to note, however, is that this precise elaboration of the positive obligations of the right to life arose in the European context, and the legal protection of the right to life in disasters remains strongest in the European context because of that. That being said, that positive obligations exist in respect of the right to life is accepted globally, so it is perhaps only a matter of time before other regional

211 *Budayeva* (n 83) [128-29].

courts – on their own initiatives or having been inspired by the ECtHR's judgments – enhance protection of the right to life in disasters in a similar manner.[212] As it stands now, though, it remains the case that aspects of the right to life in the disaster context are under-developed, both by courts and the CCPR, but that the existing interpretations of the right by those bodies have nonetheless been instrumental in ensuring that the right to life remains a priority for States, especially in times of disaster.

Greater progress has been made in the development of key aspects of the right to an adequate standard of living in times of disaster. The right to an adequate standard of living is realised through the protection of its constituent rights, namely the rights to food, housing, health, and water.

The CESCR has stressed that in relation to the right to food, States remain under an obligation to ensure the availability and accessibility of food even in times of disaster. Crucially, in order for an affected State to meet its obligations under article 11(2) of the ICESCR, it must 'take measures individually and through international co-operation'.[213] In the context of emergency humanitarian aid, this means that an affected State is under an obligation to accept offers of (*bona fide*) assistance where it is unable to ensure the right to food itself.

The CESCR has been similarly instrumental in respect of the right to adequate housing. Of critical importance here is the fact that the CESCR has explicitly identified 'victims of natural disaster' as a 'disadvantaged group' for the purposes of adequate

212 Recall in Chapter 1, section 1.1.4(b), that it was acknowledged that it is not uncommon for regional human rights courts to rely on interpretations of human rights obligations from other regional instruments or courts, especially where the human rights issue concerned is not of special relevance to any one particular region. See *Parrillo v Italy* App no 46470/11 (ECtHR, 27 August 2015); *Case of Artavia Murillo et al. (in vitro fertilization) v Costa Rica* (Preliminary Objections, Merits, Reparations and Costs) (28 November 2012) IACtHR Series C No 257.

213 ICESCR (n 20) art 11(2).

housing, which means that the affected State is not only under an obligation to make housing accessible to that group, but also that the group should be treated as a priority.[214] Again, where affected States are unable to ensure adequate housing to affected populations themselves, ('to the extent that any such steps are considered to be beyond the maximum resources available to a State party'), 'it is appropriate that a request be made as soon as possible for international co-operation in accordance with articles 11(1), 22 and 23 of the Covenant, and that the Committee be informed thereof'.[215] Whilst some aspects of the right to adequate housing may be subject to progressive realisation (as with other economic and social rights), in respect of the effective monitoring of homelessness, the State is under an obligation of immediate effect, which means that where an affected State refuses external offers of assistance in respect of, say, needs assessments following disasters, it may be held in violation of its obligations under article 11(1) of the ICESCR.

Similar obligations exist in relation to the right to health, and the CESCR identifies availability, accessibility, acceptability, and quality as the four components of an affected State's obligation in this respect. Particularly relevant to disaster situations is the right to prevention, treatment, and control of diseases under article 12(2)(c) of the ICESCR, as '[t]he right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations.'[216] Obligations of international co-operation in the realisation of the right to health exist similarly to the right to food and right to adequate housing.

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214 General Comment 4 (CESCR) (n 140) 13.
215 ibid 14.
216 ibid 15.

The right to water as the final component of the right to an adequate standard of living has also been important in this context, especially considering the importance of clean and safe drinking water during and after disasters, when water supplies may be contaminated, but this component of the right to an adequate standard of living is notably weaker than its counterparts as it relies on other rights for its protection, as identified in section 3.2.2(d).

The relevance and impact of the principle of progressive realisation to and on the right to an adequate standard of living was also considered in the disaster context. Important here is the fact that despite the principle of progressive realisation, there remains a minimum standard in respect of any given right such that an affected State, even in times of catastrophic disaster, remains under an obligation to implement measures to guarantee *at least part of* the right. Again, the CESCR has been instrumental in ensuring that progressive realisation does not bar effective protection of human rights in emergencies by States, and it has stressed that even in disasters, States are under an obligation to ensure that they have taken all measures available to them, which – according to article 2(1) of the ICESCR – will include accepting external aid where appropriate assistance has been offered.

Clearly, then, the content of the rights to life and to an adequate standard of living has been elaborated such that – in theory – they could be applied in situations of refusal such that an affected State would be restricted in its exercise of its right to refuse (assuming that State is party to the relevant conventions, or that a norm of customary international law was concerned). That being said, in practice, there appear still to be stumbling blocks in the implementation of affected State obligations. This is demonstrated in the work of the relevant treaty bodies; in this case, the CCPR and the CESCR.

Whilst the human rights treaty bodies have published guidance – primarily through General Comments – that stipulates explicitly that States must take all available positive measures and that such measures include appropriate international assistance to ensure the right to life and the right to an adequate standard of living, they have been less forthcoming when it comes to delivering that instruction to States through the reporting mechanisms, which, arguably, would be (a) the most appropriate place to do so and (b) the most effective in terms of ensuring that States do implement their obligations in the manner that the treaty bodies deem appropriate. In relation to Venezuela, for example, the mass of evidence submitted to the CESCR by humanitarian organisations and others at the time of reporting makes clear: that there was a severe food shortage, that the government's efforts were failing to make any difference, and that international assistance was consistently being offered to help. Yet, despite the General Comments (that are even referenced throughout the reports and communications to States) providing a clear basis upon which the CESCR could make recommendations to States that they accept that international assistance, the CESCR did not explicitly do so in relation to Venezuela. This strikes as a missed opportunity, and one that is brought sharply into focus as the severe food crisis in Venezuela continues.

What this inconsistency of treatment suggests is that whilst international mechanisms like the treaty bodies are willing to elaborate the content of obligations in the disaster context (reiterating that the right to life applies even in times of emergency and that States must take all measures to ensure rights, such as international assistance where the right to an adequate standard of living is concerned), it remains the case that those same bodies are not explicitly recommending international assistance to States as a means of implementing those rights. This is problematic. Not only does it show an inconsistency in the theoretical and practical treatment of the right (which may indicate the need for further development of the right, which in turn perhaps affords States greater flexibility in their own interpretations of what is necessary to protect the rights), but it also shows that treaty bodies are still shying away from doing anything that might be seen as an infringement of State sovereignty or an interference in States' internal affairs. This is understandable considering the difficulty that many treaty bodies have in ensuring that States submit reports in the first place;[217] after all, the treaty bodies do not wish to deter States from reporting by recommending something that the States might consider an overstep. Perhaps, then, what is needed to ensure that treaty bodies recommend international assistance – where appropriate – is an international convention covering humanitarian assistance that does make the case for accepting appropriate assistance more forcefully, or one that would state that refusing appropriate assistance in certain situations would be a breach of human rights. The work of the ILC on PPED and the potential of a new convention in this respect are considered in Chapters 5 and 6.

Finally, it is significant that so many of the provisions examined in this chapter, particularly those in the ICESCR, rely on co-operation among States for their fulfilment.[218] This is something that can be attributed to the obligations of co-operation that exist under the UN Charter. Those obligations, and how they affect a State's right to refuse emergency humanitarian aid, are examined in the next chapter.

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217 Note, for example, Pakistan's considerable delay in reporting, as noted in text to n 115.

218 Recall ICESCR (n 20) art 2(1): 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation…'.

CHAPTER 4

THE DUTY TO CO-OPERATE ON HUMANITARIAN MATTERS

4.0 Introduction

The UN Charter[1] cemented co-operation as a central theme in international law, and, as Simma explains, one of the first practical contexts in which co-operation was promoted was humanitarian assistance: 'The need for international cooperation was particularly emphasized in the first few years [of the Charter's existence], whenever the GA initiated relief actions.'[2]

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1 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter). The leading commentary on the UN Charter is Bruno Simma and other (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012).

2 For example, UNGA Res 48 (I) (11 December 1946) UN Doc A/RES/48(I); UNGA Res 400 (V) (20 November 1950) (financing of economic development of developing countries) UN Doc A/RES/400(V); UNGA Res 410 A (V) (1 December 1950) (relief and rehabilitation of Korea) UN Doc A/RES/410A(V). Simma and others (n 1) 118.

Wolfrum, who has written extensively on co-operation,[3] states simply: '[t]he main feature of [the] international law of co-operation is *the obligation of States to co-operate with each other*.'[4] It is perhaps already plain, though, that States do not have a general duty to co-operate with each other *on all matters* and *at all times*. Such a duty would be incompatible with the fundamental principle of State sovereignty, and in any case would be unduly burdensome – perhaps even impossible – as a practical matter. Instead, whatever obligations of co-operation do exist between States apply in a markedly more restricted manner, with most requiring co-operation in certain activities or in pursuit of certain goals. In this sense, these narrower duties can be seen as manifestations of the general duty to co-operate.

The central concern of this chapter is how the duty to co-operate in solving international problems of a humanitarian character (hereinafter 'the duty to co-operate on humanitarian matters') under the Charter – one such narrower manifestation of the general duty to co-operate – applies in the context of the refusal of international assistance, such that any obligations that flow therefrom might restrict the affected State's right to refuse.

3 See, for example, Rüdiger Wolfrum, *Solidarity: A Structural Principle of International Law* (Springer 2010) (with Chie Kojima). A two-volume festschrift on the topic has been published to recognise Wolfrum's contribution: Holger P Hestermeyer and others (eds), *Coexistence, Cooperation, and Solidarity: Liber Amicorum Rüdiger Wolfrum (Vol I)* (Brill Nijhoff 2012). For more on law of co-operation generally, see: Bogdan Babovic, 'The Duty of States to Co-operate with One Another in Accordance with the Charter' in Milan Sahovic (ed) *Principles of International Law concerning Friendly Relations and Co-operation* (Oceana Dobbs Ferry 1972); Jost Delbrück (ed), *International Law of Co-operation and State Sovereignty* (Duncker & Humbolt 2002); Jost Delbrück, 'The International Obligation to Cooperate – An Empty Shell or a Hard Law Principle of International Law? A Critical Look at a Much Debated Paradigm of Modern International Law' in Hestermeyer and others (n 3).

4 Rüdiger Wolfrum, 'Cooperation, International Law of' MPEPIL (2010) para 1 (emphasis added).

That norms of co-operation are relevant in the disaster context is plain as a practical matter but has been confirmed by the UNGA in its cornerstone resolution on disaster response. In Res 46/182 of 19 December 1991, that body confirmed:

> The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws.[5]

As will be elaborated in section 4.1 below, it is widely accepted that States have a duty to co-operate on humanitarian matters under the Charter. But whether the refusal of (*bona fide*[6]) international assistance by an affected State is *prima facie* an uncooperative act and hence a breach of the duty to co-operate is another matter entirely. Lack of clarity on this question arose from the fact that despite providing for such a duty, the Charter (and other relevant international instruments that have reiterated such a duty) do not elaborate sufficiently that duty such that its application in this specific context (or others for that matter) is straightforward. Is the duty enshrined in the Charter a legal one, or just moral? What does the duty require of States? And to whom is the duty owed?

Because of this uncertainty over the nature, scope, and content of any purported general duty to co-operate under the Charter, it has been the practice of States to develop more detailed norms of co-operation in agreements relating to

5 UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182, annex, para 5.

6 Recall the explanation in Chapter 1, section 1.1.5(b), that any refusal of international assistance will only be considered problematic where the aid being offered is *bona fide* (compliant with the humanitarian principles, safe, non-discriminatory, etc.).

specific activities or contexts. See, for example, agreements concerning: Antarctica;[7] biodiversity;[8] climate change;[9] criminal justice;[10] culture;[11] disarmament;[12] fisheries

7 For example, Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71, article III; Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entered into force 14 January 1998) (1991) 30 ILM 1455, arts 5 and 6.

8 For example, Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79, arts 5, 8-10, and 12-18.

9 For example, UN Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, arts 4 and 6(b); Kyoto Protocol to the UN Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162, arts 2 and 10; Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) (*UN*) <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54113/Part/I-54113-0800000280458f37.pdf> accessed 8 April 2018.

10 For example, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 86 ff. See also the many instruments listed in Mahmoud Cherif Bassiouni, 'An Appraisal of the Growth and Developing Trends of International Criminal Law' (1974) 45 Revue Internationale de Droit Pénal 405, which concerns the inter-State mechanisms of co-operation developed to achieve the goals of the international criminal regime, and, more generally, Neil Boister, *An Introduction to Transnational Criminal Law* (OUP 2012). See also Cyrille Fijnaut, 'Transnational Crime and the Role of the United Nations in its Containment through International Cooperation: A Challenge for the 21st Century' (2000) 8(2) European Journal of Crime, Criminal Law and Criminal Justice 119 for an assessment of the importance of the UN (i.e. of an international organisation) in co-operation on international criminal matters.

11 For example, UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 23 November 1972, entered into force 15 December 1975) 1037 UNTS 151; Treaty on European Union and the Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon (adopted 13 December 2007, entered into force 1 December 2009) OR 6655/08 (15 April 2008) art 167; Agreement on Cultural Cooperation between the Government of the French Republic and the Government of the People's Republic of China (27 September 2002) 2212 UNTS 357.

12 For example, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 3 September 1992, entered into force 29 April 1997) 1974 UNTS 45; Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) 2688 UNTS 39; Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) UNGA Res 67/234 B (2 April 2013) UN Doc A/RES/67/234 B.

management;[13] friendly relations;[14] health;[15] human rights;[16] international watercourses;[17] investment;[18] maritime piracy;[19] non-proliferation;[20] outer space;[21]

13 For example, United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS); Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (adopted 22 November 2009, entered into force 5 June 2016) [2016] ATS 21; Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (adopted 5 September 2000, entered into force 18 August 2004) 2275 UNTS 43, arts 8(1), 23, 25(6), 30, and 32(4).

14 For example, bilateral treaties of friendship and commerce such as the Treaty of Brotherhood, Cooperation and Coordination between the Syrian Arab Republic and the Lebanese Republic (adopted 22 May 1991, entered into force 3 June 1991) 1675 UNTS 147, arts 1 and 2; Treaty on Friendship and Co-operation between the Government of the Federative Republic of Brazil and the Government of the Republic of Colombia (12 March 1981) 1404 UNTS 105 and the Agreement on co-operation in respect of petroleum, supplementary to the Treaty of Friendship and Co-operation (9 February 1988) 1502 UNTS 305.

15 For example, WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166, arts 3(4), 5(4-6), 17, 19(2-3), and Part VII.

16 For example, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic Social and Cultural Rights (adopted 16 December 1976, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); UN Charter (n 1) arts 55 and 56.

17 For example, Convention on the Law of the Non-navigational Uses of International Watercourses, GA Res 51/229 Annex (21 May 1997) arts 4-5, 8-9, 12-17, 23-25, and 28; Treaty for Amazonian Co-operation (adopted 3 July 1978, entered into force 12 August 1980) 1202 UNTS 70, arts IX, XIII-XV.

18 For example, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 art 34(1); cf also Rule 23(1) Conciliation Rules and Rule 34(3) Arbitration Rules adopted pursuant to Article 6(1)(c) of the Convention.

19 For example, UNCLOS (n 13) art 100; Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (adopted 11 November 2004, entered into force 4 September 2006) 44 ILM 829 (2005) arts 9-15.

20 For example, Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161, arts IV and VI.

21 For example, Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205, arts I, III, V, and IX-XII; Agreement between the United States of America and the Russian Federation concerning Cooperation in the Exploration and Use of Outer Space for Peaceful Purposes (with annex) (17 June 1992) 2362 UNTS 459, arts 1, 2, 4, and 5.

peace and security;[22] regional integration;[23] trade;[24] transboundary air pollution;[25] transnational organised crime;[26] terrorism;[27] and war crimes and crimes against humanity.[28] As McWhinney has confirmed,

> [t]he new International Law rules [on co-operation] are derived pragmatically, through a process of problem-oriented, case-by-case development, based on analogical extension of existing, classical international law categories and expressed sometimes in *ad hoc* agreement between States or groups of States, sometimes in international judicial or arbitral decisions, and sometimes in doctrinal elaborations by text-writers acted upon in State practice and acquiring thereby the character and quality of customary law.[29]

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22 For example, UN Charter (n 1) arts 39 ff; Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3.

23 For example, Treaty of Lisbon (n 11) art 4(3); Treaty of Amity and Cooperation in Southeast Asia (adopted 24 February 1976, entered into force 15 July 1976) 1025 UNTS 316, arts 3-6, 8, 9, and 12.

24 For example, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, General Agreement on Trade in Services (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 183, arts VII(5), IX(2), and XXV; Agreement on Trade Relations between the United States of America and the Republic of Albania (adopted 14 May 1992, entered into force 2 November 1992) 2362 UNTS 481, arts X and XIV.

25 For example, UN Economic Commission for Europe, Convention on Long-Range Transboundary Air Pollution (adopted 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217; Agreement between the Government of Canada and the Government of the United States of America on Air Quality (31 March 1991) (1991) 30 ILM 679. See also Phoebe Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (OUP 2000) 24-59 on treaty regimes regulating transboundary air pollution.

26 For example, UN Convention on Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, arts 7(4), 13, and 26-30; Treaty between the Federal Republic of Germany and the Swiss Confederation on Cross-border Police and Judicial Cooperation (27 April 1999; 1 March 2002) 2388 UNTS 257, arts 3-4, 13, 20, 23-24, and 42-43.

27 For example, International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89, art 7; International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) (2000) 39 ILM 270, arts 12 and 18; International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) (1998) 37 ILM 249, arts 10 and 15.

28 For example, Rome Statute (n 10) Part IX; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, arts 88-89.

29 Edward McWhinney, 'The Concept of Co-operation' in Mohammed Bedjaoui (ed), *International Law: Achievement and Prospects* (UNESCO and Martinus Nijhoff Publishers 1991).

In the specific context of disasters, it is useful here to recall the norms of co-operation that were identified in disaster treaties in Chapter 2. There, the conclusion was that the norms are primarily bilateral or multilateral and that – as with other areas identified above – they tend to address a particular activity rather than seeking to obligate States to co-operate with each other in a more 'general' sense.[30] Chapter 3 also identified some relevant norms of co-operation that apply in the context of the protection of human rights.[31] Whilst these norms are undoubtedly useful in so far as determining affected State obligations in times of disasters, they do not tell us much about whether any general obligations exist in this context. Indeed, as Chapter 2 confirmed, at most it could be said that the increasing number of those treaty-based obligations of co-operation might signal that customary norms in this respect are crystallising, (which in turn might eventually indicate a more general duty).

The question, then, is whether the Charter places States under that more general obligation to co-operate on humanitarian matters, such that an affected State's right to refuse would be restricted? As the following sections demonstrate, there is an

30 See, for example, 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) 2296 UNTS 5 (Tampere Convention) and the Framework Convention on Civil Defence Assistance (adopted 22 May 2000, entered into force 23 September 2001) 2172 UNTS 231 (FCCDA), which obligate States parties in respect of telecommunications and civil defence activities respectively. See also the Agreement Between Member States and Associate Members of the Association of Caribbean States for Regional Cooperation on Natural Disasters (adopted 17 April 1999, entered into force 14 March 2014) (*IFRC*) <www.ifrc.org/docs/idrl/I399EN.pdf> accessed 17 April 2018 and the ASEAN Agreement on Disaster Management and Emergency Response (adopted 26 July 2005, entered into force 24 December 2009) (*ASEAN*) <http://agreement.asean.org/media/download/20140119170000.pdf> accessed 2 July 2018, which are multilateral treaties that obligate States of a certain region – here the Caribbean and Southeast Asia respectively – to co-operate on various disaster-related matters.

31 To achieve the realisation of the rights recognised in the ICESCR, for example, art 2(1) of the ICESCR (n 16) requires '[e]ach State Party … to take steps, individually and through international assistance and co-operation'.

argument that such norms do exist under the Charter, principally as a result of articles 1(3), 55, and 56.

Norms of co-operation under the Charter are said here to provide for a duty to co-operate in a more 'general' sense because those norms apply to a group of States (the Member States of the UN) far greater in number than the bilateral and regional groups considered in Chapter 2. As introduced above and elaborated below, the Charter provides for a general duty to co-operate on a range of matters, one of which being in solving international problems of a humanitarian character. Here, that generality refers both to the scope of application of the norm in terms of addressees and the subject matter. The nature, scope, and content of this more general duty to co-operate on humanitarian matters is, however, subject to some debate.[32] One particular issue that will be examined in detail in section 4.3 is what the nature of the obligations tells us about how any obligations might be enforced. Critical here is whether the obligations in the Charter properly can be characterised as multilateral (or 'collective'), or whether in fact they are 'bundles of bilateral rights and obligations', to borrow Simma's words.[33] As section 4.3 demonstrates, this is an important question given that it is not only multilateral obligations that may flow from multilateral instruments.

32 As explained below, this duty derives primarily from art 1 of the Charter, which outlines the purposes of the UN. Simma and others explain that this article (among others) was the result of a compromise in the drafting of the Charter, and that '[i]t is a matter of controversy whether the purposes of the United Nations as contained in Art. 1 of the Charter are meant to be legally binding.' Simma and others (n 1) 108. On the drafting history, see Albrecht Randelzhofer, 'Purposes and Principles of the United Nations' in Rüdiger Wolfrum (ed), *United Nations: Law, Policies and Practice* (CH Beck 1995) 995.

33 Simma introduced the idea that a multilateral treaty may consist of 'bundles of bilateral rights and obligations' in 1989. See Bruno Simma, 'Bilateralism and Community Interest in the Law of State Responsibility' in Yoram Dinstein and Mala Tabory (eds), *International Law at a Time of Perplexity: Essays in Honor of Shabtai Rosenne* (Martinus Nijhoff 1989) 821-22.

In the remainder of this chapter, these questions are addressed in turn. As a foundational matter, section 4.1 examines the Charter as the source of the duty to co-operate on humanitarian matters, with some consideration also given to certain other widely-ratified treaties that reiterate such a duty. The question then turns to what is actually required of States under such a duty, which entails interpreting articles 55 and 56 in section 4.2. Then, section 4.3 considers the nature of the duty to co-operate on humanitarian matters under the Charter, clarifying, ultimately, to whom such a duty is owed. Finally, the conclusion of this chapter in section 4.4 outlines the basic obligation of States to co-operate in the disaster context and makes special note of the fact that in any given of case of refusal, the co-operative actions that are expected of States may vary, which is something that has implications for any new international convention that might treat refusal in future (an issue returned to in Chapter 6).

4.0.1 Defining co-operation

Before turning to section 4.1, however, it is worth spending a few moments to consider the definition of 'co-operation'. The debate surrounding the nature, scope, and content of the duty is owed – in no small part – to the fact that co-operation has never actually been defined formally in international law. Neither international treaties nor resolutions of international organisations contain such a definition, and the same is true even of the most authoritative declaration on the topic: the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.[34] The fact that this declaration, too, omits a definition of co-operation is something that Wolfrum attributes to co-operation being 'preconceived terminology'.[35] In other words, States have seen no reason to include definitional articles in their agreements and declarations because the definition is, ostensibly, obvious. In a debate in the UN General Assembly's Sixth Committee (Legal), N'Diaye (Mali) confirmed this view: 'The principle of co-operation among States embodie[s] a self-evident obligation … no country or continent could claim to be self-sufficient.'[36] That being said, for Wolfrum, the Friendly Relations Declaration does convey an *understanding* of co-operation, if not a formal definition, leading him to conclude that co-operation can be understood as: 'the voluntary co-ordinated action of two or more States which takes place under a legal regime and services a specific objective'.[37] Thus, for the purposes of this chapter, it seems acceptable to conclude that a duty or obligation to co-operate means 'the obligation to enter into such co-ordinated action so as to achieve a specific goal.'[38]

34 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) (adopted without vote) (Friendly Relations Declaration).

35 Wolfrum (n 4) para 2.

36 N'Diaye (Mali), quoting President Modibo Keïta (Mali), had stressed that 'the peoples of the world were doomed to co-operate or perish'. UNGA Sixth Committee (20th session) (8 December 1965) UN Doc A/C.6/SR.893, 330, para 23.

37 Wolfrum (n 4) para 2.

38 ibid.

4.1 Articles 1(3), 55, and 56 of the UN Charter

The achievement of co-operation is a core purpose of the UN, as reflected in the first article of the Charter – the Organisation's founding and constitutive instrument. In Chapter I ('Purposes and Principles'), article 1 lists four purposes of the Organisation, and in paragraph 3 identifies one such purpose as being:

> To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character.[39]

Both the broader issue of peacetime disasters and the narrower issue of international assistance unquestionably find their natural home in the category of 'problems of a humanitarian character', rendering this provision applicable in the present context. That co-operation is required of States is perhaps implicit in membership of an organisation with this purpose, but the actual duty to do so is elaborated nonetheless in articles 55 and 56 of Chapter IX ('International Economic and Social Co-operation'), which provide:

> Article 55
>
> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> a. higher standards of living, full employment, and conditions of economic and social progress and development;
> b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

39 UN Charter (n 1) art 1(3). Simma and others (n 1) 108-120.

> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
>
> Article 56
>
> All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.[40]

By virtue of the wording of the articles, and the more general obligation to perform treaty obligations in good faith,[41] all 193 Member States of the UN are, therefore, committed to the purposes of the Organisation and under a duty to take co-operative action *with each other*, *on their own,* and *with the Organisation* in the achievement of those purposes. As this wording has important consequences for the content of the duty, this conclusion is elaborated below in section 4.2.1. This duty, as it exists between States in any case, has been reiterated in the Friendly Relations Declaration:

> States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences.[42]

40 UN Charter (n 1) arts 55-56. Simma and others (n 1) 1537-1611.

41 As explained in relation to human rights treaties in Chapter 3, the customary *pacta sunt servanda* principle provides that treaties are binding on States that are party to them and that those States are to execute the treaty in good faith. See also Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) preamble ('noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized') and art 26 ('Every treaty in force is binding upon the parties to it and must be performed by them in good faith').

42 Friendly Relations Declaration (n 34) 123. The Declaration goes on to list certain modalities of actioning co-operation, which could also inform the content of the duty to co-operate. That being said, there are disaster-specific instruments that usefully elaborate this content, and accordingly those are explored in more detail in section 4.2 below.

It is, then, undoubtable that for States parties to the Charter there exists a duty to co-operate on humanitarian matters. Whether that duty also exists in customary international law, such that it applies to *all* States, is a more complicated matter (considered below), though materially, however, this only affects a handful of States given that the Charter already has 193 parties.

What falls to be determined next is what the obligations in articles 55 and 56 require of affected States.

4.2 Interpreting Articles 55 and 56

Having established above that Member States of the UN are committed to the purposes of the Organisation and under a duty to take co-operative action with each other, on their own, and with the Organisation for the achievement of those purposes, the focus can turn to a more precise examination of the scope and content of that duty. Whilst the nature of the duty (considered in the next section) tells us, *inter alia*, to whom the duty is owed (such that under the law of State responsibility it accordingly tells us which subject is, on the occasion of breach and assuming the wrongfulness of the act is not precluded, the holder of a right to reparation for injury caused by that breach), the scope and content of the duty tell us what is owed. In other words, the scope and content inform the understanding of how the duty to co-operate on humanitarian matters actually obligates a disaster-affected State to behave. As will become apparent, though, the scope and content of the duty to co-operate on humanitarian matters under the Charter is unclear; the Charter itself does not go into any detail about what is required, thus the task of determination falls to treaty interpretation, which is relatively straightforward in respect of certain key words that are used in article 56 ('take', 'action', and so on) but, again, falls short of indicating that any *particular* actions might be required. Helpful in this sense is viewing the UN Charter as a 'living instrument'[43] and, in accordance with article 31(3) of the VCLT, using subsequent agreements and practice between the parties, as well as any relevant rules of international law applicable in the relations between the parties, to help in the interpretation of that central obligation.

The remainder of this section proceeds firstly, in section 4.2.1, by looking at the meaning of certain key words as interpreted in line with the VCLT ('in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'[44]). Secondly, in section 4.2.2, consideration is given to subsequent agreements or practice between the parties that might assist in the further interpretation of those terms,[45] and any relevant rules of international law applicable in the relations between the parties.[46] Thirdly, in section 4.2.3, the relationship between the obligation to co-operate and the sovereign right of a State to determine its internal affairs is scrutinised. Finally, in section 4.2.4, the issue of whether the obligation to co-operate is one of conduct or of result, which is instrumental in so far as understanding precisely what the duty to co-operate on humanitarian matters requires of States in terms of their behaviour, is addressed.

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43 A number of scholars have referred to the UN Charter as a 'living instrument'. See, for example, Bardo Fassbender, *The United Nations Charter as the Constitution of International Community* (Brill 2009) 130 (where there is a subheading entitled, 'The Charter as a Living Instrument') and Daniel Moeckli and Nigel D White, 'Treaties as "Living Instruments"' in Dino Kritsiotis and Michael Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2016).

44 VCLT (n 41) art 31(1). Chapter 2 detailed relevant academic commentary on the VCLT in general and in relation to specific articles. In particular, see Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 205-226; Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 161 ff.

45 ibid art 31(3)(a) and (b).

46 ibid art 31(3)(c).

Before moving to section 4.2.1, however, it should be noted that the approach of this and following sections has been to treat individual parts of the VCLT rules separately. Gardiner, however, warns against this, stating that 'the Vienna rules are to be applied together, not in bits.'[47] What is meant by this is that interpretation under the VCLT should be concluded as a singular exercise in consideration of all of the rules and the results that they offer in relation to all others (i.e. the 'ordinary meaning' of article 31(1) in consideration of the 'context' of article 31(2), the 'subsequent agreements' of article 31(3)(a), 'any relevant rules' of article 31(3)(c) and so on); one cannot pick and choose rules therefrom to secure a particular interpretation. The approach taken here should not be interpreted as disagreement with this important observation; rather, it should be seen as having been necessary for the sake of explaining how each part of the VCLT might help in understanding the obligation. In an actual dispute over interpretation, all elements would – per Gardiner's advice – be considered together.

4.2.1 The meaning of the terms in article 56

Recall again that article 56 requires States 'to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.'[48] An articulation of the understanding of 'co-operation' was elaborated in the introduction to this chapter, and the purposes of article 55 were set out in section 4.1 above. Key here, then, is the phrase 'take joint and separate action'.

47 Gardiner (n 44) 161.
48 UN Charter (n 1) arts 56.

It was mentioned above that as a consequence of article 56, Member States of the UN are committed to the purposes of the Organisation and under a duty to take co-operative action *with each other*, *on their own,* and *with the Organisation* in the achievement of those purposes. This conclusion speaks to the terms 'joint' and 'separate' in article 56. Article 31(1) of the VCLT requires that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Thus, if, per article 56 of the UN Charter, States are to 'take joint and separate action in co-operation with the Organization', then the ordinary meaning of the terms 'joint and separate action' would mean that States are to take such action 'jointly' (with other States) and 'separately' (on their own). The object and purpose of the UN Charter having been elaborated already in the text to n 39 and in article 55, it is clear that 'jointly' also implies 'with the Organization', as is confirmed at the end of article 56. Thus, States are required to take action in co-operation with each other, on their own, and with the Organisation (which may in fact be other States) to achieve the purposes set out in article 55.[49]

As for 'take action', both 'take' and 'action' imply positive measures; the affected State should not only refrain from acting in a manner not in conformity with

49 This conclusion is confirmed in Stoll's analysis in Simma and others (Stoll does not speak to co-operation with the Organisation explicitly, but cf his elaboration of 'The Organization' at 1605): 'the "pledge" element of Art. 56 … can be understood as implying a duty of members to implement Art. 55 "jointly", but more importantly also "separately" by taking "action". The term "pledge themselves" indicates that the member States are committed to take such action. … Such action may be taken jointly as well as separately. Joint action can be understood to signify any conduct by two of more members, which is coordinated in some way. Separate action can be understood as an action which is "independent, separate and national"' (quoting Leland M Goodrich, Edvard Hambro, and Anne P Simons (eds) *Charter of the United Nations – Commentary and Documents* (3rd edn, Columbia University Press 1969) 381). Simma and others (n 1) 1604.

the requirements of the Charter (which may in any case be seen as uncooperative) but the State should also *act positively* to achieve the purposes set out in article 55. The article does not require the State to achieve *as a matter of result* the purposes of the UN as set out in article 55, but it does require it to take action *as part of* the achievement of those purposes.[50] But what type of positive measures are obligated by articles 55 and 56?

According to Stoll, such positive measures ('action') may include: 'legislative, administrative, and policy measures as well as the spending of funds and the provision of resources', but, ultimately, '[i]n the absence of a more meaningful definition, the choice between these means is up to the member States.'[51] The articles, therefore, leave up to States the *choice* of actions to be taken; none in particular are actually *obligated*.[52] It seems likely, therefore, that in any given situation of refusal, the actions that are considered to be obligated may vary from case to case. For this reason, it is again especially helpful to view the Charter as a 'living instrument', the interpretation of which may change depending on the situation in which it is being applied, and to consider subsequent agreements and practice, and any relevant rules of international law applicable in the relations between the parties as provided for as means of interpretation under article 31(3) of the VCLT.

50 This raises the issue of whether obligations of co-operation are obligations of conduct or of result. This question is returned to in section 4.3.4.

51 Simma and others (n 1) 1604.

52 Again, this is consistent with the understanding of the obligation to co-operate being one of conduct and not of result.

4.2.2 Subsequent agreements and practice[53]

In its work on the Law of Treaties, the ILC stressed that:

> The importance of … subsequent practice in the application of a treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.[54]

The drafters of the VCLT did not envisage strict criteria for what might constitute 'subsequent agreements' in the sense of article 31(3)(a) and (b), but there nonetheless remain certain characteristics of such agreements that must be present in order for those agreements to be used in the interpretation of the treaty. These requirements are

53 The ILC continues to work on the issue of subsequent agreements and subsequent practice in relation to the interpretation of treaties, having incorporated the topic into its programme of work in 2008. See ILC, 'Analytical Guide to the Work of the International Law Commission – subsequent agreements and subsequent practice in relation to the interpretation of treaties' (*UN*) <http://legal.un.org/ilc/guide/1_11.shtml> accessed 13 April 2018. See also Irina Buga, *Modification of Treaties by Subsequent Practice* (OUP 2018).

54 ILC, *Yearbook of the International Law Commission: Vol. II* (1966) (ILC Yearbook 1966) 221.

that the agreements are: in the form of agreements, not practice;[55] relational;[56] between a sufficient number of parties;[57] and subsequent.[58]

Whilst the agreements considered in this section are demonstrably 'agreements', 'subsequent', and indeed whilst it could be argued that they are 'relational', [59] there remains an issue over whether the agreements are between a sufficient number of parties. The point has been made several times throughout this thesis that there is no extensively-ratified global treaty on disasters (with provisions on co-operation in disasters) that might provide for obligations that apply to all States, thus it cannot be said that an agreement between all the parties exists that might be used in the interpretation of norms of co-operation contained in the Charter. In this context, the result of this is that there is no 'subsequent agreement' between all the parties. The closest agreement to that in the disaster context is the Tampere Convention[60] – which has 49 ratifications and 60 signatories, the most of any open

55 Special Rapporteur, Georg Nolte, elaborates on this requirement in ILC, 'First report on subsequent agreements and subsequent practice in relation to treaty interpretation, by Georg Nolte, Special Rapporteur' (19 March 2013) UN Doc A/CN.4/660 (ILC Nolte Report), 28-32, but the salient point here is that the agreement need not be a treaty (although all the agreements considered here are); it must, however, represent 'an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation'. ibid 221.

56 The ICJ confirmed in *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v Norway*) [1993] ICJ Rep 38 that a subsequent agreement or treaty merely being 'in the same field' is insufficient; what is crucial (to be relational) is that the agreement 'refers' to the treaty being interpreted (in this case, the UN Charter) [28].

57 Strictly, agreements need not be between all parties of the treaty being interpreted, but where there are fewer parties to the agreement than the treaty being interpreted, there needs to be evidence that the agreements 'establish an agreement between all parties regarding the meaning and scope of a respective multilateral treaty provision' on the basis of being 'taken together and sufficiently consistent'. An example would be the c. 3-4000 bilateral air service agreements or air transport agreements that have been concluded since the Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295. See ILC Nolte Report (n 55) 33.

58 The agreements concerned must be reached after the conclusion of the treaty being interpreted. ILC Yearbook 1966 (n 54) 221.

59 As Chapters 2 and 3 have demonstrated, so often the preambles of disaster treaties refer to the UN Charter or the aims of the Organisation, either explicitly or indirectly. ILC Nolte Report (n 55) 32.

60 Tampere Convention (n 30).

disaster treaty – but of course that treaty only concerns the provision of telecommunications assistance, not co-operation in humanitarian matters more broadly or the provision of other types of international assistance. Subsequent practice may, therefore, be more informative in this regard.

In asserting that the concept 'subsequent agreement' should – for clarity's sake – be limited to a single individual agreement (notwithstanding the acceptability of the bilateral air agreements already mentioned in n 57), Nolte accepts that where agreements do exist between a limited number of parties to the treaty being interpreted, those agreements could nonetheless still have 'interpretative value'[61] as supplementary means of interpretation within the meaning of article 32[62] of the VCLT because they 'are a form of "subsequent practice" (in the broad sense) which does not (yet) establish the agreement of all the parties'.[63] As with 'subsequent agreements', there are no strict criteria for 'subsequent practice': such practice 'in the broad sense covers any application of the treaty by one or more parties' and it can take 'various forms.'[64] Here it is asserted that there is 'interpretative value' in the instruments already mentioned, and others mentioned below, because of this, and it is on that basis that the rest of this section proceeds.

In the absence of an extensively ratified global treaty on the subject that would demonstrate such agreement by virtue of its membership, what remain are the numerous other agreements between States that, whilst regional and bilateral,

61 ILC Nolte Report (n 55) 34.

62 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.' VCLT (n 41) art 32. Recall Gardiner's comments about the process of applying the VCLT articles at text to n 47 above.

63 ILC Nolte Report (n 55) 34.

64 ibid 43. It must also be relational and subsequent, as mentioned above.

nonetheless have in common the fact that they espouse largely the same *types* of co-operation in their provisions. What is crucial here is concordant practice showing agreement, and whilst interpreting the terms in this sense is not instructive as to generally applicable norms – as of course no norm could apply to all States on the basis of it appearing in several agreements between certain States – it nonetheless remains the case that these agreements indicate the types of co-operation that might be required of any given State in any given situation, thus they at least show what types of co-operation are relevant and what should be the 'starting points' in any given case.

The remainder of this section is dedicated to the task of ascertaining what types of action affected States might be expected to take under the duty to co-operate on humanitarian matters in the context of refusal, an exercise that involves the examination of existing agreements and State practice that indicate such a range of types of co-operative actions. This section does not serve to highlight that in each case separate legal obligations to undertake such actions exist; rather it serves only to illustrate what might be expected as an application of the Charter's provisions on humanitarian co-operation.

Agreements concerning co-operation in disasters speak either to areas in which co-operation is to be actioned, or to specific actions that are to be undertaken in co-operation with other actors, or to both.

The 2012 Food Assistance Convention,[65] for example, seeks 'to improve the effectiveness, efficiency, and quality of food assistance … especially in emergency situations, by strengthening international cooperation' (preamble), has the objective of

65 Food Assistance Convention (adopted 25 April 2012, entered into force 1 January 2013) 2884 UNTS. For commentary, see Marsha Echols, 'The Food Assistance Convention' (2013) 52(1) ILM 354.

'facilitating … cooperation' (article 1(c)) and provides that Parties should always adhere to certain principles, including that they should 'actively seek to cooperate … to improve the effectiveness and efficiency of food assistance' (article 2(b)(ii)).

Similarly, the 2000 FCCDA[66] that considered 'the need for the development of international co-operation in the field of Civil Defence in terms of prevention, forecasting, preparedness, intervention and post-crisis management' (preamble) commits Parties to 'promoting co-operation between Civil Defence Services' (article 2(a)) and 'reducing obstacles to assistance and particularly delays in intervention' (article 2(b)), envisioning as part of that co-operation that '[o]ffers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time' (article 3(e)) and that 'States Parties undertake to explore all possibilities for co-operation in the areas of prevention, forecasting, preparation, intervention and post-crisis management' (article 4).

Also similar in this regard is the 1998 Tampere Convention, which (as mentioned above*)* concerns telecommunications assistance in times of disaster and notes 'the international cooperation and coordination in disaster mitigation and relief, including the demonstrated life-saving role played by the timely deployment and use of telecommunication resources' (preamble), requiring in article 1(1) that Parties 'shall cooperate among themselves and with non-State entities and intergovernmental organizations, in accordance with the provisions of this Convention, to facilitate the use of telecommunication resources for disaster mitigation and relief'. To achieve that, article 1(2) envisions the deployment of equipment for information purposes, the sharing of information, the provision of prompt telecommunication assistance to

66 FCCDA (n 30).

mitigate the impact of a disaster, and the installation and operation of telecommunications resources to be used by humanitarian actors.

These agreements are typical and can be used to inform the co-operation obligations of States, firstly because some affected States will be party to those obligations, and secondly because they elaborate the types of co-operation that in any case will be envisioned in situations of disaster.

Other *areas* in which co-operation relevant to disasters is – at times – obligated include: in the protection of persons with disabilities;[67] the delivery of assistance in emergencies;[68] health;[69] prevention of marine pollution;[70] response to incidents involving hazardous and noxious substances;[71] the simplification and harmonisation of customs procedures;[72] and rapid response to natural disasters.[73] Other *actions* relevant to disasters which are – at times – obligated include: planning joint actions in

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67 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

68 Agreement between Governments of Member States of Shanghai Cooperation Organization on Cooperation in Delivery of Assistance for Emergency Liquidation (signed 26 October 2005) (*IFRC*) <www.ifrc.org/Global/Photos/Asia%20Pacific/201412/AGREEMENT%20between%20Governments%20of%20Member%20States%20of%20Shanghai%20Cooperation%20Organization%20on%20Cooperation%20in%20Delivery%20of%20Assistance%20for%20Emergency%20Liquidation.pdf> accessed 17 April 2018 (SCO Cooperation agreement).

69 WHO, International Health Regulations (entered into force 15 June 2007) <www.who.int/ihr/publications/9789241596664/en/> accessed 22 May 2018 (International Health Regulations).

70 Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea (adopted 25 January 2002, entered into force 17 March 2004) OJ L261/41 (Protocol on Preventing Pollution).

71 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances (adopted 15 March 2000, entered into force 14 June 2007) (*IFRC*) <www.ifrc.org/docs/idrl/I627EN.pdf> accessed 17 April 2018 (Protocol on Hazardous and Noxious Substances).

72 International Convention on the Simplification and Harmonization of Customs Procedures (adopted 18 May 1973, entered into force 25 September 1974) 950 UNTS 270 (Kyoto Convention) (revised 1999, entered into force 2006) (Kyoto Customs Convention).

73 SAARC Agreement on Rapid Response to Natural Disasters (signed 11 November 2011) (*SAARC*) <http://saarc-sec.org/uploads/digital_library_document/28_Rapid_response_to_Natural_disasters.pdf>.

emergencies;[74] environmental monitoring;[75] exchange of information;[76] specialist training;[77] sending disaster units and supply materials;[78] providing financial and logistical support;[79] developing public health capacities;[80] maintaining contingency plans;[81] salvage and recovery operations;[82] the provision of expert advice;[83] facilitation of the arrival and departure of ships, aircraft and other modes of transport engaged in responding to an incident;[84] training of personnel;[85] exchange of information and expertise;[86] the establishment of response co-ordination mechanisms;[87] training of personnel;[88] information sharing;[89] the creation of contingency plans;[90] the provision of technical support;[91] and the facilitation of participation in customs schemes.[92]

Certain non-binding instruments are also instructive here. Returning to UNGA Res 46/182, States are encouraged to co-operate in regard to 'specialized personnel and teams of technical specialists, as well as relief supplies, equipment, and services…'[93] Similarly, the 1976 ASEAN Declaration on Mutual Assistance on Natural Disasters presented a similar set of areas in which inter-State co-operation was anticipated:

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74 SCO Cooperation agreement (n 68) art 2(5).
75 ibid.
76 ibid.
77 ibid.
78 ibid art 4.
79 International Health Regulations (n 69) art 44(1)(c).
80 ibid art 44(1)(b).
81 Protocol on Preventing Pollution (n 70) art 4(1).
82 ibid art 6.
83 ibid art 12(1).
84 ibid art 12(3)(a).
85 FCCDA (n 30) art 2(a).
86 ibid.
87 Protocol on Hazardous and Noxious Substances (n 71) art 4(2)(d).
88 Ibid art 4(2)(b).
89 ibid art 4(3)(b).
90 ibid art 4(3)(c).
91 ibid art 5(1).
92 Kyoto Customs Convention (n 72) chapter 1.3.
93 UNGA Res 46/182 (n 5) annex, para 27.

> Member Countries shall, within their respective capabilities, cooperate in the improvement of communication channels among themselves as regards disaster warnings, exchange of expert services and trainees, exchange of information and documents, and dissemination of medical supplies, services and relief assistance.[94]

It is important at this stage to stress once again that whilst the agreements and practice outlined in sections 4.2.1 and 4.2.2 are not absolutely conclusive as to the interpretation of obligations flowing from the duty to co-operate on humanitarian matters contained in the Charter, they are nonetheless instructive as to the types of co-operation that might be expected of States in relation to their performance of those obligations. A final point to consider now is how those obligations can be balanced against the right of a State to determine its internal affairs.

4.2.3 Co-operation obligations and sovereignty

Another important aspect of the content of the duty to co-operate is the relationship of the obligations contained therein to the rights of the State as a sovereign. It may appear obvious, but should be noted nonetheless, that any obligations to co-operate applicable in the context of refusal – although reciprocal in many ways – do not create a relationship of equality between the affected State and the assisting States in respect of all assistance activities.

The affected State remains in charge of the assistance activities being conducted on its territories and retains the ultimate control over the domestic aspects

94 ASEAN Declaration on Mutual Assistance on Natural Disasters (signed 26 June 1976) (*IFRC*) <www.ifrc.org/docs/idrl/N81EN.pdf> accessed 2 July 2018.

thereof, such as distribution. That being said, the existence of an obligation to co-operate with assisting actors does mean that such a sovereign right is curtailed in so far as a State cannot exercise its sovereign rights in a manner that is not consistent with its obligations of co-operation under the Charter or under customary law. The UNGA, for one, has confirmed that a State may be in violation of article 56 if its policies are not directed towards the goals enshrined in article 55 or the pledges of the members under article 56, which demonstrates a clear curtailment of sovereignty if indeed sovereignty is understood – as it widely is – to mean the State has full control of its internal affairs, including laws and policies.[95] As will be returned to in Chapter 5, it is noteworthy that the ILC has taken this position in its draft articles on PPED, reiterating that:

> Cooperation must be undertaken in accordance with the requirement of consent of the affected State to external assistance (draft article 13), as well as the recognition that the affected State may place appropriate conditions on the provision of external assistance, particularly with respect to the identified needs of persons affected by a disaster and the quality of assistance (draft article 14).[96]

4.2.4 Co-operation: an obligation of conduct or of result?

Obligations of conduct require the State to act in a manner consistent with the primary rule, whereas obligations of result require the State to achieve a particular situation specified in the primary rule but leave the State free to determine the means by which that result is to be achieved. As Wolfrum has put it,

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95 UNGA Res 616B (VII) (5 December 1952) UN Doc A/RES/616B(VII).

96 ILC, 'Report of the International Law Commission on the Work of its 68th session' (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10, 17-73 (PPED draft articles, with commentaries) commentary to art 8, para 7.

> the distinction between obligations of conduct and those of result depends on whether the international obligation concerns the performance (or omission) of a particular act or the establishment/maintenance of a particular situation.[97]

There are no hard and fast categories of international obligations that are conclusively obligations of conduct or of result; instead, such categorisation relies upon interpretation of the primary rule. Recall that article 56 requires States to take action for the achievement of the purposes set out in article 55; it does not require that States actually achieve those purposes (although that is not to suggest that the achievement thereof is therefore any less desirable). This suggests the obligation in article 56 is one of conduct and not of result.

What is more, the notion of co-operation in and of itself indicates that any corresponding obligation would be one of conduct and not of result; obligations of co-operation necessarily must be obligations of conduct, as inevitably the means of achieving co-operation is co-operation itself. What this means is that when assessing an affected State's refusal in the light of its obligation to co-operate (the means of doing so being elaborated in section 4.4 below), the focus needs to be on how that refusal might represent a contravention of co-operative conduct, not on whether refusal vitiates any purported or perceived 'end result' of co-operation.

97 Rüdiger Wolfrum, 'Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations' in Mahmoush H Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Brill 2010) 364.

4.3 The Nature of the Charter-based Obligations

It is clear from the sources of law examined in section 4.1 that a duty to co-operate on humanitarian matters exists under international law, principally as a result of articles 1(3), 55, and 56 of the Charter. Less clear from those sources, however, is the nature of such a duty. As stressed in the introduction to this chapter, understanding the nature of the duty is paramount to be able to base any claim for wrongful refusal upon the breach of such a duty, not least because the nature of the duty indicates, among other things, to whom any corollary obligations are owed.

A good starting point in this regard is the aforementioned debates as to whether article 56 of the UN Charter actually contains a legal obligation. Despite its apparent simplicity, article 56 has attracted considerable debate among legal scholars. Doubtless it includes a duty, but is that duty one of *legal* obligation, or is it more of a political commitment or another type of unilateral declaration? Kelsen famously claimed that article 56 does not contain any such legal obligation and that it is 'meaningless and redundant'.[98] It is fair to say, however, that most scholars – especially nowadays – are not of this opinion, and the word 'pledge' in article 56 has been key for many in coming to the conclusion that article 56 contains an obligation of a legal character.[99] Schachter, for example, writing on the impact of the Charter on the human rights obligations of the US, considered 'pledge' to imply 'legal commitment'.[100] Other

98 Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (The Lawbook Exchange Ltd 1950) 100.

99 See, for example, Stoll's analysis in n 49.

100 Oscar Schachter, 'The Charter and the Constitution: The Human Rights Provisions in American Law' (1950-1951) 4 Vanderbilt Law Review 643, 646-53.

scholars have turned to the drafting history of the Charter to confirm that States did intend the article to contain a legal obligation, but that the language of the article was softened to appease more conservative States.[101] In consideration of the broader role that article 56 plays in the realisation of the purposes of the UN, it is submitted that article 56 does contain a legal obligation. The remainder of this chapter proceeds on that understanding. What, then, is the nature of that legal obligation? And what does that tell us about to whom that obligation is owed?

At the outset, and as has been recognised by draft article 7 (on co-operation) of the ILC's work on PPED (explored in more detail in Chapter 5), it is important to note that 'the nature of the obligation of co-operation may vary, depending on the actor and the context in which assistance is being sought and offered.'[102]

The first reason for variance in the ILC's commentary, 'the actor', does not apply here, as this chapter only considers the obligations of affected States to co-operate whereas draft article 7 applies also to other States (assisting States as defined in draft article 3(c)[103] and potentially other States involved in assistance, such as transit States) and to certain international organisations (particularly the UN and the Red

101 Lepard, for example, explains that at the time of the drafting of the Charter, Australia had suggested that article 56 legally obligated States to take 'separate action as well as collective action', but the US objected to 'separate action' (i.e. action taken by States on their own) on the grounds that such an obligation would interfere with a State's domestic affairs. The resultant 'take action jointly and separately' represented a compromise: '[i]t was vague enough that the United States could be satisfied that it only required collective action, while Australia believed that the formulation continued to call for appropriate separate action.' Brian D Lepard, *Customary International Law: A New Theory with Practical Implications* (CUP 2010) 314.

102 PPED draft articles, with commentaries (n 96) commentary to art 7, para 6.

103 Draft article 3(c) defines 'a State providing assistance to an affected State with its consent'. Ibid art 3(c).

Cross/Red Crescent movement respectively, and other international organisations in so far as they count as 'other assisting actors' per draft article 3(d)[104]).

The second reason for variance, however, does apply here, and relates to the context in which the assistance is being sought or offered. In this sense, the 'context' refers to the basis upon which assistance is being sought or offered; in other words, whether the assistance is being sought or offered in pursuance of a treaty in force between the States concerned, (as would be the case with the treaties explored above), as a matter of custom, or as an act of comity[105] between the States concerned (i.e. not as a result of any sense of legal obligation, but as a gesture of solidarity or friendly relations). The nature of the obligation to co-operate and the entity to whom the obligation is owed in the first two of those circumstances may vary (and with the third there is no obligation so to whom the obligation is owed is a moot point). From the examination of sources above, it is clear that the main instrument of concern here is the Charter, although where the refusal can be seen as an issue relating to human rights protection (which will certainly be most occasions), other instruments and the customary nature of the obligation are also relevant. This variance in source in respect of treaty-based obligations and customary obligations is explored in the remainder of this section.

104 Draft article 3(d) defines 'other assisting actor' as 'a competent intergovernmental organization, or a relevant non-governmental organization or entity, providing assistance to an affected State with its consent'. ibid art 3(d).

105 For a general introduction to comity, see Jörn Axel Kämmerer, 'Comity' MPEPIL (2006).

The Charter, signed on 26 June 1945 in San Francisco and entering into force on 24 October 1945, is known widely to have a 'special'[106] or 'hybrid' character. As Schrijver has put it:

> It is *contractual* with regard to its provisions on signing, amendments, ratification and entry into force. It is *normative* with regard to its provisions on aims and principles. It is *constitutive* with regard to its provisions on membership and the organization of the United Nations with its six principal organs, establishing the composition, functions and powers, and their voting procedures.[107]

Critical to this section owing to the provisions on aims and principles identified above (articles 1, 55 and 56) is the *normative* nature of the Charter.

Contrary perhaps to the usual implication of 'normative', article 1 is often understood not to provide for any specific obligations, but rather to provide the context within which the specific obligation in article 56 is based:

> The "purposes and principles" are designed to provide a guide for the conduct of the UN organs in a fairly flexible manner. It is a matter of controversy whether the purposes of the United Nations as contained in Art. 1 of the Charter are meant to be legally binding.[108]

In this sense, then, article 1's co-operation is understood to serve more as a reiteration of a goal of the UN than an explicit obligation (but recall that such an obligation is

106 In *Certain Expenses of the United Nations*, the Court acknowledged that the Charter, as a treaty, has 'special characteristics'. *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151, p 10.

107 Nico J Schrijver, 'The Future of the Charter of the United Nations' in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law: Volume 10* (Koninklijke Brill NV 2006) 5.

108 Simma and others (n 1) 108.

implicit in membership of the Organisation, and its obligatory nature has been supported in the practice of the United Nations[109]).

Of a more persuasive normative nature are the provisions spelled out in article 56, the context for which is elaborated in article 55. That article 56 contains specific *obligations* for Member States has – as identified earlier – been a subject of some debate, but nowadays the fact that it does contain *legal* obligations is uncontentious; indeed, it is not only among scholars like Lepard, Schachter, and Stoll[110] that this is the majority view; it has also been confirmed in the practice of the UN since its early days.[111] The question remains, however, to whom are those obligations owed? In order to answer that question, some basics on the nature of the Charter must first be outlined.

Distilled to its simplest form, the Charter is a treaty ('an international agreement concluded between States in written form and governed by international law … and whatever its particular designation'[112]) that, owing to its open membership and purposes, embodies both the form and the very spirit of multilateralism; in other words, the Charter can be described as a *multilateral* treaty not only because there are three or more parties but because it eschews State unilateralism – the 'individualistic approach to foreign affairs' – in favour of 'an approach to foreign relations that seeks

109 See, for example, UNGA Res 285 (III), whereupon considering the Soviet Union's actions in enacting measures that 'prevent or coerce the wives of citizens of other nationalities from leaving their country of origin with their husbands or in order to join them abroad', the UNGA declared that the Soviet Union was in breach of its obligations under, *inter alia*, article 1(3) of the UN Charter. UNGA Res 285 (III) (25 April 1949) UN Doc A/RES/285(III).

110 As mentioned above, see Lepard (n 101) 314; Schachter (n 100) 646-53; Simma and others (n 1) 1604.

111 See, for example, the preambular paragraph of ECOSOC Res 290 (XI) on full employment that states: 'Having in mind the obligations of Member of the United Nations under Articles 55 and 56 of the Charter to take joint and separate action to promote higher standards of living, full employment and conditions of economic and social progress and development'. ECOSOC Res 290 (XI) (15 August 1950).

112 VCLT (n 41) art 2(1)(a).

cooperation [among] States.'[113] Despite extensive ratification, there is less certainty over whether the Charter accurately (or indeed usefully) can be described as 'universal'. Aside from whether the Charter represents customary law, which would render it 'universal' in that sense, scholars have also weighed in on whether it has such a character.

For Nollkamper, the Charter is 'almost universal',[114] and Crawford would agree: 'Three treaties, although not formally universal, are approaching that status. One of these is the United Nations Charter itself.'[115] The utility in recognising the Charter as universal is, however, limited in this context, as the distinction between 'multilateral' treaties and 'universal' treaties – if indeed one can generalise that it is *distinctions per se* that are usually made between the two – exist more in theory than the practice of international law. A salient point here, though, is that regardless of the form of the Charter (multilateral, universal or otherwise), the nature of the rules may vary. Indeed, as was mentioned above, it is not the case that only multilateral rules arise from multilateral instruments; bilateral rules, too, may flow therefrom.[116]

It is plain that rules give rise to obligations for States. The central concern here is the nature of the obligations that flow from the rules contained in the Charter. Clearly, the obligations in the Charter are not bilateral, as the obligations do not exist only as between two parties such that all other parties have no interest in their performance. As the preamble and other key purpose and principles articles of the

113 André Nollkamper, 'Unilateralism/Multilateralism' MPEPIL (2011) para 1.
114 ibid para 4.
115 James Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 Collected Courses of the Hague Academy of International Law 325, 341.
116 Simma (n 33) 821-22. See also Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14(5) EJIL 907 (wherein the Marrakesh Agreement Establishing the World Trade Organization is used as a case study in distinguishing bilateral and 'collective' obligations).

Charter (such as article 1(3)) make apparent, the interests enshrined in the Charter – such as the protection of human rights through international co-operation – are shared among the Organisation's members. Rather, therefore, the obligations are multilateral, in that they are 'held by or owed to a number of persons in common, up to and including obligations which are owed to the international community as a whole'.[117]

Two possibilities for obligations under the Charter are thus presented: the obligations are owed to 'a number of persons in common' (rendering the obligations of *erga omnes partes* character, thus owed to Member States of the UN) or 'the international community as a whole' (rendering the obligations of *erga omnes* character, thus owed to all States). That obligations *erga omnes partes* are widely understood to exist between States parties to a treaty and obligations *erga omnes* to exist between all States on the basis of customary law is relevant here in so far as both types of obligation may flow from the Charter (or at least be reflected in it where customary international law on, say, co-operation in the protection of human rights, is concerned). On this basis, it seems reasonable to conclude that the obligation to co-operate on humanitarian matters is owed primarily to Member States of the UN (recalling that there are 193 of them), but where its customary elements are concerned, it could be owed to the international community as a whole (recalling too that the practical difference here may only be a handful of States). Whether the fact that the obligation to co-operate on humanitarian matters being owed at least to Member States and at most to all States

117 Crawford (n 115) 344.

means that in the case of wrongful refusal by an affected State, any other State could be considered to have *jus standi* in an international dispute is another matter entirely.[118]

Finally, the obligation to co-operate considered here could also be owed to the affected populations themselves.[119] This argument rests on the centrality of human rights protection in 'humanitarian matters'. 'Humanitarian matters' is not defined in

118 That an obligation is owed to a State does not mean that that State is automatically furnished with *jus standi*. See, for example, *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) (Judgment) [2012] ICJ Rep 422 where, although the Court did not set out an explicit test for such standing in the case of *erga omnes partes* obligations, it did state (somewhat as a justification for such a position) that: 'All the [States parties to the Convention] have a common interest in compliance with [the] obligations. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties "have a legal interest" in the protection of the rights involved (Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 32, para. 33). These obligations may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case.' Some caution should be exercised here, though, in so far as the paragraph referred to in the *Barcelona Traction* case actually concerns obligations *erga omnes*, not *erga omnes partes*, (cf [33] of that judgment) but, that aside, the crucial point remains. The preamble to the Charter, as well as the wording of articles 1, 55, and 56 above, make clear that UN Charter is another such convention whereby all Member States – and in relation to the human rights provisions at least, all States – have an interest in the protection of rights enshrined therein, thus, there may be the possibility of all other States having *jus standi*, just not on an automatic basis. *Case concerning Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) (Judgment) [1970] ICJ Rep 3.

119 It is important here to consider whether any obligations owed would be to affected populations as individuals or as a group. Whilst factually it may be possible to identify an 'affected population' as a group, the legal nature of the rights concerned would indicate preference for considering the obligations to be owed to individuals. Chapter 3 identified that the human rights most relevant to situations of disaster include the right to life and the right to an adequate standard of living, both of which are understood as individual rights (compared to, for example, the right of self-determination, which is widely understood as a group right). The rights of an affected population should also be understood as individual rights because the recognition of group rights in IHRL more generally has arisen partly in response to the need to protect particular *peoples* from discrimination. No generally accepted definition of a 'people' exists in international law, but UNESCO's influential suggestion includes the following features: a common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connect; and common economic life (UNESCO, Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO, SNS-89/CONF.602/7 (22 February 1990)). Populations affected by disasters share few of these features, and are not comparable to, for example, indigenous groups or members of a particular religion. The understanding of affected populations' rights in this thesis, therefore, is that the rights belong to individuals. On groups rights more generally, including the distinction between individual and group rights, see Philip Alston (ed), *Peoples' Rights* (OUP 2001); Geoff Gilbert, 'Individuals, Collectivities, and Rights' in Nazila Ghanea and Alexandra Xanthaki (eds), *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry* (Brill 2004) 139.

the Charter (or formally elsewhere), but *humanitarian* matters, i.e. matters that pertain to the welfare of humans, must necessarily include human rights, as the system that has been built around human rights exists precisely for the improvement of human welfare.[120] Considering that the Charter has existed since 1945 and that an expansive network of human rights protection mechanisms has built in international law since that time, interpreting the Charter as a 'living instrument' would see the Charter evolve alongside that system; perhaps even as an integral part thereof.[121] Indeed, the preambles to many of the human rights conventions that constitute such an expansive network cite the Charter as the basis of their commitments; parties to the ICESCR, for example, agree upon the articles contained therein 'in accordance with the principles proclaimed in the Charter of the United Nations' and '[c]onsidering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms'.[122] At the core of human rights obligations for States is the notion that whilst the protection of human rights is certainly an interest of all States (such that human rights obligations are *erga omnes*

120 On the rationale for the early human rights system, from which the contemporary extensive system has developed, see Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press 2004) 173-340; Charles R Beitz, *The Idea of Human Rights* (OUP 2009) 14 ff; Stefan-Ludwig Hoffmann (ed), *Human Rights in the Twentieth Century* (CUP 2011).

121 Indeed, the same is true of the evolution of the human rights system. As the Charter has evolved, so has the human rights system alongside it. Many authors have noted the pervasive nature of the human rights system and its impact on other areas of international law. See, for example, George A Mermann and Petros C Mavroidis, *Trade and Human Health and Safety* (CUP 2006) 298 ff; Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(3) EJIL 613; Sheila R Foster and Paolo Galizzi, 'Human Rights and Climate Change: Building Synergies for a Common Future' in Daniel Farber and Marjan Peeters (eds), *The Climate Law Encyclopedia* (Edward Elgar 2016). For a view on the practical consequences of these synergies for the UN system, see Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13(3) EJIL 621. UN institutions, too, have recognised this parallel several times. See, for example, UNHRC Res 10/4 (2009) on human rights and climate change (25 March 2009) UN Doc A/HRC/10/4.

122 ICESCR (n 16) preamble.

obligations as envisioned by the judges in *Barcelona Traction*[123]), the obligations are nonetheless owed to populations. Seen as a central part of the international human rights system, the Charter too could feasibly contain obligations that are owed to populations. However, as with States above, the fact that affected populations might be owed such an obligation does not mean that they automatically have standing, (although they perhaps have a greater chance given the equally extensive means of realising human rights through individual complaints mechanisms provided for in international law).

In summary, it seems possible to make the argument that the duty to co-operate on humanitarian matters in the refusal context could justifiably, and at any one time, be owed to Member States of the UN, to all States, or to affected populations. For the purposes of unlawful refusal, there need not be a blanket position on this. What matters is that depending on the specifics of the situation at hand, such a range is at least arguable.

4.4 Interim Conclusion

Because every disaster situation is unique, the co-operative actions expected of affected States in any given situation are – on the whole – likely to vary. States responding to the 2010 Haitian earthquake, for example – which killed over 200,000, left over three million in need of emergency humanitarian aid, and resulted in uncontrollable disease

123 *Barcelona Traction* (n 118).

outbreaks (particularly cholera)[124] – acted very differently, and would be expected to co-operate very differently, to how they did in response to the Fukushima Daiichi nuclear accident a year later in Japan – the evacuation of which caused a small number of deaths, and the plant explosions resulting in significant environmental harm and contamination affecting public health in an expansive area of territory.[125] That being said, it is nonetheless possible to draw out some expectations of States that are common to most – if not all – disasters, and obligations regarding co-operation in situations of disaster reflect this reality.

This chapter has made clear that in any given situation of refusal, an affected State could owe its obligation to co-operate under article 56 of the UN Charter to other Member States of the UN, to all States, or to affected populations themselves (see section 4.3).

Under that duty, the affected State must adopt positive measures aimed at the achievement of the purposes of the UN set out in article 55, and it must abstain from measures that would hinder the achievement of those purposes. Those measures must be taken together with other States (on a bilateral or multilateral basis or through the UN or similar organisations) or individually (see section 4.2.1). Whilst there are no

124 On various actors and actions taken in response to the earthquake, see, for example: Abhijit Bhattacharjee and Roberta Lossio, 'Evaluation of OCHA Response to the Haiti Earthquake: Final Report' (*OCHA* 2011) <www.unocha.org/sites/dms/Documents/Evaluation%20of%20OCHA%20Response%20to%20the%20Haiti%20Earthquake.pdf> accessed 17 April 2018; Oxfam, *From Relief to Recovery: Supporting Good Governance in Post-earthquake Haiti* (Oxfam 2011); Gary Cecchine, *The US Military Response to the 2010 Haitian Earthquake: Considerations for Army Leaders* (RAND 2013).

125 On various actors and actions taken in response to the nuclear accident, see, for example: Daniel Kaufmann and Veronika Penciakova, 'Japan's Triple Disaster: Governance and the Earthquake, Tsunami and Nuclear Crises' (*The Brookings Institution* 16 March 2011) <www.brookings.edu/opinions/japans-triple-disaster-governance-and-the-earthquake-tsunami-and-nuclear-crises/> accessed 17 April 2018; Richard Hindmarsh, *Nuclear Disaster at Fukushima Daiichi: Social, Political and Environmental Issues* (Routledge 2013); Mindy Kay Bricker, *The Fukushima Daiichi Nuclear Power Station Disaster: Investigating the Myth and Reality* (Routledge 2014).

specific co-operative actions that are obligated in all circumstances, for most States there will be an obligation to co-operate in the realisation of certain human rights (namely certain economic, social, and cultural rights under the ICESCR and in the protection of persons with disabilities in the event of disaster under the CRPD).

The precise actions to be taken remain, however, subject to the determination of the affected State as a sovereign (see section 4.2.3). In the absence of any subsequent agreements between all parties that might assist in the interpretation of the Charter's provisions, international courts and other arbiters may – in any given dispute over refusal – look to the practice of States after the entry into force of the Charter to assist in such interpretation (see section 4.2.2). Whilst that practice is not conclusive as to the content of the obligations under the Charter, it is nonetheless illustrative of the types of co-operation that may be expected of States in any disastrous situation requiring emergency humanitarian aid, thus it remains an important matter here.

Understood in the light of the foregoing, one can conclude that what the law of co-operation requires of one affected State may vary considerably from what it requires of another affected State, thus, in any given situation of refusal, obligations of co-operation may restrict the right to refuse in markedly different ways. This has important implications for any new international convention that may treat refusal (i.e.

for the convention that is expected to result from the work of the ILC on PPED),[126] and thus this conclusion is returned to in Chapters 5 and 6.

126 Any new international convention may, in turn, have important implications for the understanding of the obligations that flow from the Charter. As Simma and others have confirmed: 'On several occasions, the GA has stated that the codification of the rules of international law and their progressive development would assist in promoting the "purposes and principles" of the Charter of the United Nations', noting in particular: UNGA Res 1505 (XV) (12 December 1960) UN Doc A/RES/1505(XV); UNGA Res 1686 (XVI) (18 December 1961) UN Doc A/RES/1686(XVI); UNGA Res 2103 A (XX) (20 December 1965) UN Doc A/RES/2103A(XX); UNGA Res 2166 (XXI) (5 December 1966) UN Doc A/RES/2166(XXI); UNGA Res 2167 (XXI) (5 December 1966) UN Doc A/RES/2167(XXI); UNGA Res 2181 (XXI) (12 December 1966) UN Doc A/RES/2181(XXI); UNGA Res 34/146 (17 December 1979) (International Convention against the Taking of Hostages) UN Doc A/RES/34/146; and UNGA Res 36/106 (10 December 1981) (Draft Code of Offences against Mankind) UN Doc A/RES/36/106. Simma and others (n 1) 117.

CHAPTER 5

THE ILC'S WORK ON PPED

5.0 Introduction

Chapter 1 identified that despite several efforts in recent decades to develop norms on the refusal of international assistance, it has remained the case that States and scholars alike are divided – and at times unclear – on the extent to which international law restricts an affected State's right to refuse.[1] When the ILC adopted the PPED topic into its long-term programme of work in 2007,[2] there arose an opportunity to address in a more holistic and systematised manner an affected State's obligations in times of disaster, particularly the right to refuse – something Boethe identified as being one of the 'big' problems of relief.[3]

1 See Chapter 1, section 1.2.

2 ILC, 'Report of the International Law Commission on the Work of its 59th Session' (7 May-5 June and 9 July-10 August 2007) UN Doc A/62/10, 230.

3 In 1980, Michael Boethe had commented that the International Law Association's (ILA) work on disasters did not engage with the 'big' problems of whether a State has a duty to 'undertake or accept relief'. 'Report on the Fifty-Ninth Conference' (Belgrade 1980) (ILA 1980) 530. See J Benton Heath, 'Disaster, relief and neglect: the duty to accept humanitarian assistance and the work of the International Law Commission' (2011) 43 NYU Journal of International Law and Politics 419, 422.

The work on PPED was not the first consideration of the international legal regulation of disasters by a body of international law experts,[4] but with the ILC's unique mandate to codify and progressively develop the law in this area, the topic did entail greater potential for a binding instrument to emerge as its outcome.[5] Whilst such an instrument does not yet exist, it is likely that one inspired by the PPED draft articles will emerge in the coming years, and, considering States' initial enthusiasm for the project,[6] it may well gain considerably more support than its predecessors.[7]

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4 As Chapter 1 identified, there had previously been attempts at more comprehensive or holistic treaty-making in this area with the IRU in the 1930s (Convention Establishing an International Relief Union (adopted 12 July 1927, entered into force 27 December 1932) 35 LNTS 249 (IRU Convention)) and the Draft Convention on Expediting the Delivery of Emergency Assistance in the 1980s (UNDRO, 'Report of the Secretary-General to the United Nations General Assembly and Economic and Social Council' (18 June 1984) UN Doc A/39/267/Add.2; E/1984/96/Add.2, Proposed draft Convention on expediting the delivery of emergency relief (Draft Convention)). Moreover, the work of the IFRC's Disaster Law Programme (introduced in Chapter 1, section 1.1.3(b)) served as a basis for the ILC's work. As Heath puts it, 'the ILC represents the latest in a line of international institutions that have attempted to define the duty of states to accept disaster relief'. Heath (n 3) 423.

5 The ILC's mandate and the potential outcomes of the work are detailed in section 5.4 below.

6 Many States welcomed the ILC's undertaking, noting in particular the timeliness of such an effort. See, for example, the comments of: Benin (A/C.6/62/SR.18 para 47); Egypt (A/C.6/62/SR.18 para 71); Guatemala (A/C.6/62/SR.19 para 12); UK (A/C.6/62/SR.19 para 42); Sri Lanka (A/C.6/62/SR.19 para 55); India (A/C.6/62/SR.19 para 107); Poland (A/C.6/62/SR.20 para 1); US (A/C.6/62/SR.20 para 23); Hungary (A/C.6/62/SR.21 para 7); Greece (A/C.6/62/SR.21 para 53); Romania (A/C.6/62/SR.21 para 78); Israel (A/C.6/62/SR.21 para 99); Kenya (A/C.6/62/SR.21 para 112); Sierra Leone (A/C.6/62/SR.24 para 100); and New Zealand (A/C.6/62/SR.25 para 19).

7 It is not only the IRU Convention (n 4) and the Draft Convention (n 4) that might be said to have failed. There is relatively little international support for many multilateral conventions already in existence, as Chapter 2 demonstrated. It is not unreasonable to assume that such a lack of engagement might be traced to the fact that States have – historically at least – had few opportunities to engage in the global negotiation of disasters in such a manner. The ILC's work has attracted the inputs of States from all regions of the world, whereas many other multilateral disaster conventions in existence have – initially in any case – been limited to participation by certain groups of States, either on a regional basis (hence they in any case may be limited in their number of potential ratifications) or by membership of a certain organisation. 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) 2296 UNTS 5 (Tampere Convention), for example, has been described as one of the leading multilateral instruments in this area, but the fact that it was an initiative of the ITU (members of which are primarily European) signed at a conference in Europe, where there were only 60 members present, meant that States from other regions of the world were practically restricted in their ability to exercise autonomy in the drafting process. It is of little wonder, therefore, that the convention only has 49 parties.

After nearly a decade of work on the topic, in 2016, the ILC adopted on second reading a set of eighteen draft articles on PPED with commentaries.[8] Ultimately, the objective of the draft articles was to 'facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights.'[9]

Whilst it is a stretch to say that the ILC intended to serve as a *deus ex machina* in this regard, that has been (and perhaps still is) the expectation.[10] This is unsurprising, as despite being non-binding in a formal sense,[11] the work of the ILC as an organ of the UN is highly influential; Judge Schwebel of the ICJ, for example, has noted the 'breadth and depth of importance' and 'great weight' that the landmark *Gabčíkovo-Nagymaros Project* judgment[12] gave to the work of the ILC,[13] and several important

8 ILC, 'Report of the International Law Commission on the Work of its 68th session' (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10, 17-73 (PPED draft articles, with commentaries).

9 PPED draft articles, with commentaries (n 8) art 2.

10 Whilst it is fair to assume that many have expected the facilitation mentioned in the ILC's core objective for PPED (see text to n 9), other expectations relate to the centrality of the affected population in the work and clarifications as to the role of the international community. Flavia Zorzi Giustiniani, 'The Works of the International Law Commission on "Protection of Persons in the Event of Disasters". A Critical Appraisal.' in Andrea de Guttry, Marco Gestri, and Gabriella Venturini (eds), *International Disaster Response Law* (Springer 2012) 83.

11 See section 5.4 below on the legal status of the draft articles.

12 *Case Concerning the Gabčíkovo-Nagymaros Project* (*Hungary v Slovakia*) [1997] ICJ Rep 7 [47], [50], [53], [58], [79], [82] and [94].

13 UNGA 'Report of the International Court of Justice' (27 October 1997) 52nd session (1997) UN Doc A/52/PV.36, 2.

international conventions have also been developed on the basis of the ILC's work since its establishment in 1947.[14]

The ILC's main proposal in respect of the rules on refusal can be found in draft article 13:

> Article 13
> Consent of the affected State to external assistance
>
> 1. The provision of external assistance requires the consent of the affected State.
> 2. Consent to external assistance shall not be withheld arbitrarily.
> 3. When an offer of external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.[15]

Draft article 13 provides for a 'qualified consent regime' whereby the affected State may withhold its consent to external assistance (i.e. it may refuse), but it shall not do so arbitrarily. Paragraphs 1 and 2 of draft article 13 respectively can be described as the 'substantive' obligation in the provision, whereas paragraph 3 concerns obligations that are better described as 'procedural'. These obligations are returned to in section 5.2 below.

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14 See, for example: Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11; Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95; Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261; Convention on Special Missions (adopted 8 December 1969, entered into force 21 June 1985) 1400 UNTS 231; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT); Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986) (1986) 25 ILM 543; Vienna Convention on Succession of States in respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

15 PPED draft articles, with commentaries (n 8) art 13.

As with existing international law on refusal – which is recapped below in section 5.1 – the explicit rule in draft article 13 must be understood in the light of other rules. In this case, those other rules are draft articles that otherwise inform or support the qualified consent regime provided for by draft article 13, namely: draft articles 4-6 on the protection of human rights; draft articles 7-8 on the duty to co-operate; and draft articles 10-15 on the role of the affected State. These draft articles are considered in section 5.3.[16]

Draft article 18 on the relationship of the draft articles to other rules of international law informs the legal status of the draft articles, and thus is considered briefly in section 5.4.[17]

The aim of this chapter is to analyse how the rules in the PPED draft articles provide for restrictions on an affected State's right to refuse. The focus here, then, is not on the PPED project as a whole, but rather on the ILC's treatment of refusal and on how that treatment maps onto existing international law. The analysis here is primarily a substantive one, with certain practical and policy concerns raised by the ILC's work considered in Chapter 6. An interim conclusion that sets up the discussion of the potential of a new international convention in concluding Chapter 6 is then presented in section 5.5.

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16 Sections 5.2 and 5.3 constitute 'internal' critiques of the ILC's restrictions on refusal, where the focus particularly is on the extent to which the ILC has achieved clarity and coherence with the new rules. As mentioned above, an 'external' critique of the draft articles, that considers briefly, *inter alia*, the form of regulation suited thereto, is provided in Chapter 6.

17 Section 5.4 considers the status of the draft articles on PPED as they stand. This is an important consideration not only because it reflects the present state of the draft articles, but also because there remains the possibility that – despite the recommendations of the Special Rapporteur – a new international convention based on the draft articles may not actually result from the work. If this is the case, it is critical to know what role the draft articles will play as they currently stand and the extent to which they will affect existing international law rules on disasters. Again, aspects of this concern are developed in Chapter 6.

Before turning to the qualified consent regime under draft article 13, however, it is important to take stock of the existing international law on refusal. Chapters 2-4 provided the detailed analyses of these existing rules, and in section 5.1 below those rules are considered collectively. Such collective consideration allows for a wider appreciation of the problematic state of affairs faced by the ILC since commencing work on the topic in 2007.

5.1 A Recap of Existing International Law on Refusal

Chapters 2-4 considered in detail the existing international law on refusal. As identified above, the purpose of this section is to present those rules in a more collective manner and to restate some important conclusions about the extent to which those rules restrict an affected State's right to refuse. This is an important exercise, not least because a clear appreciation of the strengths and weaknesses in existing international law is required for an effective comparative analysis of the rules proposed by the ILC in its work on PPED (examined in sections 5.2 and 5.3 below).

Chapter 1 introduced, and Chapter 2 qualified, customary international law as the foundation or 'starting point'[18] in the assessment of existing international legal regulation of disasters. Customary rights and obligations of sovereignty are at the heart of the issue in so far as any enquiries into the lawfulness of a refusal necessarily engage consideration of whether, in the disaster context, sovereignty demands respect for the rights of the affected State as a sovereign (an affected State's right to prescribe its own

18 See Chapter 2, section 2.1.

internal affairs free from intervention, for example) or whether sovereignty demands action from that State in satisfaction of its sovereign obligations to protect its population (the acceptance of external assistance where that State is unable to respond adequately to the disaster itself, for example). As Chapter 1 identified, most States and scholars find themselves at a point on a spectrum in this regard, ultimately recognising that sovereignty actually entails both. The question, then, is how precisely are these two aspects of sovereignty balanced in the disaster context?

As international law has continued to develop – particularly in relation to human rights – it is apparent that more has become expected of States when disaster strikes. It is no longer satisfactory for a State to refuse international assistance where it is unable to meet humanitarian demands itself (if indeed it ever were), especially in consideration of the fact that no State has ever been able to demonstrate the ability to protect its population in a major disaster such that international assistance would not ensure or enhance that protection.[19] It is for this reason that contemporary international law has come to be understood as placing limited restrictions on a State's right to refuse, not as trending towards that right's abolition altogether. It is for this reason, too, that certain instances of refusal (such as where the assistance being offered is discriminatory) are recognised *ab initio* as lawful decisions (*mutatis mutandis*).[20] That the right to refuse has a customary basis is uncontested; the pertinent questions arise in relation to the other rules of international law that have come to restrict (primarily) the exercise of such a right.

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19 Recall, for example, the fact that it was impossible for the US – one of the most developed States in the world, according to the UNDP – to protect fully the affected population in the aftermath of Hurricane Katrina in 2005. See Chapter 1, section 1.1.5(b), text to n 208.

20 See Chapter 1, section 1.1.5(b).

In part, the shift towards a view of sovereignty that demands more of affected States in times of disasters can be attributed to the frustrations that States experienced in the poorly coordinated and otherwise ineffective responses to major disasters in the 1970s and 1980s.[21] Spurred by the desire to see greater and more effective humanitarian coordination between key actors,[22] efforts were made to draft a convention on humanitarian assistance in the early 1980s. The 1984 Draft Convention[23] failed to garner sufficient support, however, and it became the second major international convention behind the 1927 IRU Convention[24] to fail.

As a result of these failures, and of the remaining desire to see disaster responses better regulated at the international level, States instead turned their attention to drafting binding and non-binding agreements on specific types of disasters[25] or assistance,[26] or on regional bases.[27] Despite increasing in number, (which is encouraging in so far as it demonstrates that States are willing to create rules on this topic), these agreements, for the most part, constitute a weakly organised and poorly implemented framework (if one can even call it that) when it comes to the regulation

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21 The UN International Decade for Natural Disaster Reduction (UNGA Res 44/236 (22 December 1989) UN Doc A/RES/44/236), for example, was prompted by, *inter alia*, the frustrations arising from the poor international responses to the 1970 Bhola cyclone, the 1976 Tangshan earthquake, and the 1983 Ethiopian drought. See Chapter 1, section 1.1.3 (a).

22 The UN set the stage in this regard by seeking to improve the coordination of its own humanitarian activities in UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182. See Chapter 1, section 1.1.3(a).

23 Draft Convention (n 4).

24 IRU Convention (n 4).

25 Recall, for example, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (adopted 26 September 1986, entered into force 26 February 1987) 1457 UNTS 133 (Nuclear Assistance Convention).

26 Recall, for example, the Food Assistance Convention (adopted 25 April 2012, entered into force 1 January 2013) 2884 UNTS.

27 Recall, for example, the ASEAN Agreement on Disaster Management and Emergency Response (adopted 26 July 2005, entered into force 24 December 2009) (*ASEAN*) <http://agreement.asean.org/media/download/20140119170000.pdf> accessed 2 July 2018.

of refusal. Indeed, there is only one binding instrument with explicit rules on refusal,[28] and where States might be said to have sought to plug gaps[29] with bilateral agreements, there are too few agreements or too little in the way of commonality to indicate any degree of widespread State consensus on pressing issues.[30] Non-binding guidelines make up for some of these gaps and vagueness, but owing to their non-binding nature, their impact on a refusing State could only be expected to be minimal.[31]

In terms of the more general conclusions drawn in Chapter 2 about the direct regulation of refusal in existing international law, it is significant that the rules examined (in customary law as well as in the binding agreements) demonstrate considerable deference to a view of sovereignty as, primarily, protecting the affected State's right to refuse. This is seen extensively in the customary and treaty-based protections of the requirement of consent and of the recognition of the primary responsibility of the affected State.[32] It is significant, too, that so many of the agreements and guidelines examined provide for a duty to co-operate (although, as explained later in section 5.3.2, this duty is a much more limited one compared to that proposed by the ILC in draft article 7).

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28 'The requesting State Party shall retain the authority to reject all or part of any telecommunications assistance offered pursuant to this Convention in accordance with the requesting State Party's national law and policy.' Tampere Convention (n 7) art 4(5). See Chapter 2, section 2.2.

29 Whilst the Tampere Convention (n 7) contains explicit rules on refusal as well as a host of other important subjects (for example: privileges, immunities, and facilities (art 5); payment or reimbursement of costs or fees (art 6); and regulatory barriers (art 9)), it only applies to instances in which an affected State is refusing telecommunications assistance. Thus far, States have failed to make up for the lack of rules on refusal in relation to assistance more generally.

30 Recall the subtle differences in drafting discussed throughout Chapter 2.

31 See Chapter 2, sections 2.3.2, 2.4.2, 2.5.2 and 2.6.2.

32 See Chapter 2, sections 2.1-2.3.

On account of the weaknesses in the existing direct regulation of refusal, *inter alia*, human rights have in many respects come to play an instrumental role in PPED.[33] The increase in the attention paid to the protection and enjoyment of human rights in the disaster context[34] was undoubtedly building at the time of even some of the earliest disaster agreements, so it is important to note that in temporal terms the human rights protections cannot be said to be attributable solely to the weaknesses in the direct regulation of refusal. Yet that increase in attention is certainly connected to those weaknesses and arguments as to the necessity of a human rights approach are nonetheless bolstered by the existence and pervasiveness of such.[35] As with the direct regulation of refusal considered above, for an effective comparative analysis of the ILC's proposals in respect of human rights, it is critical to assess those proposals against the conclusions drawn in Chapter 3. For the most part, these conclusions relate (a) to existing human rights protections that are relevant to refusal[36] and (b) to the so-called 'human right to humanitarian assistance'.[37]

In respect of existing human rights protections, the right to life and the right to an adequate standard of living (the latter realised through its component rights to food, health, housing, and water) were identified as the rights with most factual relevance to situations of disaster, especially where the goal of emergency humanitarian aid is the preservation of human life in the short-term.

33 See generally Chapter 3.
34 See Chapter 3, section 3.0.
35 See Chapter 3, section 3.0.
36 These were considered in Chapter 3, sections 3.1 and 3.2.
37 This was considered in Chapter 3, section 3.3.

In terms of the right to life, one important conclusion was that the right to life entails positive obligations in the disaster context just as it does negative ones.[38] This could mean that refusing States are required to act to protect the right to life, which is significant considering that often refusal manifests through State inaction.[39] That the right to life is non-derogable, too, is significant in so far as PPED is concerned, as it could mean that an affected State is obligated to accept international assistance where doing so would be the only way of protecting the right to life. Whilst this conclusion is drawn primarily from the CCPR – whose decisions are formally non-binding – and from European jurisprudence,[40] it is nonetheless significant considering the persuasiveness of human rights body interpretations and the potential for cross-fertilisation between regional human rights courts.[41] A more general conclusion drawn about the right to life, however, was that despite encouraging signs in these interpretations, the overall development of obligations in relation to the protection of the right to life in the disaster context is limited. This is something to which the ILC's human rights-related proposals (in draft articles 4-6) should speak to make a valuable contribution to the development of rules in this area.

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38 This conclusion was drawn from the fact that human rights entail the tripartite obligation to respect, protect, and fulfil. See Chapter 3, section 3.1.2. In this regard, the obligation to fulfil has been interpreted as entailing positive obligations on the part of the State. The CCPR has stated that 'judicial, administrative and educative and other appropriate measures' must be taken, along with the legislative ones as recommended by, *inter alia*, the ECtHR in *Budayeva and others v Russia* App nos 1533/02, 21166/02, 20058/02, 11673/02, and 15343/02 (ECtHR, 20 March 2008). See CCPR, 'General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) (HRTB Compilation, Vol I), 243.

39 See Chapter 1, section 1.0.

40 See Chapter 3, section 3.1.2, particularly extracts from the judgment in *Budayeva* (n 38).

41 See Chapter 1, section 1.1.4(b), particularly text to n 193. See also Chapter 3, section 3.4, particularly text to n 212.

Of greater potential in respect of restrictions on the right to refuse are obligations to protect the right to an adequate standard of living. The right to an adequate standard of living is realised through its component rights to food, health, housing, and water, and as such entails rights with immediate factual relevance to situations of disaster (starvation and malnutrition, disease and injury, homelessness and displacement, and so on).[42] In setting standards for the realisation of these rights, the CESCR has provided a solid foundation upon which those rights are to be realised in the disaster context (although, recall that – like the CCPR – comments of the CESCR are persuasive but ultimately non-binding). Certain interpretations of those component rights make a strong case for an obligation to accept international assistance: the CESCR has confirmed that the right to food, for example, requires that States make available food[43] and that if the State cannot provide the food itself, there remains the obligation to co-operate internationally to ensure that the available supplies reach those in need. In this regard, the refusal of international assistance where the State cannot provide the food itself could be seen as a violation of that State's obligations.[44]

Similar obligations of international co-operation exist in relation to aspects of the right to adequate housing and health.

In relation to the right to adequate housing, the CESCR has identified 'victims of disaster' as a 'disadvantaged group' for the purposes of the right to adequate housing, which means that adequate housing should not only be made accessible, but

42 See Chapter 3, section 3.2.1 and 3.2.2.
43 CESCR, 'General Comment No. 12: The right to adequate food (art. 11)' in HRTB Compilation, Vol I (n 38) 57.
44 See Chapter 3, section 3.2.2(b).

that the group should be 'ensured some degree of priority'.[45] Furthermore, General Comment 4 (1991) stresses that '[t]o the extent that any such steps are considered to be beyond the maximum resources available to a State party' – as States could feasibly claim in relation to disasters – 'it is appropriate that a request be made as soon as possible for international co-operation in accordance with articles 11(1), 22 and 23 of the Covenant'.[46] Again, should an affected State refuse international assistance such that it is unable to perform these obligations, it may violate its obligations under the ICESCR.[47]

In relation to the right to health, it is significant that the CESCR has confirmed that

> [t]he right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations.[48]

Once again, should an affected State refuse international assistance such that it is unable to perform these obligations, it may violate its obligations under the ICESCR.[49]

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45 CESCR, 'General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)' in HRTB Compilation, Vol I (n 38) 13.
46 ibid 14.
47 See Chapter 3, section 3.2.2(b).
48 CESCR, 'General Comment No. 14: The right to the highest attainable standard of health (art. 12)' in HRTB Compilation, Vol I (n 38) 82.
49 See Chapter 3, section 3.2.2(c).

A more general conclusion in respect of the right to an adequate standard of living is that despite the principle of progressive realisation[50] applying to rights of an economic, social, and cultural character – of which the right to an adequate standard of living is one such right – the existence of a minimum core standard ensures that in any situation where the resources of the States to realise rights are threatened or destroyed, (more often than not the case in times of disaster) there is at least some potential for rights protection and enjoyment in there being a minimum core.[51] Critically, States are under an obligation to take measures to ensure this minimum core, which in the context of disasters may mean that a State has to accept appropriate offers of international assistance to ensure the rights.[52]

Disappointingly, however, there again has been some issues in ensuring that these aspects of the right are communicated firmly to States in the human rights committees such that compliant behaviour is encouraged and refusing States – like Pakistan[53] and Venezuela[54] – are held to account. The fact that human rights often rely on individuals to initiate and sustain a complaint against a State, and that the recommendations of the human rights committees are non-binding, mean that those hoping for more effective means of securing humanitarian access through the human rights system have been disappointed.[55] The CCPR and the CESCR have been

50 Recall that unlike the right to life, which is a civil and political right, the right to an adequate standard of living is a right of an economic and social character and as such is subject to progressive realisation. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) reads: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' See also Chapter 3, section 3.2.1.

51 See Chapter 3, section 3.2.1.

52 See Chapter 3, section 3.2.1.

53 See Chapter 3, section 3.1.3.

54 See Chapter 3, section 3.2.3.

55 These more practical concerns are returned to in Chapter 6.

instrumental in ensuring that the rights have been interpreted in the disaster context, but unfortunately, they have fallen short of ensuring that the rights have strong practical application. Indeed, it is disappointing that both committees have – as yet – failed to recommend explicitly to States that international assistance can be a means of ensuring compliance with key human rights obligations. References to such a notion are certainly present, which is encouraging, but they are indirect, which is unsatisfactory considering the potential that those committees have in ensuring protection for human rights in times of disaster.[56] This, again, is a problem to which the ILC has had an opportunity to speak through its work on the PPED topic.

Instead, the focus has once again shifted to an affected State's horizontal obligations, which may, in certain circumstances, be more effective at ensuring compliant behaviour and the remedy of violations. As a result, obligations of co-operation have been relied upon to bolster restrictions on the right to refuse.[57]

Whilst the exact co-operative actions required of States in times of disaster are difficult to pinpoint,[58] it is possible to identify some obligations that are common to all situations of disaster. Firstly, an affected State must adopt positive measures to achieve the purposes set out in article 55 of the UN Charter.[59] Secondly – and connected to the first requirement – an affected State must also abstain from measures that would hinder the achievement of those purposes.[60] Again, whilst no specific co-

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56 See Chapter 3, section 3.2.3. Compliance with and implementation of human rights obligations is also returned briefly to in Chapter 6, section 6.1.1.

57 See, generally, Chapter 4.

58 See Chapter 4, section 4.2.1. This is also concordant with the obligation to co-operate being one of conduct and not of result. There are no subsequent agreements that might provide for such actions, and thus practice once again becomes informative of State obligations. See Chapter 4, section 4.2.2.

59 See Chapter 4, section 4.2.1.

60 ibid.

operative actions are obligated, there is an obligation to co-operate in the realisation of certain human rights.[61] Finally, it can be concluded that in any given situation of refusal, an affected State could owe its obligation to co-operate under article 56 of the UN Charter to other Member States of the UN, to all States, or to affected populations themselves.[62] As explored later in section 5.3, this obligation is narrower than that proposed by the ILC, which provides an interesting point of comparison.

It is into this 'patchwork'[63] of obligations that the ILC stepped in 2007 with its adoption of the topic of PPED into its long-term programme of work.[64] In that regard, it is these issues that the ILC needed to address in order to make a valuable contribution to the international legal rules on refusal. The ILC's proposals in that respect are accordingly assessed in sections 5.2 and 5.3 that follow.

5.2 The Qualified Consent Regime under Draft Article 13

Draft article 13 is central to the ILC's treatment of refusal in that it 'creates for affected States a qualified consent regime in the field of disaster relief operations.'[65] The article reads:

61 See Chapter 4, section 4.4.
62 See Chapter 4, section 4.3.
63 Sandesh Sivakumaran, 'Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief' (2017) 28(4) EJIL 1097, 1097.
64 UNGA Res 62/66 (6 December 2007) UN Doc A/RES/62/66. See Chapter 1, section 1.1.3(c).
65 PPED draft articles, with commentaries (n 8) commentary to art 13, para 1.

Article 13
Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.
2. Consent to external assistance shall not be withheld arbitrarily.
3. When an offer of external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.[66]

In his first report on PPED, Special Rapporteur Valencia-Ospina explained that the concept of PPED itself was 'predicted on such principles as humanity, impartiality, neutrality and non-discrimination, as well as sovereignty and non-intervention.'[67] From the first report, then, it was clear that the PPED topic (like certain efforts before it[68]) would have to strike a balance between the demands of humanitarianism on the one hand and sovereignty (the respect thereof) and non-intervention (the assurance thereof) on the other.

This balance manifests in draft article 13. Paragraph 1, in confirming that the provision of external assistance requires the consent of the affected State, heeds the desire of States to see their sovereignty protected in the draft articles, principally by confirming the applicability of the principle of non-intervention. That is immediately balanced, however, by paragraphs 2 and 3, which, respectively, preclude the withholding of consent on arbitrary grounds and place upon the affected State certain

66 PPED draft articles, with commentaries (n 8) art 13.

67 ILC, 'Preliminary report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur' (5 May 2008) UN Doc A/CN.4/598 (SR Preliminary Report 2008), para 52.

68 See, for example, the ILC's completed work on reservations to treaties, which concerned, *inter ali*a, reservations to human rights treaties (a topic that requires the balancing of the State's right to consent to obligations in treaties with its customary obligations to protect human rights). The Guide to Practice on Reservations to Treaties was adopted by the ILC at its 63rd session in 2011. ILC, 'Report of the International Law Commission on the Work of its 63rd session' (26 April – 3 June and 4 July – 12 August 2011) UN Doc A/66/10, para 75 ff.

procedural obligations. In doing so, paragraphs 2 and 3 heed the concern for human welfare (in this case the welfare of the affected population) enshrined in the humanitarian principles.[69] As the Special Rapporteur put it, 'that an affected State's right to refuse an offer is not unlimited reflects the dual nature of sovereignty as entailing both rights and obligations'.[70] This idea is certainly not new; indeed, in Chapters 2-4, various attempts at striking this balance were seen in consideration of customary law, disaster agreements, human rights decisions, and elaborations of the duty to co-operate. Understanding how this balancing exercise has impacted the restrictive potential of the qualified consent regime is critical, therefore, in terms of the internal assessment of the rule in draft article 13. The remainder of this section unpicks aspects of the ILC's proposal in that respect.

5.2.1 The requirement of consent under paragraph 1

The notion of the consent of the affected State manifests in various forms throughout the PPED project and appears most often as a corollary of the central principles of State sovereignty and non-intervention, 'according to which the State has primary responsibility to offer protection and assistance to those affected by disasters on its

69 In explaining how draft article 13 enhances the welfare of the affected population, da Costa notes that paragraph 3 benefits the affected population because in requiring that affected States make a decision on assistance (whenever possible), it 'may well speed up the process so that aid can more quickly reach those in need.' Karen da Costa, 'RIP R2P: On the controversial "responsibility to protect" doctrine and why it adds no value to disasters' in Flavia Zorzi Giustiniani and others (eds) *Routledge Handbook of Human Rights and Disasters* (Routledge 2018).

70 PPED draft articles, with commentaries (n 8) commentary to art 13, para 3.

territory.'[71] As has been identified in this thesis,[72] this approach has long been recognised. Indeed, in Res 46/182, the UNGA stressed:

> The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.[73]

Chapter 2's enquiry into the direct regulation of disasters identified the customary basis of the requirement of affected State consent as well as several instruments that require such consent. Recall, for example, article 4(5) of the Tampere Convention ('No telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party.'); article III(1) of the SAARC agreement ('… external assistance shall only be provided upon the request and with the consent of the affected Party'); and article 11 of the ASEAN agreement ('Assistance can only be deployed at the request, and with the consent, of the Requesting Party, or, when offered by another Party or Parties, with the consent of the Receiving Party.'). Draft article 13 serves to confirm the centrality of this important provision in the draft articles, and in that respect can be seen as confirmation or restatement of existing international law. After all, requiring that the consent of the affected State is secured prior to any international assistance being initiated is one means of ensuring that those central principles of sovereignty and non-intervention are respected.

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71 SR Preliminary Report 2008 (n 67) para 54.
72 See Chapter 2, section 2.1.
73 UNGA Res 46/182 (n 22), guiding principle 3.

As a derivative of the corollaries of sovereignty,[74] the notion of consent has been a feature of the ILC's work on PPED since the start of the project. It was only with the third report of the Special Rapporteur, however, that the requirement of consent was introduced into a draft article. In his third report, the Special Rapporteur based the requirement of consent in (what was then) draft article 8[75] on the primary responsibility of the affected State:

> Draft article 8
> Primary responsibility of the affected State
> 1. The affected State has the primary responsibility for the protection of persons and provision of humanitarian assistance on its territory. The State retains the right, under its national law, to direct, control, coordinate and supervise such assistance within its territory.
> 2. External assistance may be provided only with the consent of the affected State.[76]

The Special Rapporteur stressed that the primary responsibility for PPED was the 'internal' dimension of sovereignty, whereas the requirement of consent was the 'external' dimension.[77] In a departure from Res 46/182, which states that the assistance *should* be provided with the consent of the affected State, draft article 8 actually makes such consent a requirement.[78] This reflects the position in customary international

74 See Chapter 2, section 2.1.

75 In the present draft articles as adopted, draft article 8 concerns 'forms of cooperation in the response to disasters'. PPED draft articles, with commentaries (n 8) art 8. See section 5.3.2 below.

76 ILC, 'Third report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur' (31 March 2010) UN Doc A/CN.4/629 (SR Third Report 2010), para 96.

77 ibid paras 99-100.

78 ibid para 100.

law[79] as well as the tendency of States to include such a requirement in disaster agreements,[80] and, again, may thus be read as confirmation of existing law.

Several States – including Indonesia, Iran, South Korea, and Switzerland[81] – were in accordance with draft article 8 during the ILC discussions, but it was recognised that where an affected State 'failed to protect persons in the event of a disaster because it lacked either the capacity or the will to do so' there once again had to be a balance struck between sovereignty and the protection of the affected population.[82] In that regard, Portugal even stressed that 'a State should bear responsibility for its refusal to accept assistance, which could constitute an internationally wrongful act if such a refusal violated the rights of the affected persons under international law' (which hints at human rights protection, considered in more detail in section 5.3 below).[83] These views, *inter alia*, revealed the need for a separate draft article that further qualified the requirement of consent. This separate draft article emerged with the Special Rapporteur's fourth report.

In his fourth report, the Special Rapporteur confirmed that '[a]s a matter of international law, the affected State has the right to refuse an offer. However, this right is not unlimited … sovereignty also entails obligations.'[84] Acknowledging the considerable harm caused by certain exercises of the right to refuse – like the situation

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79 See Chapter 2, section 2.1.

80 See generally Chapter 2.

81 Indonesia (A/C.6/65/SR.24, para 68); Islamic Republic of Iran (A/C.6/65/SR.24, para 37); Republic of Korea (A/C.6/65/SR.25, para 29); Switzerland (A/C.6/65/SR.22, para 38).

82 SR Third Report 2010 (n 76), para 22.

83 Portugal (A/C.6/65/SR.23, para 13). Iran, however, warned that claiming that refusal could constitute an internationally wrongful act 'would not only be expressly contrary to international law but also constitute an unprecedented step which could have adverse consequences for international relations' (A/C.6/65/SR.24, para 36).

84 ILC, 'Fourth report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur' (11 May 2011) UN Doc A/CN.4/643 (SR Fourth Report 2011), para 52. See also SR Third Report (2010) (n 76), para 75.

in Myanmar described at the outset of this work[85] – the Special Rapporteur conceded that States should be seen as having a restricted right to refuse: 'Since consent to assistance is sanctioned by international law, rather than disregarding it, a limitation on its exercise also grounded in international law may be justified.'[86] This, too, could be reconciled with the notion of sovereignty: while sovereignty requires the consent of the affected State for external assistance, it also imposes an obligation on the affected State to act 'in a way that best contributes to the protection and assistance of those in need'.[87] This notion – which accords with the understanding throughout this thesis – mirrors a claim of Elihu Lauterpacht:

> to give effect, through appropriate limitation and international supervision of the internal sovereignty of States, to the principle that the protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international.[88]

Ultimately, in stating that the provision of external assistance requires the consent of the affected State, paragraph 1 of draft article 13 serves to clarify a position that has long existed in practice and that has been reflected in hard law in customary rules as well as on an *ad hoc* basis through binding instruments, as demonstrated by Chapter 2. In this respect, paragraph 1 of draft article 13 may be read as a desirable and useful codification of existing international law, albeit not an unexpected one.

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85 See Chapter 1, section 1.0.
86 SR Fourth Report 2011 (n 84), para 54.
87 SR Fourth Report 2011 (n 84), para 56.
88 Elihu Lauterpacht (ed), *International Law: Collected Papers of H Lauterpacht: Vol 2* (1975) 47.

More significant contributions, which may represent progressive development[89] of the law on this topic, are found with paragraphs 2 and 3 concerning the prohibition on arbitrary refusal and certain procedural requirements respectively.

5.2.2 The prohibition on arbitrary refusal under paragraph 2

Paragraph 2 operationalises the ILC's recognition of the fact that 'an affected State's discretion regarding consent is not unlimited'.[90] It is clear from the discussions in section 5.2.1 above that the Special Rapporteur was convinced of the need for a restriction on the affected State's right to refuse external assistance. Paragraphs 57-61 of his fourth report[91] concern the restrictions that human rights and duties of co-operation respectively place on the right to refuse – considered in detail in section 5.3 below – but it is clear that the term 'arbitrary' was not drawn particularly from either. Drawing upon wording that appears both in the GPID[92] and the Bruges Resolution,[93] paragraph 2 states that the affected State shall not withhold its consent to external

89 On the ILC's dual mandate of progressive development and codification, see section 5.4 below.

90 PPED draft articles, with commentaries (n 8) commentary to art 13, para 5.

91 SR Fourth Report 2011 (n 84), para 57-61.

92 Guiding principle 25(2) provides: 'Consent [to external assistance] shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.' UN Commission on Human Rights, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add (GPID).

93 Institute of International Law, 'Resolution on Humanitarian Assistance' Bruges Session (2 September 2003) (Bruges Resolution) art VIII(1): 'Affected States are under the obligation not arbitrarily and unjustifiably to reject a bona fide offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare.'

assistance 'arbitrarily'. In adopting arbitrariness in this provision, the ILC has – in effect – proposed a new standard for assessing refusal.

In the absence of a widely-used legal definition of 'arbitrariness',[94] the ILC relies upon several principles for general guidance on what might constitute an arbitrary refusal. The ILC itself does not provide a clear definition of arbitrariness, which is disappointing considering the value that such a definition would bring to the work. Indeed, in certain State reactions to the ILC's adoption of the draft articles (considered later in section 5.4.2), comments were made as to the fact that: 'it was not clear how arbitrariness could be ascertained.'[95] That being said, the ILC does provides some useful guidance.

As a preliminary matter, the ILC stresses that in any given case, the assessment must be conducted on a case-by-case basis, which is something that has been stressed in this thesis from the outset.[96] The first three principles are articulated in the negative: firstly, a refusal will not be considered arbitrary where the affected State already has the capacity to respond adequately to the disaster; secondly, a refusal of one source of assistance will not be deemed arbitrary if the affected State has already accepted assistance from elsewhere such that it can respond adequately to the disaster; and thirdly, a refusal of an offer will not be deemed arbitrary where the offer was not made in accordance with the draft articles.[97] For the most part, the first two principles are

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94 As Sivakumaran puts it, 'guidance on the meaning of arbitrary withholding of consent is sorely lacking.' Sandesh Sivakumaran, 'Arbitrary Withholding of Consent to Humanitarian Assistance in Situations of Disaster' (2015) 64(3) ICLQ 501.

95 ILC, 'Report of the ILC on the work of its sixty-eighth session (2016). Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-first sessions, prepared by the Secretariat' UN Doc A/CN.4/703 (ILC 68th Session Report 2016 Summary), para 113.

96 See Chapter 1, section 1.1.5(c).

97 PPED draft articles, with commentaries (n 8) commentary to art 13, para 8.

common sense reflections of the reality of the disaster response; where there is no need for assistance, a State will not be criticised for its decision to refuse excess offers. The third principle reflects an obligation of good faith (considered in more detail below) for affected States, and – in so far as the draft articles stress the importance of the humanitarian principles[98] – also reflects aspects of existing international law.[99]

For guidance that is articulated in the positive, the ILC states that where an offer of assistance is made in accordance with the draft articles and no alternate sources of assistance are available, there would be a strong inference that a decision to withhold consent is arbitrary.[100] This appears to be an alternative way of articulating that where an affected State cannot provide the assistance itself, it should turn to international assistance. In that respect, this elaboration may be drawn from existing human rights law,[101] although it is not clear in the commentary. Thereafter, the ILC considers works of other bodies on this topic.

The first source from which the ILC draws guidance is the Oxford Guidance on the Law Regulating Humanitarian Relief Operations in Situations of Armed

98 Recall the explanation in Chapter 1 that a State will not be criticised for its decision to refuse aid where the offer does not comply with the humanitarian principles of humanity, impartiality, neutrality, and independence. See Chapter 1, section 1.1.5(b).

99 Many international agreements and guidelines include a requirement that assistance be provided on the basis of the humanitarian principles, or a recognition (usually in the preamble) that the humanitarian principles are an important guiding principle in disaster relief. See, for example, annex I, paragraph 2, of UNGA Res 46/182 (n 22): 'Humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality.' As mentioned in Chapter 1, UNGA Res 46/182 has inspired many of the agreements and guidelines on disaster relief since 1991.

100 PPED draft articles, with commentaries (n 8) commentary to art 13, para 8.

101 Recall, for example, that where States are unable to fulfil the minimum core of certain rights, the State may be required to accept offers of international assistance to satisfy its obligations under the ICESCR. See Chapter 3, section 3.2.1 and section 5.1 of the present chapter below.

Conflict.[102] Demonstrably, this guidance relates to situations of armed conflict and the IHL rules on relief that are applicable therein, but nonetheless it 'provides valuable insights'.[103] That work recognises that there is no all-encompassing definition of arbitrariness in international law, but that various fields of international law relate to arbitrariness in some manner. According to Akande and Gillard (the authors of the Guidance):

> international humanitarian law, international human rights law, and general principles of public international law provide guidance on the type of conduct that would justify the conclusion that a state is acting arbitrarily in withholding consent to humanitarian relief operations.[104]

For Akande and Gillard, consent is withheld arbitrarily if: (a) it is withheld in circumstances that result in the violation by a State of its obligations under international law; or (b) the withholding of consent violates the principles of necessity and proportionality; or (c) consent is withheld in a manner that is unreasonable, unjust, lacking in predictability or that is otherwise inappropriate.[105] Paragraph (a) is especially important in the peacetime context, and paragraph (c) is also highly relevant.

Several times throughout this thesis, it has been determined that whilst the substantive obligations concerned do not explicitly prohibit a refusal, a refusal may in and of itself represent a violation of the affected State's international law obligations: in respect of human rights obligations considered in Chapter 3, for example, a refusal

102 Dapo Akande and Emanuela-Chiara Gillard, 'Oxford Guidance on the Law Regulating Humanitarian Relief Operations in Situations of Armed Conflict' (*OCHA* 2016) <www.unocha.org/sites/dms/Documents/Oxford%20Guidance%20pdf.pdf> accessed 7 July 2018. This work was commissioned by OCHA upon the request of the Secretary-General for further analysis on the issue of arbitrary withholding of consent.

103 PPED draft articles, with commentaries (n 8) commentary to art 13, para 9.

104 Akande and Gillard (n 102) para 48.

105 Akande and Gillard (n 102) para 49.

may violate the right to life even though the obligation entailing protection of right to life itself does not include any reference to refusal. This is a conclusion to which paragraph (a) speaks, and in restating that point here, the ILC seems to suggest the possibility of a 'compound' type of obligation of affected States in respect of refusal. Moreover, paragraph (a) confirms that arbitrariness is not a narrowly defined standard; it could, at any one time, speak to numerous international law obligations. This articulation also suggests that where a State refuses in violation of one of its international legal obligations, it cannot rely on the preservation of its sovereignty (reflected in the requirement of consent) as a right that trumps its international obligations. This is a position that is reflected in several areas of international law already examined in Chapters 2-4, but one that has not been reflected adequately in other works on the subject. In this light, the ILC's contribution (building upon Akande and Gillard's articulation) is significant. This, too, can be seen as an area of codification that is both desirable and warranted in the present context.

Paragraph (c) appears to act more as a 'catch all' for situations that do not readily fit into the existing rules or that might not breach an existing international legal obligation. On the face of it, there are some immediate definitional concerns with the use of the terms: 'unreasonable, unjust, lacking in predictability or that is otherwise inappropriate.' The ordinary meanings of these terms are vague, yet in practice it is not difficult to imagine a situation in which a refusal would attract these descriptions. For example, as Venezuela continues to refuse international assistance to help its starving and malnourished population, one could readily describe its refusal both as a violation of its existing international obligations (its duty to protect the right to food under the ICESCR) and as an 'unreasonable, unjust … or … otherwise inappropriate' act. The terms, in fact, seem mutually reinforcing: something that is unreasonable may be so because it is unjust, and likewise something that is inappropriate may be so because it is unreasonable. This introduces an element of confusion into the analysis and distorts an otherwise sound standard of arbitrariness. Whilst practically this may be necessary as a catch-all, it seems a bold departure in terms of the existing legal basis for such a position. Considering that States have expressed concerns over the lack of clarity in the meaning of arbitrariness,[106] this may be an element of progressive development that, ultimately, is impractical in the peacetime context.

The commentary to draft article 13 reveals too that the principle of good faith plays a core role in determining arbitrariness.[107] Recognising that the affected State has the primary role in the direction, control, coordination and supervision of disaster assistance (draft article 10), the ILC confirms that the determination of the most appropriate form of assistance falls to the affected State's discretion. The ILC is clear, however, that the discretion must be exercised in good faith in accordance with the affected State's international obligations.[108] In this context, good faith requires both that the affected State carry out its primary role in consideration of its international legal obligations and that it meets certain procedural requirements that relate thereto. Both of these aspects of good faith are examined in turn.

According to the Special Rapporteur, the principle of good-faith serves as an 'outer limit of sovereignty and the exercise of discretion'.[109] In that regard, the Special

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106 See text to n 95 above.

107 PPED draft articles, with commentaries (n 8) commentary to art 13, para 10.

108 The ILC recalls paragraph 1 of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) (adopted without vote) (Friendly Relations Declaration), which notes that '[e]very State has the duty to fulfil in good faith [its obligations] in accordance with the Charter of the United Nations', 'obligations under the generally recognized principles and rules of international law' and 'obligations under international agreements valid under the generally recognized principles and rules of international law.'

109 PPED draft articles, with commentaries (n 8) commentary to art 13, para 11.

Rapporteur's comments can be understood as referring to the principle's function as a restriction on the exercise of rights[110] and, ultimately, to it being a means through which a balance can be struck between rights and obligations that are in conflict.[111] This is especially important where treaty obligations are at stake, as is demonstrably the case here. 'Good faith' is difficult to define in absolute terms,[112] but can more easily be illustrated by explaining its role in international law. Here, its role in limiting the exercise of sovereignty is imperative. Whilst the Special Rapporteur does not expand upon what the principle of good faith requires of States in the present context, some general inferences may in any case be drawn by its inclusion in the work.

The first inference serves to highlight the importance, again, of other rules of international law. That a State is free to act as long as its actions do not contravene a prohibitive rule of international law is fundamental.[113] Demonstrably, then, good faith does not ground a specific obligation for affected States in the present context, but it still serves to guide their behaviour. Practically, what this means is that a State cannot argue that it is entitled to violate its obligations in the name of preserving its sovereignty. This is a critically important consideration for refusal, because it grounds

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110 The principle of good faith in international law also entails the principle of *pacta sunt servanda*, prohibition on the abuse of discretion, estoppel and acquiescence, and the obligation to negotiate in good faith. See Steven Reinhold, 'Good Faith in International Law' (2015) UCL Journal of Law and Jurisprudence 40, 47-57.

111 On the principle of good faith in international law, see Markus Kotzur, 'Good faith (*Bona fide*)' MPEPIL (2009).

112 Reinhold notes that several authors have desisted from providing a definition of 'good faith' owing to the overarching nature of the principle. For example, see: Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens 1953) 105; Georg Schwarzenberger and Edward D Brown, *A Manual of International Law* (6th edn, Professional 1976) 118 -19; William Tetley, 'Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering' (2004) 35 Journal of Maritime Law and Commerce 561, 563 (in considering the domestic application of the principle of good faith). Although, cf J F O'Connor, *Good Faith in International Law* (Dartmouth Publishing Company 1991) 36.

113 The PCIJ restated this general legal principle in, *inter alia*, *The Case of the SS Lotus* (*France v Turkey*) (Judgment) PCIJ Rep Series A No 10, para 46.

in law the underlying presumption of this work that an affected State has a right to refuse, but not an unlimited one.[114] Here, this contribution of the ILC is welcome. Indeed, if anything, this position should be stronger in the ILC's draft articles.

The requirement that an affected State carry out its primary role in good faith also entails certain procedural requirements, which are examined in the next section.

5.2.3 Procedural obligations under paragraph 3

Recall that paragraph 3 of draft article 13 provides: 'When an offer of external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.'

Procedural requirements have arisen several times throughout this thesis. In Chapter 2, for example, it was demonstrated that procedural requirements form an important part of the existing direct regulation of refusal.[115] Owing to the ILC's extensive consideration of existing multilateral and bilateral agreements throughout its work, it is unsurprising that procedural requirements were included in the eventual draft articles.

Paragraph 3 contains two procedural requirements: firstly, that the affected State make known its decision, and secondly, that the affected State make that decision known in a timely manner. The ILC may well have sought to codify existing laws and practices in this respect because those obligations arise in some of the agreements and

114 See Chapter 1, section 1.1.5(a).
115 See Chapter 2, section 2.6.

guidelines that were examined in Chapter 2.[116] But it is clear from the commentary to draft article 13 that the ILC was also contemplating the need for coherence and clarity in the rules (which, as demonstrated in section 2.6 of Chapter 2, are materially similar but articulated in different ways).

It is interesting that the ILC did not go as far as to require that an affected State provide reasons for its refusal. That being said, the ILC does encourage affected States to give reasons where its consent to assistance is to be withheld. That encouragement comes from recognition of the fact that the provision of reasons is fundamental to establishing good faith in that State's decision to withhold its consent. The ILC therefore concludes that the absence of reasons may act to support an inference that the withholding of consent is arbitrary.[117] This assertion is certainly supported elsewhere. Sivakumaran, for example, offers a comprehensive analysis of the meaning of 'arbitrary' in the context of withholding of consent to assistance, arguing that 'although the language of "arbitrary" withholding of consent is used, actual uses of the term [by the ILC] indicate that it is being used as a synonym for "unjustified" withholding of consent.'[118] In that regard, Sivakumaran submits: 'the State that seeks to withhold consent must provide a reason for doing so.'[119] It is disappointing that the ILC has not more firmly proposed a requirement to give reasons for refusal.

116 See, for example, the Framework Convention on Civil Defence Assistance (adopted 22 May 2000, entered into force 23 September 2001) 2172 UNTS 231 (FCCDA) art 3(e) and the non-binding 'IDRL Guidelines' (*IFRC*) <www.ifrc.org/what-we-do/disaster-law/about-disaster-law/international-disaster-response-laws-rules-and-principles/idrl-guidelines/> accessed 20 June 2018, guideline 10(1).

117 PPED draft articles, with commentaries (n 8) commentary to art 13, para 10. See also Sivakumaran (n 94).

118 Sivakumaran (n 94) 504.

119 ibid.

In drafting paragraph 3, however, the ILC sought to avoid a rigid duty that would see an affected State having to respond to every offer of assistance in the event of a disaster; such a duty, unsurprisingly, was seen as overly burdensome.[120] Instead, the ILC sought to afford affected States flexibility in determining how best to respond to offers of assistance. Whilst there are no formal criteria for what counts as 'timely', it is apparent that the ILC was contemplating a relatively fast decision; in the commentary to draft article 13, the ILC notes the importance of responding quickly so that assisting actors can react appropriately.[121] Considering the wider purpose of the draft articles being to 'facilitate the adequate and effective response to disasters' (wherein 'an element of timeliness is implicit in the term "effective"')[122], a timely decision would necessarily entail a short response time from the affected State. That affected States are to have flexibility in this regard, though, is clear in the ILC's choice of the phrase 'whenever possible' in paragraph 3; that clause was included to ensure that in extreme situations in which the affected State is not able to grant consent (owing to failed government, for example) that the article can accommodate such incapacity.[123]

5.2.4 Reflections on the qualified consent regime

In providing for a qualified consent regime applicable to affected States in times of disaster, the ILC has made a major and welcome contribution to the development of rules on refusal.

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120 PPED draft articles, with commentaries (n 8) commentary to art 13, para 12.
121 ibid.
122 ibid commentary to art 2, para 2.
123 ibid commentary to art 13, para 13.

The qualified consent regime exists in three parts: first, it provides that the consent of the affected State is required for the provision of external assistance; second, it provides that the affected State may not withhold its consent arbitrarily; and third, it provides that the affected State must comply with certain procedural requirements in relation to the granting or withholding of its consent.

The first of these provisions confirms a position that has been seen extensively in existing international law, demonstrated not least by the many examples of such a requirement outlined in Chapter 2. In this sense, paragraph 1 of draft article 13 may be seen as codification of existing law. Similarly, the third of these provisions also codifies existing law by ensuring that certain common procedural requirements are met. These two points are relatively uncontentious and should be seen as welcome clarifications, although, as mentioned above, it is regrettable that the ILC has not been firmer in its proposal that States seeking to withhold consent should give reasons for such.

It appears the law has been progressively developed in respect of the second provision, which states that the affected State may not withhold its consent arbitrarily. The standard of arbitrariness is a new standard in this area of law; it is not found elsewhere in the existing international hard law on disasters, but is found in two non-binding guidelines.[124] It is helpful that the ILC has elaborated aspects of this standard in the commentary such that some content can be attributed thereto, although, again, as identified above, some States have expressed concerns over the lack of clarity in the meaning.[125] In this author's view, the greatest contribution of the ILC's guidance on the meaning of 'arbitrary' comes from the statements on the applicability of the

124 GPID (n 92) guiding principle 25(2) and Bruges Resolution (n 93) art VIII(1).
125 See text to n 95 above.

principle of good faith in the commentary to draft article 13 (explored above). Whilst that principle would apply regardless of it being stressed in the ILC's work, that the ILC has explicitly recognised the principle's function as a restriction on the exercise of rights[126] serves to add a valuable definitional element to the arbitrariness standard that has not been drawn out so explicitly elsewhere in the context of peacetime disasters.[127] Indeed, it confirms that an affected State has an obligation to limit the exercise of its sovereignty where other international legal obligations demand compliance; in the context of refusal, this means a State cannot refuse where to do so would be in violation of another international law obligation. Should a new international convention be drafted on the basis of the PPED draft articles, this point should be afforded explicit articulation.

It is not on the basis of the qualified consent regime alone, however, that the ILC provides for restrictions on the State's right to refuse. As was mentioned at the outset, certain other draft articles also provide for restrictions in so far as they confirm key aspects of existing international law on refusal and in so far as they act in support of draft article 13.

5.3 Other Relevant Draft Articles

The draft articles considered in this section were never intended to treat the issue of refusal directly, yet they are nonetheless relevant to the overall treatment of the issue

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126 See n 110 and text to n 110 above.

127 Note that Akande and Gillard (n 102) make this important point in their work on refusal in the context of armed conflict.

because (a) two are referenced in the commentary to draft article 13 as supporting articles[128] and (b) considered together, the draft articles indicate the rational of the project, something in the light of which draft article 13 must of course be understood.

The most relevant of these additional draft articles are: draft articles 4-6 on human rights; draft articles 7-8 on co-operation; and draft article 10 on the primary role of the affected State (which itself is bolstered by relevant provisions in draft articles 11-15). In the remainder of this section, these subjects (human rights, co-operation, and the role of the affected State) as reflected in the draft articles are considered in turn, with a particular focus on how their provisions map onto existing international law, which was restated in section 5.1 above.

5.3.1 The protection of human rights under draft articles 4-6

The protection of human rights is a central theme in the broader topic of PPED, indicated not only by the scope of article 5 (see below) but also by the fact that the Special Rapporteur decided to take a rights-based approach[129] to the work from the

128 The commentary to draft article 13 makes reference to aspects of other draft articles – namely draft articles 6 and 10 – that should be read in conjunction with draft article 13. PPED draft articles, with commentaries (n 8) commentary to art 13, paras 2, 3, 8, and 10.

129 There is no formal definition of a rights-based approach (RBA), but the Special Rapporteur, recalling the emergence of RBAs in development work, suggested that PPED, like development, 'could and should be seen as a matter of rights'. ILC, 'Second report on the protection of persons in the event of disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur' (7 May 2009) UN Doc A/CN.4/615 (SR Second Report 2009), para 16. The Special Rapporteur also noted that: 'The essence of a rights-based approach to protection and assistance is the identification of a specific standard of treatment to which the individual, the victim of a disaster, *in casu*, is entitled. To paraphrase the Secretary-General, a rights-based approach deals with situations not simply in terms of human needs, but in terms of society's obligations to respond to the inalienable rights of individuals, empowers them to demand justice as a right, not as charity, and gives communities a moral basis from which to claim international assistance when needed.' SR Preliminary Report 2008 (n 67) para 54. See also Peter Uvin, *Human Rights and Development* (Kumarian Press, 2004) 165.

outset. Confirmed in the third report of the Special Rapporteur, the individual 'as a bearer of rights and as a person with essential needs, is at the centre of [the] work on the topic'.[130] As section 5.1 above made clear, the ILC's human rights-related proposals must be considered (a) in the light of existing international law on the topic and (b) in the light of the so-called 'human right to humanitarian assistance' (although, as discussed below, it may actually be the case that the Special Rapporteur sees the latter as part of the former, which is a different conclusion from the one drawn in Chapter 3.)

Draft article 5 is the article most relevant to the protection of human rights, but support can also be found in draft article 4 on human dignity[131] and draft article 6 on the humanitarian principles.[132] Draft article 5 provides:

> Article 5
> Human rights
> Persons affected by disasters are entitled to the respect for and protection of their human rights in accordance with international law.[133]

The ILC is clear that draft article 5 'serves as a reminder of the duty of States to ensure compliance with all relevant human rights obligations applicable both during the

130 SR Third Report 2010 (n 76), para 63.

131 Draft article 4 on human dignity provides: 'The inherent dignity of the human person shall be respected and protected in the event of disasters', with the commentary to draft article 4 making clear that human dignity is a 'core' and 'guiding' principle in PPED, and that human dignity underpins IHRL. The commentary to draft article 5 further recognises, 'an intimate connection between human rights and the principle of human dignity reflected in draft article 4'. PPED draft articles, with commentaries (n 8) commentary to art 4, para 1, and commentary to art 5, para 1.

132 Draft article 6 on the humanitarian principles provides: 'Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.' Again, the commentary to draft article 6 stresses that the humanitarian principles are 'core' principles that are 'fundamental to applicable laws in disaster relief efforts.' PPED draft articles, with commentaries (n 8) commentary to art 6, para 2.

133 ibid art 5.

disaster and the pre-disaster stage.'[134] In this regard, the ILC's proposed article accords with the increase in the importance being attached to human rights protection and enjoyment in the disaster context.[135] This acknowledgement does not, however, speak precisely to the substantive obligations of affected States, thus the commentary to draft article 5 is important in adding content to an otherwise quite vague – indeed 'generic'[136] – provision.[137]

It is clear that the ILC was primarily concerned with human rights obligations as 'expressed in relevant international agreements and … customary international law', but it nonetheless notes the contextual importance of non-binding texts at the international level, such as the GPID, and it envisioned the possibility of protection under national law.[138] What is critical here, though, is that the ILC adopted the formulation in article 5 to indicate 'the broad field of human rights obligations, without seeking to specify, add to or qualify those obligations.'[139] This important point is returned to below in relation to the (so-called) human right to humanitarian assistance.

As mentioned earlier, in one respect, draft article 5 is important in so far as – read with its commentary – it reinforces certain key aspects of the human rights obligations found to be relevant to refusal in existing international law. Recall in Chapter 3 that it was asserted that States have positive as well as negative duties in

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134 ibid commentary to art 5, para 1.
135 See Chapter 3, section 3.0.
136 Giustiniani (n 10) 73.
137 Giustiniani criticises the ILC in this respect, noting that: '[t]he assertion that people affected by disasters shall be protected and respected in their dignity and rights is at least vague and adds nothing to what should be taken for granted.' ibid.
138 PPED draft articles, with commentaries (n 8) commentary to art 5, para 2.
139 ibid.

respect of human rights,[140] and the ILC confirmed this in the commentary to draft article 5:

> States' obligations are not restricted to avoiding interference with people's rights ("respect"), but may extend, as required by the rules in question, to "protection" of their rights by, *inter alia*, adopting a number of measures varying from passive non-interference to active ensuring of the satisfaction of individual needs, all depending on the concrete circumstances … such measures also extend to the prevention and avoidance of conditions that might lead to the violation of human rights.[141]

Disappointingly, however, this appears to be the only expansion upon the key substantive aspects of an affected State's obligations to realise human rights in the ILC's commentary to draft article 5. On account of the broad nature of those obligations, this was, perhaps, a practical choice: to have expanded upon certain aspects may have given the impression that other aspects were less important. Indeed, the ILC confirmed that the formulation in draft article 5 was chosen to reflect that broad nature 'without seeking to *specify*, add to or qualify those obligations.'[142] That may well have been the case, but there remained the opportunity for the ILC to at least have expanded upon certain (arguably) critical aspects of those obligations (such as the non-derogable nature of the right to life and the existence of a minimum core obligation that must be met in respect of certain rights) so as to confirm the proposed centrality of human rights in PPED.[143]

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140 See Chapter 3, section 3.1.2.

141 PPED draft articles, with commentaries (n 8) commentary to art 5, para 4.

142 ibid art 5. Emphasis added.

143 Recall that the ILC had confirmed the individual 'as a bearer of rights and as a person with essential needs, is at the centre of its work on the topic' in SR Third Report 2010 (n 76), para 63. Moreover, at the outset of the work, the ILC stressed that '[e]xisting international human rights obligations lie *at the core* of the content of protection in the context of disasters'. ILC, 'Protection of persons in the event of disasters - Memorandum by the Secretariat 2007/590' (2007) UN Doc A/CN.4/590, 1 (emphasis added).

Ultimately, the ILC decided it was unnecessary to 'draw up an exhaustive list of all potentially applicable rights'[144] (being concerned that 'such a list could lead to an *a contrario* interpretation that rights not mentioned therein were not applicable'[145]) and instead chose to focus on rights that were 'particularly relevant' to the disaster context.[146] In this regard, the ILC identified the right to life as reflected in article 6 of the ICCPR[147] and 'relevant rights' in the ICESCR,[148] namely those 'in relation to the provision of essential foodstuffs, essential health case, basic shelter and housing and education for children … which continue even in the context of a disaster' (i.e. the right to an adequate standard of living).[149] This approach is concordant with that taken in this thesis, and as such can be understood as reflecting the *de facto* prioritisation of certain rights that was identified in Chapter 3.

Contrary to the conclusion drawn in Chapter 3, however, the ILC does appear to recognise the right to humanitarian assistance. In explaining rights that are 'particularly relevant' to PPED, the ILC lists those in the paragraph above and then indicates '[o]ther applicable rights [including] the right to receive humanitarian assistance'[150]. Recall that the ILC did not intend to 'add to' a State's obligations with its formulation of article 5,[151] so the logical implication here is that the ILC recognises a *legal* right to humanitarian assistance. This was not the conclusion drawn in Chapter 3, therefore it is critical to examine further the basis of the ILC's claim.

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144 PPED draft articles, with commentaries (n 8) commentary to art 5, para 5.
145 ibid.
146 ibid commentary to art 5, para 6. This was also the wording adopted in Chapter 3.
147 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
148 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).
149 PPED draft articles, with commentaries (n 8) commentary to art 5, para 6.
150 ibid.
151 See text to n 139.

The ILC considered, *inter alia*, the right to humanitarian assistance in its 62nd session in 2010. In the Special Rapporteur's third report, various references were made to the right to humanitarian assistance,[152] but many of which were in relation to IHL, which later finds itself excluded.[153] Article 5 featured in the Drafting Committee's report of 2010 (where it was then draft article 8[154]) and in the Statement of the Chairman of the Drafting Committee[155] (where again, it was draft article 8). In his statement, the Chairman confirms that in article 5, the reference to human rights 'incorporates both substantive rights and limitations (such as the possibility of derogations) as recognised by existing international human rights law'[156] and that '[i]t is implicit that there is a corresponding obligation to respect such rights'.[157]

Interestingly, the right to humanitarian assistance was not listed in the original rights 'of particular importance' as recognised by the Special Rapporteur in his first report on PPED.[158] There, he recognised 'the right to life, the right to food, the right to health and medical services, the right to the supply of water, the right to adequate housing, clothing and sanitation, and the right not to be discriminated against.'[159] The Special Rapporteur goes on to report that the CRPD[160] and the ACRWC[161] contain

152 SR Third Report 2010 (n 76) para 59 ff.

153 PPED draft articles, with commentaries (n 8) art 18(2).

154 Draft article 8 read: 'Persons affected by disasters are entitled to respect for their human rights.' See ILC, 'Report of the Drafting Committee on the text and titles of draft articles 6, 7, 8 and 9 provisionally adopted by the Drafting Committee on 6, 7 and 8 July 2010' (14 July 2010) UN Doc A/CN.4/L.776.

155 Statement of the Chairman of the Drafting Committee (20 July 2010) (*UN*) <http://legal.un.org/docs/?path=../ilc/sessions/62/pdfs/english/dc_chairman_statement_4th_protection.pdf&lang=E> accessed 20 April 2018 (DC Chairman's Statement 2010).

156 ibid 9.

157 ibid 8.

158 SR Preliminary Report 2008 (n 67) para 26.

159 ibid.

160 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 11.

161 African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/24.9/49 (1990) (ACRWC) art 23(1) and (4).

rights and obligations relevant to a right to humanitarian assistance, but there he admits that the CRPD 'does not refer to a right to protection, the provision being formulated rather as an obligation on the contracting State to ensure protection and safety in the occurrence of a natural disaster' and similarly in the African Charter, 'the obligation to ensure that a child receives appropriate protection and humanitarian assistance.'[162] Neither instrument explicitly provides for a right to humanitarian assistance. The Special Rapporteur goes on to note that the GPID[163] provide for a right to request and to receive protection and assistance from the national authorities, but this is a non-binding text that has only been given legal effect in narrow regional contexts.[164]

That the Special Rapporteur identified these texts is significant, as if these instruments are the basis upon which the Special Rapporteur later claims that there exists a legal 'right to receive humanitarian assistance', such that it is another right 'particularly relevant'[165] to PPED, then it would appear that the recognition of such a right is based on weak legal foundations: the CRPD relates to a narrow section of the population; the ACRWC is a regional instrument; and the GPID, strictly, are non-binding. Indeed, as Chapter 3 identifies, it is particularly difficult to find a sound legal basis for the right in existing international law; any claim that there exists a right to receive humanitarian assistance would appear, therefore, appear to be progressive development of the law in this area, and one that may not be welcome given the concerns that States have raised in the past about what a right to humanitarian

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162 SR Preliminary Report 2008 (n 67) para 26.

163 GPID (n 92) principle 3(2).

164 See, for example, the International Conference on the Great Lakes Region, Protocol on the Protection and Assistance of Internally Displaced Persons (adopted 30 November 2006) (*Refworld*) <www.refworld.org/pdfid/52384fe44.pdf> accessed 20 April 2018, which commits member States of the International Conference on the Great Lakes Region to adhere to the GPID.

165 See text to n 150.

assistance might actually entail in the practical context (some were especially concerned that a right to humanitarian assistance would give rise to a corresponding right on the part of third States to enter an affected State's territory for the purposes of providing assistance).[166]

Overall, the ILC's articulation of the role of human rights in PPED does little but serve to confirm that human rights are relevant in disaster situations just as in any other, and that accordingly States have the obligation to ensure the protection and enjoyment of those obligations. As mentioned above, this is something that Giustiniani argues should already be taken for granted.[167]

It is disappointing from a human rights perspective that key aspects of the obligations (the non-derogable nature of the right to life and the existence of a minimum core obligation in respect of the right to an adequate standard of living, for example, or indeed some of the more specific interpretations of the rights, such as the necessity of international assistance where key aspects of the rights are not able to be ensured by the affected State alone) were not drawn out in more detail in the commentary. In that regard, the ILC has not gone far enough in articulating the precise ways in which human rights serve as restrictions on the right to refuse, which may not have been its goal with draft article 5, but is something that is nonetheless important in terms of (a) the ILC's broader objective being to 'facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full

166 Recall from Chapter 3 that certain States – including Brazil, Chile, Ethiopia, India, Mexico, Nicaragua, Pakistan, Peru, and Sudan – indicated in UNGA discussions that State sovereignty and the principle of non-interference might preclude the recognition of a right to humanitarian assistance altogether. See Chapter 3, section 3.3.1, n 208 and text to n 208.

167 Giustiniani (n 10) 73 and n 137 in this chapter.

respect for their rights'[168] and (b) the fact that an arbitrary withholding under draft article 13 is recommended to be understood in the light of the other draft articles, which of course includes draft article 5.[169] Moreover, considering that the reason that human rights have not gained particular traction in effecting change in refusing State's decisions is because the recommendations are coming from the human rights committees and are not – as yet – existent in any primary obligations,[170] the opportunity for the ILC to propose a primary obligation that would contain such explicit language appears to have been missed.[171]

Finally, considering that the existence of a right to humanitarian assistance was an issue that – as Chapter 3 demonstrated – predates the ILC's work on the PPED topic,[172] it is disappointing that the ILC did not take a firmer and indeed clearer stance on the existence of such a right one way or the other.

5.3.2 Duty to co-operate under draft articles 7-8

Draft article 7 is straightforward in its reflection of a duty on the part of affected States to co-operate with various other actors.

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168 PPED draft articles, with commentaries (n 8) art 2.

169 ibid commentary to art 13, para 8.

170 Recall the committees' failures in respect of Pakistan and Venezuela, for example, which provided an opportunity for a valuable contribution to be made in the ILC's work (see section 5.1 above).

171 McDermott argues there has, in fact, been a dilution of the protection of human rights in draft article 5 throughout the drafting process, which may account for why such explicit language has not been included. Rónán McDermott, 'The Human Rights Approach of the International Law Commission in its Work on the Protection of Persons in the Event of Disasters' in Giustiniani and others (n 69).

172 See Chapter 3, section 3.3.2.

> Article 7
> Duty to cooperate
> In the application of the present draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors.

That an obligation in this regard is so clear is unsurprising given that the Special Rapporteur described co-operation as being 'indispensable for the protection of persons in the event of disasters.'[173] Early consideration of co-operation in the ILC's work[174] also evidences this importance.

In the commentary to draft article 7, the Special Rapporteur starts by identifying the principle of co-operation before examining the basis of a duty to co-operate under the UN Charter.[175] Just as Chapter 4 identified, articles 55 and 56 were particularly relevant in this regard, with the Special Rapporteur confirming that those articles provide for a 'general duty to cooperate'[176] alongside other agreements, such as the Friendly Relations Declaration[177] and UNGA Res 46/182.[178] The Special Rapporteur also noted the special relevance of co-operation to the protection of human rights, noting in particular the treaty bases for co-operation in the context of disasters in the ICESCR (requiring that States co-operate as a means of realising the rights contained therein)[179] and the CRPD (recalling that the CRPD is applicable 'in situations of risk, including situations of armed conflict, humanitarian emergencies and

173 PPED draft articles, with commentaries (n 8) commentary to art 7, para 1.
174 SR Second Report 2009 (n 129) paras 50-70.
175 PPED draft articles, with commentaries (n 8) commentary to art 7, para 1.
176 ibid.
177 Friendly Relations Declaration (n 108).
178 UNGA Res 46/182 (n 22).
179 ICESCR (n 148) arts 11, 15, 22, and 23.

the occurrence of natural disasters'[180]). These positions accord with the analysis of existing international law as detailed in Chapter 4.

Where the ILC makes the greatest contribution in respect of the application of the general duty to co-operate to the PPED context, however, is in respect of: (a) clarifying the relationship between obligations of co-operation and the primary responsibility of the affected State; (b) extending the requirement to co-operate to non-State assisting actors as well as assisting States; and (c) confirming the elaboration of typical forms of co-operation that might be required in any given disaster context. Certain aspects of these proposals differ from the view taken in Chapter 4, and as such demand further scrutiny.

In regards to the relationship between obligations of co-operation and the primary responsibility of the affected State, the ILC is clear that co-operation 'should not be interpreted as diminishing the primary role of the affected State'.[181] In that respect, the ILC stresses that co-operation, in fact, should be seen as 'complementary' to the duty of the affected State to safeguard its population.[182] This relationship reflects the balance between the rights and obligations of sovereignty that underlie the debates and divisions over the lawful parameters of the exercise of the right to refuse. To this author's knowledge, no States raised any issues over this articulation, and as such this is a welcome clarification that may well serve to develop progressively the law in desirable ways.

Attracting more comments from States was the ILC's position on co-operation with non-State assisting actors. Draft article 7 is clear in requiring that affected States

180 CRPD (n 160) art 11.
181 PPED draft articles, with commentaries (n 8) commentary to art 7, para 4.
182 ibid.

co-operate, 'as appropriate', 'with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors'. Two points are important here: one relates to the fact that the ILC's provision requires co-operation with actors other than States, which is not wholly supported by the legal bases for co-operation as identified in the ILC's work; and two relates to the use of the term 'as appropriate' to qualify that requirement.

It is significant that the ILC was explicit in requiring co-operation with assisting actors, and the practical importance of this provision is perhaps clear to see owing to the critical role that non-State assisting actors play in humanitarian assistance. The commentary to draft article 7 explains that express reference to the UN and Red Cross and Red Crescent Movement (RCRC) was made to recognise the 'central role' played by the UN and the 'important role' played by the RCRC.[183] '[O]ther assisting actors' was left intentionally broad by the ILC so as to reflect the 'all-of-society' approach that is required for effective disaster risk reduction.[184] It was recognised in Chapter 4 that the general duty to co-operate under article 56 of the UN Charter may well be read as providing a duty on the part of Member States to take co-operative action *with each other*, *on their own,* and *with the Organisation* in the achievement of the purposes set out in article 55.[185] This qualifies the requirement of co-operation with the UN, but it does

183 ibid commentary to art 7, paras 7 and 8.

184 The Sendai Framework for Disaster Risk Reduction 2015-2030, para 19(b): '[d]isaster risk reduction requires that responsibilities be shared by central Governments and relevant national authorities, sectors and stakeholders' and para 19(d): '[d]isaster risk reduction requires an all-of-society engagement and partnership'. The Sendai Framework was adopted at the Third UN World Conference on Disaster Risk Reduction in Sendai, Japan, on 18 March 2015, and was endorsed by the UNGA in UNGA Res 69/283 (23 June 2015) UN Doc A/RES/69/283 as continuance of the work of the Hyogo Framework for Action 2005-2015 (endorsed by the UNGA in UNGA Res 60/195 (2 March 2006) UN Doc A/RES/60/195 after the 2005 World Disaster Reduction Conference. UNISDR, 'Hyogo Declaration on Disaster Reduction' Preamble (22 January 2005) A/CONF.206/6 and Corr 1).

185 See Chapter 4, section 4.1.

not necessarily qualify the ILC's requirement that affected State's co-operate – as a matter of law – with the RCRC and with the broader category of 'other assisting actors'. Admittedly, there would certainly be overlaps in these actors in practice (with the 193 Member States of the UN constituting the vast majority of the recognised States), but the wording of the draft article seems to suggest organisational co-operation as opposed to inter-State co-operation, which, at the present time at least, may actually lack a sound legal basis in existing international law.[186] This is something that States questioned earlier on in the work as well as upon the adoption of the draft articles in 2016: indeed, States commented that a distinction needed to be made between the duty of States to co-operate with the UN – as per their obligations under the Charter – and the duty of States to co-operate with other organisations.[187] If the ILC has gone further in suggesting that co-operation with other assisting actors other than the UN should be required as a matter of law, then this may indeed reflect progressive development of the law in this area.

The inclusion of the term 'as appropriate', however, may qualify the requirement of co-operation such that it does, in fact, represent *lex lata*. In the commentary to draft article 7, the ILC notes that 'as appropriate' provides three important qualifications: firstly, it qualifies the draft article in so far as it allows for the recognition of 'existing specific rules that establish the nature of the obligation to cooperate among the various actors'; secondly, it indicates 'a degree of latitude in determining, on the ground, when cooperation is or is not "appropriate"'; and thirdly,

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186 This is a subject that confirms the need for the role of non-State actors to be drawn out more in disaster law. This point is returned to in Chapter 6, section 6.2.2.

187 State views have been anonymised. See ILC, 'Report of the ILC on the Work of its 61st Session' (4 May-5 June and 6 July-7 August 2009) UN Doc A/64/10, 334. See also ILC 68th Session Report 2016 Summary (n 95) para 109.

it qualifies 'the actors with whom the cooperation should take place.'[188] The ILC is explicit in stating that 'as appropriate' does not qualify 'the level of cooperation being envisaged.'[189] Comments on the draft articles, however, do not appear to demonstrate that these qualifications adequately clarify the scope of the requirement of co-operation as articulated in draft articles 7 and 8.[190]

Finally, and also reflecting the approach of Chapter 4, the ILC presents 'forms of cooperation' that might be required in draft article 8:

> Article 8
> Forms of cooperation in the response to disasters
> Cooperation in the response to disasters includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources.

Just as Chapter 4 concluded that no forms of co-operation are explicitly obligated in the general duty to co-operate but that other agreements could provide such obligations, the ILC also reflects the types of co-operation that might be required in draft article 8. The findings of the ILC accord with the conclusions drawn in Chapter 4 as to the types of co-operation that might be required.[191] Considering that the ILC

188 PPED draft articles, with commentaries (n 8) commentary to art 7, para 6.

189 ibid. Arguably, however, the ILC does actually qualify the level of co-operation being envisaged, because it offers forms of co-operation expected in the response to disasters in draft article 8. There, however, the ILC makes explicit the fact that it is not creating or suggesting any additional legal obligations in that regard. ibid commentary to art 8, para 1.

190 A number of States and organisations queried aspects of these draft articles on definitional grounds. See ILC, 'Protection of persons in the event of disasters. Comments and observations received from Governments and international organizations' (16 March 2016) UN Doc A/CN.4/696 (ILC Comments from Govts 2016), 29 ff.

191 See Chapter 4, section 4.2.2, noting that the agreements and practice outlined in section 4.2.2 are not absolutely conclusive as to the interpretation of obligations flowing from the duty to co-operate on humanitarian matters contained in the Charter, but that they are nonetheless instructive as to the types of co-operation that might be expected of States in relation to their performance of those obligations.

included draft article 8 'without creating any additional legal obligations',[192] it stands to reason that the value in draft article 8 should be seen in the '[illustration] of the principal areas in which cooperation may be appropriate'.[193]

Aside from the three contributions listed above, there is one final point of interest in the ILC's treatment of co-operation: the ILC explicitly links the duty to co-operate with the requirement of the consent of the affected State: 'Cooperation must … be undertaken in accordance with the requirement of consent of the affected State to external assistance (draft article 13).'[194] Here, it is apparent that the ILC is stressing that a requirement to co-operate would never give rise to a presumption of consent, or a situation in which consent was not required. This statement represents another occasion in which the ILC has given preference to a view of sovereignty that protects the right to refuse as opposed to restricting it.

Ultimately, then, the ILC for the most part provides a reflection of obligations of co-operation that are seen elsewhere in existing international law. Where the ILC might be said to have advanced the rules in this area is in respect of the requirement to co-operate with non-State assisting actors, and this is a matter that should be given more attention before the drafting of a new international convention.

5.3.3 The role of the affected State under draft articles 10-11

192 PPED draft articles, with commentaries (n 8) commentary to art 8, para 1.
193 ibid commentary to art 8, para 4.
194 ibid commentary to art 8, para 7.

The final aspect of the ILC's work that may provide for restrictions on the right to refuse is the ILC's enunciation of the role of the affected State, primarily in draft articles 10 and 11.

(a) The role of the affected State

Draft article 10 on the role of the affected State is relatively straightforward, and for the most part reflects existing international law. The draft article speaks both to the sovereign obligations of an affected State in relation to the protection of persons and to sovereign rights in so far as the primary role of the affected State is confirmed.

> Article 10
> Role of the affected State
> The affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control.
> The affected State has the primary role in the direction, control, coordination and supervision of such relief assistance.

Paragraph 1 is significant in so far as it confirms that the 'provision of disaster relief assistance' is closely connected to the 'protection of persons'. That the ILC has articulated a duty in this manner is particularly significant, not least because such specific wording as to what the duty entails (i.e. the provision of assistance) informs the content of that obligation. In the commentary to draft article 10, the ILC is clear that such a duty derives from the sovereignty of the affected State: 'Draft article 10 is premised on the core principle of sovereignty' and, critically, '[t]he duty held by an affected State to ensure the protection of persons and the provision of disaster relief assistance in its territory, as recognized in paragraph 1, stems from its sovereignty.' This is, perhaps, the clearest and most direct articulation of the provision of assistance being a derivative of State sovereignty (a view that was articulated here in Chapter 2[195]). In this regard, paragraph 1 serves both to confirm the customary basis of a State's obligation to protect persons in the context of PPED and to clarify that the provision of assistance is one such derivative of that obligation.

Two word choices in particular, however, add some useful content to that obligation. The first is the word 'ensure' in paragraph 1. That the sovereign obligations of the State in terms of the protection of persons are articulated specifically in relation to the 'provision of disaster relief assistance' is significant for present purposes owing to its specificity, as explained above, but also because the duty is phrased such that an affected State must 'ensure' assistance. The obligation to ensure such provision is open-ended enough that a State could ensure that provision using its own domestic resources, or it could ensure that provision by consenting to external assistance (recalling that the qualified consent regime provided for in draft article 13 must be read in the light of the other draft articles on PPED). Where a State refuses international assistance because it sees the provision of assistance as being something exclusive to itself, (particularly relevant where States refuse international assistance because of the desire to appear self-sufficient (as was the case with Eritrea and India,[196] for example)) then this wording could have a considerable impact on the ability of assisting actors to secure humanitarian access. That is not to say that this provision would justify a 'right of entry' in the absence of consent, but it would provide a legal ground upon which access to the affected population might be negotiated (where the negotiations would focus on the ability of the affected State to comply with its international obligations by granting consent to external assistance). Its potential seen in that light, this well-

195 See Chapter 2, section 2.1.
196 See Chapter 1, section 1.1.5.

balanced articulation would undoubtedly be welcome in a new convention drafted on the basis of the draft articles.

The second important word choice – 'primary role' (as opposed to 'primary responsibility') arises in paragraph 2. In many of the instruments and guidelines examined in Chapter 2, provisions were phrased such that the affected State's 'primary responsibility' in, *inter alia*, the provision of assistance was recognised. The SAARC agreement, for example, notes that '[e]ach affected Party shall have the primary responsibility to respond to disasters'[197] and similarly the Nuclear Assistance Convention provides that 'the overall direction, control, co-ordination and supervision of the assistance shall be the responsibility within its territory of the requesting State.'[198] Interestingly, the Food Assistance Convention adopts both terms (it notes the affected State's 'primary role and responsibility'[199]), which prompts further analysis into the differences intended between the two terms.

The commentary to paragraph 2 makes clear that the term 'role' was deemed 'more appropriate' than 'responsibility',[200] not least because the term 'responsibility' is used in 'other contexts' (presumably State responsibility) and thus there is a need to avoid confusion. More importantly, though, it appears that the word 'role' was adopted

197 SAARC Agreement on Rapid Response to Natural Disasters (11 November 2011) (*SAARC*) <http://saarc-sec.org/uploads/digital_library_document/28_Rapid_response_to_Natural_disasters.pdf> accessed 2 July 2018 (SAARC agreement) art III(1)-(2).

198 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (adopted 26 September 1986, entered into force 26 February 1987) 1457 UNTS 133 (Nuclear Assistance Convention) art 3(a).

199 Food Assistance Convention (adopted 25 April 2012, entered into force 1 January 2013) 2884 UNTS, art 2(b)(viii).

200 PPED draft articles, with commentaries (n 8) commentary to art 10, para 5.

to afford States greater flexibility in the coordination of disaster response activities.[201] The ILC confirmed that:

> Language implying an obligation upon States to direct or control disaster response activities may, conversely, be too restrictive for States that preferred to take a more limited role in disaster response coordination because, for example, they faced a situation of limited resources.[202]

In so far as the ILC was trying to ensure that there was greater flexibility in the performance of obligations, this is a welcome contribution. Indeed, it reflects not only the flexibility that is present in many of the agreements and guidelines examined in Chapter 2, but also in the flexibility that international courts have ascribed to States in times of disasters.[203] In so far as the important point about sovereign obligations of the affected State requiring that affected States have a duty to provide assistance is concerned, however, this flexibility may be seen – like some of the human rights provisions above – as diluting the view of sovereignty that focuses more on protection. In that regard, greater attention ought to be paid to word choice ('role' versus 'responsibility') to ensure that the position of the affected population is not weakened or minimised in any new international convention.

201 ibid commentary to art 10, para 6.

202 ibid.

203 The ECtHR for example, recognises that States have a margin of appreciation in determining the existence of a 'public emergency'. In the leading case of *A and others v the United Kingdom*, the Court stated that 'the national authorities are in principle better placed than the international judge to decide' on the existence of such an emergency. *A and others v the United Kingdom* App no 3455/05 (ECtHR, 19 February 2009) [173]. On the 'public emergency' jurisprudence, see Oren Gross and Fionnuala Ni Aolain, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights (2001) 23(3) HRQ 625; Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12(10) German Law Journal 1764.

Further content substantiating the affected State's primary role is given in: draft article 12 (on offers of assistance),[204] draft article 14 (on conditions on the provision of external assistance),[205] draft article 15 (on facilitation of external assistance),[206] draft article 16 (on the protection of relief personnel, equipment and goods),[207] and draft article 17 (on termination of assistance).[208] These articles would be relevant to refusal should any affected State seek to refuse assistance through, for example, failing to ensure the protection of relief personnel or terminating assistance early. The existence of these more practical provisions ensures that the PPED articles can be applied to a wider range of instances of refusal, which is welcome given the diversity of acts that might constitute refusal in any given situation.

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204 'Article 12: Offers of external assistance. 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.' PPED draft articles, with commentaries (n 8) art 12.

205 'Article 14: Conditions on the provision of external assistance. The affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law and the national law of the affected State. Conditions shall take into account the identified needs of the persons affected by disasters and the quality of the assistance. When formulating conditions, the affected State shall indicate the scope and type of assistance sought.' ibid art 14.

206 'Article 15: Facilitation of external assistance. 1. The affected State shall take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance, in particular regarding: (a) relief personnel, in fields such as privileges and immunities, visa and entry requirements, work permits, and freedom of movement; and (b) equipment and goods, in fields such as customs requirements and tariffs, taxation, transport, and the disposal thereof. 2. The affected State shall ensure that its relevant legislation and regulations are readily accessible, to facilitate compliance with national law. ibid art 15.

207 'Article 16: Protection of relief personnel, equipment and goods. The affected State shall take the appropriate measures to ensure the protection of relief personnel and of equipment and goods present in its territory, or in territory under its jurisdiction or control, for the purpose of providing external assistance.' ibid art 16.

208 'Article 17: Termination of external assistance. The affected State, the assisting State, the United Nations, or other assisting actor may terminate external assistance at any time. Any such State or actor intending to terminate shall provide appropriate notification. The affected State and, as appropriate, the assisting State, the United Nations, or other assisting actor shall consult with respect to the termination of external assistance and the modalities of termination.' ibid art 17.

(b) Responsibility of the affected State to seek assistance

Closely connected to the role of the affected State as articulated in draft article 10 is the duty of the affected State to seek external assistance. This draft article, too, places a restriction on the right of an affected State to refuse assistance by requiring that an affected State seek out such assistance in the event that its domestic capacities are exceeded. Ultimately, the draft article aims to affirm 'the obligation of the affected State to do its utmost to provide assistance to persons in a territory under its jurisdiction or control.'[209]

> Article 11
> Duty of the affected State to seek external assistance
> To the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors.

In his fourth report,[210] the Special Rapporteur considered, *inter alia*, the duties of an affected State when the magnitude or duration of a disaster exceeds the limits of that State's response capacity.[211] States had – through their comments – inspired this assessment by questioning the legal consequences of a State not being able to respond to the disaster itself.[212] Recognising that, in the event that a disaster exceeds the capacity of the affected State, the State still has (a) the sovereign right to be free from

209 ibid commentary to art 11, para 1.
210 SR Fourth Report 2011 (n 84).
211 ibid para 28.
212 Finland, for example, stated that 'if the affected State was unable to provide the goods and services required for the survival of the population, it must cooperate with other States or organizations willing and able to do so.' In other discussions, State views were anonymised. See UNGA Sixth Committee (63rd Session) 'Summary record of the 22nd meeting – Agenda item 75: Report of the ILC on the work of its sixtieth session (continued)' (20 November 2008) UN Doc A/C.6/63/SR.22, para 53.

interference and (b) the sovereign obligation to protect persons on its territories (including through the provision of disaster relief assistance, as required in draft article 10), draft article 11 again entails a balancing exercise.

One manifestation of this balance arises in the choice of the word 'seek', and another in the condition that a duty to seek assistance only arises in the event that 'a disaster manifestly exceeds [the affected State's] national response capacity'. Both of these aspects are critical to determining the extent to which draft article 11 realistically provides for a restriction on the right to refuse, and as such each aspect of the provision is considered in turn.

An overarching concern with draft article 11 is in the use of the word 'seek'. The ILC decided 'seek' more appropriate than 'request' because it considered

> that a "request" of [sic] assistance carries an implication that an affected State's consent is granted upon acceptance of that request by an assisting State or other assisting actor. In contrast, the Commission is of the view that a duty to "seek" assistance implies a broader, negotiated approach to the provision of international aid.[213]

It is interesting here that other international agreements use the word 'request', seemingly without such a concern over consent being presumed.[214] Arguably, given the strong protection of the requirement of consent in the wording of draft article 13, one would expect that the other draft articles would not need to address this concern. Regardless, it is questionable whether the word 'seek' is useful in this regard. Taking

213 PPED draft articles, with commentaries (n 8) commentary to art 11, para 6.

214 To this author's knowledge, no such concerns were raised in relation to, for example, article 4(5) of the Tampere Convention (n 7), which states: 'The requesting State Party shall retain the authority to reject all or part of any telecommunications assistance offered pursuant to this Convention in accordance with the requesting State Party's national law and policy.' nor in relation to the FCCDA (n 116) art 4(a)(2), which states: '[t]he Supporting State shall send only those Civil Defence Units requested or accepted by the Beneficiary State'.

the ordinary meaning of the term 'seek', if the affected State can discharge its obligations in respect of this duty by virtue of having attempted to find or asked for assistance, then the provision is very weak indeed. This provision does not compel the State to accept assistance (which would be going too far in any event), but it also does not indicate any post-request requirements such that anything more than 'seeking' assistance might be obligated. It might have been useful for draft article 11 to include provisions regarding the conditions (either *de novo* or linked to other draft articles[215]) under which a State could accept or reject offers of assistance made by assisting States when its national capacity was exceeded.

The inclusion of 'as appropriate' and the conditional 'if the disaster exceeds its national response capacity' also require scrutiny.

'As appropriate' is another clause included by the ILC to afford the affected State flexibility in seeking assistance; indeed, 'as appropriate' was adopted 'to emphasize the discretionary power of an affected State to choose from other States, the United Nations, and other potential assisting actors the assistance that is most appropriate to its specific needs.'[216] The ILC considers this to give effect to the primary role of the affected State. This provision could better safeguard against refusal by explicitly requiring that the determination of which assisting actor is most appropriate be carried out in good faith.

Finally, concerns can also be raised over the conditional aspect of draft article 11 – that the duty to seek assistance arises only when a disaster exceeds the national

215 This may be problematic, however, in consideration of the fact that these conditions would to a large extent be predicated on an elaboration of the scopes and contents of the duties of the affected State to co-operate and not arbitrarily withhold consent, an elaboration that has already been determined to be unclear in key respects. See section 5.2, 5.3.1, and 5.3.2 above.

216 PPED draft articles, with commentaries (n 8) commentary to art 11, para 8.

capacity of the affected State. An important question here is how this provision is to interact with the aforementioned recognition that States are the entities best placed to determine the existence of emergencies on their territory. If a State refuses to determine that an emergency has arisen (or 'disaster' in the provision), it is difficult to ascertain whether its response capacity has been exceeded, not least because a declaration of 'emergency' is so often a domestically entrenched pre-requisite of the engagement of response mechanisms.[217] There may be situations in which this is less of concern, (for example, in a catastrophic disaster that bypasses the requirement of a formal declaration of 'emergency' altogether) but the concern is of central importance for disasters that destroy only part of a territory. The commentary to draft article 11 requires that assessments are carried out in good faith,[218] but practically this may have little restrictive effect on a refusing State.

In the absence of clarifications on these important points in the article itself and in the commentary, draft article 11 appears relatively weak in its restrictive effect on a State's right to refuse. This weakness combined with the lack of hard law rules requiring an affected State to seek assistance may mean that such a provision, ultimately, is not (or not yet, in any case) suitable for inclusion in any new international convention.

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217 In Micronesia (islands that are prone to natural disasters), for example, the President is granted the power to request and coordinate international assistance under section 705 of the 1989 Disaster Relief Assistance Act where a formal declaration of a state of emergency has been made subject to section 703. If that declaration is not made, there is no formal 'emergency' and no means of triggering the duty to seek assistance. Disaster Relief Assistance Act 1989 (Federated States of Micronesia) (*Government of the Federated States of Micronesia*) <www.fsmlaw.org/fsm/code/title41/T41_Ch07.htm> accessed 26 September 2018. This is not the case with all States, however. In South Africa, 'the national executive is primarily responsible for the co-ordination and management of national disasters irrespective of whether a national state of disaster has been declared'. Disaster Management Act 2002 (South Africa) (*Government of the Republic of South Africa*) <www.cogta.gov.za/cgta_2016/wp-content/uploads/2016/06/disaster-management-act.pdf> accessed 26 September 2018, s 26 para 1.

218 PPED draft articles, with commentaries (n 8) commentary to art 11, para 7.

5.3.4 Summary of other relevant draft articles

Sections 5.3.1-5.3.3 indicate that there exists in the draft articles support for more general restrictions on the right to refuse. These restrictions overall, however, may be relatively weak compared to the central restriction that exists in the qualified consent regime provided for in draft article 13. Like human rights law and the law of co-operation in existing international law on refusal, however, their supporting role is nonetheless important in the broader consideration of the various rules on refusal and how they interact, a point of special relevance for a new international convention.

The analysis of rules here focused largely on their substance. The status of those rules, however, is also relevant to the broader question of the extent to which the draft articles on PPED provide for restrictions on the right to refuse.

5.4 Legal Status of the Draft Articles on PPED

As mentioned at the outset of this chapter, it is important to assess the status of ILC's provisions on PPED as draft articles. Not only does the following assessment confirm their existing legal status – which ultimately concretises their place in the existing international regulation of disasters – but it also serves to confirm what role the draft articles will play if, ultimately, no new international convention results from the ILC's work on PPED.

In 1947, the UNGA established the ILC with the object of 'the progressive development of international law and its codification',[219] making the ILC one of the main ways in which the UNGA discharged its mandate to 'initiate studies and make recommendations for the purpose of encouraging the progressive development of the law and its codification'.[220] That the ILC has been charged with such a mandate means that it is a 'special case'[221] when it comes to the role of the ILC – as a non-State actor[222] – in the making of international law. That special nature demands a brief examination of the core terms defining the scope of that role.

Article 15 of the ILC Statute[223] is instructive in this respect, setting out the meanings of progressive development and codification respectively. Under article 15, progressive development means 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States' and codification means 'the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.'[224]

219 Statute of the International Law Commission, UNGA Res 174(II) (21 November 1947) UN Doc A/RES/174(II), as amended by Res 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981 (ILC Statute) art 1(1). On the ILC generally, see Ian M Sinclair, *The International Law Commission* (Grotius, Cambridge, 1987); UN, *The International Law Commission Fifty Years After: An Evaluation* (UN 2000). See also Arnold Pronto and Michael Wood, *The International Law Commission, 1999-2009* (OUP 2010) on the work of the ILC against the backdrop of 'difficulties arising from the diversification and expansion of international law', which was raised as a hallmark of the international law on disasters in Chapter 1.

220 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 13(1)(a).

221 Hugh Thirlway, *The Sources of International Law* (OUP 2014) 18.

222 For more on the role of non-State actors in the making of international law, see José E Alvarez, *International Organizations as Law-makers* (OUP 2005); Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 46 ff; Jean d'Aspremont, 'International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?' in Math Noortmann and Cedric Ryngaert (eds) *Non-State Actor Dynamics in International Law – From Law-Takers to Lawmakers* (Ashgate 2010).

223 ILC Statute (n 219).

224 ibid art 15.

The clean-cut divisions in progressive development and codification outlined in the ILC Statute have not, however, manifested so neatly in practice, with the ILC actually having recommended the abolition of the distinction on the basis, *inter alia*, that such a distinction is rarely – if ever – made clear in the work on any given topic.[225] For Briggs, remarking upon the issue in 1970, the practical import of the distinction between progressive development and codification is negligible:

> the distinction … [is] unsuitable for practical application. In preparing its drafts the Commission has consistently declined to identify or label the individual articles as representing 'codification' or 'development' of the law.[226]

Giustiniani and Heath, however, are convinced that the ILC knew that it was embarking upon a project of progressive development from the outset of the work on PPED. Giustiniani claims the ILC was 'well aware … that it would embark on an exercise *de lege ferenda*'[227] and Heath summarised:

> Many aspects of disaster response are subject to disparate practice by states, and therefore any efforts to establish clear rules in this area will require a drafter to engage in progressive development of the law, rather than strict codification of existing custom.[228]

In this regard, the ILC's work on PPED should be contrasted with that on State responsibility. In that latter project, it was widely (although not uniformly) regarded

225 ILC, 'Report of the ILC on the Work of its 48th Session' (6 May to 26 July 1996) UN Doc A/51/10, paras 147(a) and 156-9.

226 Herbert W Briggs, 'Reflections on the codification of international law by the International Law Commission and by other agencies' (1969) 126 Recueil des Cours de l'Académie de Droit International 241, 242.

227 Giustiniani (n 10) 67.

228 Heath (n 3) 424.

that the ILC was embarking primarily upon an exercise of codification of existing customary rules of responsibility.[229] This was not the case with PPED.

On account of there being considerable potential for progressive development in the ILC's work on PPED, a safe position would be a more conservative view on the role of the draft articles in international law making. Until the draft articles acquire a treaty basis, the draft articles can only be seen as an authoritative statement of the rules, something that, ultimately, is not derived from the legal mandate of the ILC (as reflected in its Statute) but rather 'the authority of the Commission'[230] itself.

Article 18 may also hint at the status of the draft articles, even though its concern is the relationship of the draft articles to other rules of international law. The inclusion of article 18 may well have been for the sake of completeness (considering that the inclusion of a relationship clause is common in treaties), but it may also be read as an implicit acknowledgement that the ILC articles contain rules or may in fact be capable of containing rules:

> Article 18
> Relationship to other rules of international law
> 1. The present draft articles are without prejudice to other applicable rules of international law.
> 2. The present draft articles do not apply to the extent that the response to a disaster is governed by the rules of international humanitarian law.

229 This is evident not least in the ILC selecting the topic of State responsibility as being 'suitable for codification' in 1949, recalling that 'codification' entails 'the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.' The UNGA considered 'that it is desirable for the maintenance and development of peaceful relations between States that the principles of international law governing State responsibility be codified.' See ILC Statute (n 219) art 15; UNGA Res 799 (VIII) (7 December 1953) UN Doc A/RES/799(VIII).

230 Thirlway (n 221) 19.

The ILC confirms that the reference to 'other rules' 'aims at safeguarding the continued application of existing obligations regarding matters covered by the present draft articles.'[231] In that regard, the ILC provisions are not to be seen as having a modifying effect on the existing rules as outlined in Chapters 2-4, but in time – whether with crystallisation of customary law in the area or with the draft articles acquiring a treaty basis in a new international convention – any areas identified as representing *lex ferenda* (either in the analysis here or in comments by States, as indicated throughout) may in fact end up advancing or modifying the existing rules presented here.

As mentioned earlier, it is important to restate the legal status of the draft articles here in case a new international convention does not, ultimately, result. If that is the case, the draft articles may take on another form – such as guiding principles – but, in any case, may remain non-binding in a strict legal sense. This accords with State views of the articles as they currently stand. In comments on the draft articles, the Netherlands, for example, stated that:

> The Netherlands wishes to underscore that the draft articles can be seen as an authoritative reflection of contemporary international law or as an attempt to progressively develop the law. However, it should be clear that the draft articles themselves are not legally binding.[232]

Methodologically speaking, if a new convention does not result, then a few options remain. As Gaja confirms, these options include a request for revision or redrafting from the UNGA (made possible by article 23(2) of the ILC Statute[233]) or the articles

231 PPED draft articles, with commentaries (n 8) commentary to art 18, para 2.

232 See ILC Comments from Govts 2016 (n 190) 61.

233 'Whenever it deems it desirable, the General Assembly may refer drafts back to the Commission for reconsideration or redrafting.' ILC Statute (n 219) art 23(2).

may be subject to interpretation along the lines of a resolution of the UNGA (with certain provisos).[234]

Special consideration must be given to the commentary to the draft articles in this regard, upon which there has been heavy reliance in this chapter (on account not least that the commentaries 'are adopted precisely in order to contribute to the interpretation of the articles'[235]). If drafted into a treaty, the commentary may be used as *travaux preparatoire* in the interpretation of the provisions, but if a treaty does not result, what then is the proper role to be played by the commentary? Gaja again is instructive in this respect, noting that:

> While commentaries are generally helpful in the interpretation of ILC articles, they are not meant to introduce additional rules which have no basis in the article they refer to, nor should they endorse a meaning that is incompatible with the text of the articles.[236]

Instead, Pronto and Wood note that the commentaries are useful for discovering minority views on the articles (although in that regard reports of the ILC and of the Special Rapporteur may be more instructive, as the commentaries to draft articles adopted on second reading do not contain minority views).[237]

234 Giorgio Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2015) 85(1) BYIL 10, 17.

235 Gaja (n 234) 19.

236 ibid.

237 Arnold Pronto and Michael Wood (eds), *The International Law Commission 1999-2009: Vol IV* (OUP 2010) 8. cf Gaja (n 234) 19.

5.5 Interim Conclusion

The ILC was ambitious in undertaking to 'facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights'[238] with its work on the PPED topic.

This chapter has demonstrated that the ILC's main contribution to the issue of refusal was the qualified consent regime as provided for by draft article 13. As section 5.2.4 summarised, the qualified consent regime exists in three parts: first, it provides that the consent of the affected State is required for the provision of external assistance; second, it provides that the affected State may not withhold its consent arbitrarily; and third, it provides that the affected State must comply with certain procedural requirements in relation to the granting or withholding of its consent. For the most part, this regime reflects existing international law, but it expands upon it in one key respect: the proposal of a standard of arbitrariness to determine the lawfulness of a State's refusal. This is a welcome contribution in so far as – substantively at least – it provides a mode of assessment for cases of refusal that is presently lacking in existing international law.

Where more attention is required, however, is in respect of precisely what 'arbitrary' means for the purposes of withholding of consent to peacetime relief. In the context of IHL, this standard benefits from extensive attention from scholars like Akande and Gillard,[239] but absent that attention the ILC has resorted to principles of international law that ordinarily apply in other contexts. Whilst Sivakumaran[240] has

238 PPED draft articles, with commentaries (n 8) art 2.
239 Akande and Gillard (n 102).
240 Sivakumaran (n 94).

suggested – perhaps rightly so – that the term 'arbitrary' is better understood in the context of the ILC's work as 'unjustified', it remains the case that the draft articles themselves (and their commentaries) lack adequate elaboration of the meaning of this critical term.

This vagueness, unfortunately, appears in relation to key aspects of other draft articles that play a more supporting role in the ILC's restrictions on the right to refuse. It is unclear, for example, what the duty to 'seek' assistance would actually require of States in a practical sense, and it is concerning too that such an obligation appears to be triggered by determinations that the State has the authority to make itself. This could represent a considerable imbalance of power in the favour of refusing States should a situation arise in which the affected State actively seeks to discourage international assistance.

Ultimately, it appears that the promise of the centrality of the affected population has been lost in the draft articles, which in turn means that in terms of restrictions on the right to refuse, the balance is tipped in favour of a view of sovereignty that protects the right to refuse more than it restricts it. Indeed, as Giustiniani has remarked, there has been a 'practical denial of the premised centrality of the individual' and

> the tensions between the protection of the affected persons' rights and the respect for State sovereignty and the principle of non-intervention in internal affairs – constantly evoked during the plenary debates of the ILC and by States in the Sixth Committee – have in fact been solved to the detriment of the former's rights.[241]

241 Giustiniani (n 10) 83.

That this is so has considerable implications for the future of refusal. These implications, along with the potential of a new international convention and the future of normative development on this topic, are considered in Chapter 6.

CHAPTER 6

THE FUTURE OF REFUSAL IN INTERNATIONAL LAW

6.0 Introduction

When Cyclone Nargis devastated the Irrawaddy Delta and surrounding areas in May 2008, the international community looked on as hundreds of thousands of people suffered and perished on the ground as debates as to the nature of sovereign rights and obligations raged at the international level. Views were divided as to whether sovereignty demanded respect for Myanmar's refusal of international assistance, or whether it demanded that Myanmar accept international assistance to meet the population's widespread and growing humanitarian needs. States, it seemed, were at a stalemate. Among the Permanent Members of the UNSC, France, the UK, and the US argued for UNSC consideration of coercive measures to compel Myanmar to accept assistance, whilst China and Russia sided with the refusing State, claiming that any such action would violate the principle of non-intervention. The development of international legal rules to address these very situations was already ongoing in 2008, but Cyclone Nargis certainly played an important role in confirming that more needed to be done to resolve these persistent debates, and that more needed to be done swiftly.

A detailed overview of what followed in terms of the development of rules on refusal can be found in Chapter 5,[1] but certain key points can be restated here. The legal confusion that resulted from the events in Myanmar demanded a renewed commitment from States to improve the international legal regulation of disasters that, until the 1990s at least, had failed miserably to gain traction. Whilst the 1927 IRU Convention[2] and the 1984 Draft Convention[3] were important efforts in so far as they provided a foundation upon which the future development of rules could be based, their respective failures indicated to States that to achieve success in concluding comprehensive disaster agreements, rules would have to be developed at the regional or bilateral level, or in respect of narrower subjects, such as particular types of disasters or types of assistance.[4] As Chapter 2 demonstrated, States certainly proceeded to develop rules along these lines, and what resulted is a 'framework' (again if one can even call it that[5]) of multilateral and bilateral binding agreements that address collectively a range of disaster-related subjects. Where consensus on key points was unable to be reached in these agreements, non-binding guidelines (primarily developed by international organisations) have come to plug the gaps. Whilst the increase in such agreements is encouraging in so far as it demonstrates that States are willing to legislate on these issues, the relatively low levels of participation in these treaties combined with their limited *ratione materiae* and geographical reach means, however, that for the most

1 See Chapter 5, section 5.1.

2 Convention Establishing an International Relief Union (adopted 12 July 1927, entered into force 27 December 1932) 35 LNTS 249 (IRU Convention).

3 UNDRO, 'Report of the Secretary-General to the United Nations General Assembly and Economic and Social Council' (18 June 1984) UN Doc A/39/267/Add.2; E/1984/96/Add.2, Proposed draft Convention on expediting the delivery of emergency relief (Draft Convention).

4 See generally Chapter 2.

5 Sivakumaran's 'hodgepodge of instruments' may be a more accurate description. Sandesh Sivakumaran, 'Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief' (2017) 28(4) EJIL 1097, 1097.

part the practical impact of these agreements is limited. This is especially concerning in the present context because the only binding instrument containing explicit rules on refusal has thus far only managed to attract 49 ratifications – a disappointing number considering that other international agreements that pertain to the protection of human welfare have managed to attract a considerably higher number.[6]

On account, in part, of the difficulties in concluding comprehensive disaster agreements, human rights courts and treaty bodies have come to recognise the need to interpret State obligations to protect human rights in the context of disasters. That this has been so is also encouraging, especially given that the relevant primary obligations largely lack any explicit reference to times of disaster or to particular human rights obligations applicable therein.[7] As it stands, there have been important elaborations of the contents of two key human rights in the disaster context – the right to life and the right to an adequate standard of living – by the human rights courts and treaty bodies, but owing not least to some political concerns and difficulties in human rights enforcement, it is yet to be put to States explicitly that refusing international assistance may in fact represent a violation of their human rights obligations. The groundwork is certainly underway, and the fact that progress in this respect has been made is undoubtedly significant. But as Chapter 3 identified, there remains a long way to go before those obligations in and of themselves might restrict effectively the right to refuse.

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6 The United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107, for example, which protects human welfare through commitments on climate change, has 197 parties. Similarly, the Constitution of the World Health Organization (adopted 22 July 1946, entered into force 7 April 1948) 14 UNTS 185 has 193 parties.

7 Chapter 3 concerned relevant human rights obligations and the manners in which certain courts and human rights treaty bodies (particularly the CCPR and the CESCR) have interpreted those obligations in the disaster context.

In the same manner that human rights obligations were turned to as a means of securing PPED, so was the duty to co-operate. Not only has the general duty to co-operate in solving of problems of a humanitarian character under the UN Charter been put forward as a more general restriction on an affected State's right to refuse, but elaborations of the types of co-operation that might be expected of an affected State in the disaster context have been forthcoming. Such co-operative obligations appear in a number of the agreements examined in Chapter 2, but – as Chapter 4 demonstrated – indications as to the types of co-operation expected are also able to be deduced from some subsequent practice (in the strict sense of article 31(3)(b) of the VCLT[8] and the 'broad sense' indicated by Nolte[9]).

The result of these concurrent efforts in law-making on disasters – and on refusal as a narrower concern – are undoubtedly welcomed in so far as they have seen international law trend towards a position where it restricts (for the most part) the *exercise* of the right to refuse in a manner that better serves humanitarian interests. Yet, unfortunately, the gaps and vagueness in these existing 'groups' of rules have left what the IFRC described as a 'yawning gap' in the overall international legal regulation of disasters.[10] This is a gap into which the ILC stepped in 2007 when it adopted into its long-term programme of work the topic of PPED.

8 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(3)(b).

9 ILC, 'First report on subsequent agreements and subsequent practice in relation to treaty interpretation, by Georg Nolte, Special Rapporteur' (19 March 2013) UN Doc A/CN.4/660, 34.

10 Eduardo Valencia-Ospina, 'The ILC Work on the Protection of Persons in the Event of Disasters' (*SHARES Research Project on Shared Responsibility in International Law*, 4 December 2013) <www.sharesproject.nl/the-ilc-work-on-the-protection-of-persons-in- the-event-of-disasters/> accessed 26 September 2018.

As Chapter 5 confirmed, the ILC's objective to 'facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights'[11] was certainly an ambitious one. The recurrent difficulties in securing humanitarian access through existing international law, however, confirmed that such an ambitious effort was warranted. In terms of the development of rules on refusal, the ILC has made a significant and opportune contribution, despite the fact that addressing refusal was not its sole – nor indeed its primary – concern. In providing for a qualified consent regime in draft article 13, the ILC has introduced a potential means of assessing the lawfulness of situations of refusal – something that has been lacking in international law thus far and something that has, as a result, led to considerable problems for humanitarian practitioners as well as for States involved in humanitarian relief more broadly.

The fact that other draft articles also serve to restrict the right to refuse is also a welcome development in so far as a State's refusal will rarely manifest through a clear communication of its decision to refuse, but instead through a series of complex actions and inactions that – collectively – indicate that a State is unwilling to accept international assistance.[12] *Prima facie*, then, the ILC has – through draft article 13 and its supporting articles – provided a solution to the problem of refusal. Upon detailed examination of the exact wording of the articles and their commentary, however, it is apparent that concerns remain, which ultimately precludes this solution from being a workable one (at the present time, at least). This conclusion, combined with certain

11 ILC, 'Report of the International Law Commission on the Work of its 68th session' (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10, 17-73 (PPED draft articles, with commentaries) art 2.

12 This was the case in Pakistan in 2015, for example, when Pakistan's refusal was not explicit, but evidence nonetheless suggested that the State was unwilling to accept assistance. See Chapter 3, section 3.1.3.

other considerations, invites a closer assessment of the potential *for* and *of* a new international convention that may – as mentioned throughout this thesis – be drafted on the basis of the draft articles. This potential, along with areas that would benefit from further research, are examined respectively in sections 6.1 and 6.2 that follow.

6.1 A New International Convention and its Potential

In considering the 'potential' of a new international convention, two analyses are invited. The first relates to the potential *for* conclusion of a new international convention on the basis of the ILC's work on PPED, and the second relates to the potential *of* a new international convention to improve the existing regulation of refusal considering the present state of the rules to be contained therein. Each of these analyses is presented in turn.

6.1.1 The potential *for* a new international convention

In respect of the potential for a new international convention, it has already been identified in Chapter 5 that the ILC Statute provides for a convention to be concluded on the basis of the draft articles (which in any case are written as a draft treaty[13] save for the final provisions).[14] It has already been identified, too, that the Special

13 Giorgio Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2015) 85(1) BYIL 10, 18.
14 See Chapter 5, section 5.4.

Rapporteur was anticipating such a new convention as the work's outcome.[15] Indeed, the UNGA has even gone as far as to invite comments from States on the elaboration of a convention on the basis of the draft articles.[16]

In theory, then, there is undoubtedly potential for a convention to emerge as the outcome of the ILC's work. In practice, however, States have voiced concerns over the suitability of a convention as the ultimate form of the work. Recall from Chapter 1[17] that

> while some States agree that an international convention[18] or framework convention to inspire further bilateral or multilateral instruments[19] is the appropriate outcome, others have recommended that the draft articles be adopted as non-binding guidelines,[20] and others still have recommended a guide to practice[21] or a set of recommendations.[22]

In coming from the very actors who will take a lead role in the negotiation, conclusion, and implementation of such a new convention, these comments are significant.[23] Indeed, they may actually suggest that a new international convention is not as likely to result as the ILC and UNGA statements would suggest.

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15 ILC, 'Report by Special Rapporteur Eduardo Valencia-Ospina 2016/697' (2016) UN Doc A/CN.4/697, para 411.

16 UNGA Res 71/141 (13 December 2016) UN Doc A/RES/71/141, para 2.

17 See Chapter 1, section 1.1.3.

18 For example, Mexico, UN Doc A/C.6/67/SR.19, para 20.

19 For example, Poland, UN Doc A/C.6/64/SR.21, para 78.

20 For example: UK, UN Doc A/C.6/64/SR.29, para 40; UN Doc A/C.6/65/SR.24, para 64; UN Doc A/C.6/66/SR.23, para 45; and UN Doc A/C.6/69/SR.19, para 166; Czech Republic, UN Doc A/C.6/64/SR.20, para 43; India, UN Doc A/C.6/69/SR.21, para 70; Russian Federation, UN Doc A/C.6/66/SR.24, para 37; UN Doc A/C.6/68/SR.25, para 37, and UN Doc A/C.6/69/SR.19, para 96; Slovenia, UN Doc A/C.6/67/SR.18, para 129.

21 For example, Russian Federation, UN Doc A/C.6/65/SR.23, para 58.

22 For example, Germany, UN Doc A/C.6/68/SR.24, para 60.

23 It is to be expected, of course, that States will play a leading role in the content of any agreement, but the drafting of that agreement may be initiated or facilitated by a high-profile institutional sponsor, such as the IFRC. See section 6.1.2 below.

That being said, in considering the range of options open to States (some of which are considered further in section 6.1.2 below), it might be the case that particular features of treaties as a form of regulation would, ultimately, persuade States to conclude a treaty, even if throughout the ILC's work States had evidenced hesitation to do so. Treaties have, after all, proven a highly effective form of regulation for hundreds of years.[24] But it is not just in the mere fact of *being contained in a treaty* that obligations might be given a stronger legal footing; treaty-based obligations may also be advanced through various mechanisms for compliance and implementation that often accompany treaties.

Human rights treaties serve as a good example in this regard. Chapter 3 has already identified that many human rights treaties have corresponding compliance and implementation mechanisms in the form of the human rights treaty bodies.[25] As was mentioned, some of these treaty bodies have particular features or powers that enhance their ability to encourage compliance and implementation, such as individual complaints mechanisms that – in certain circumstances – enable the relevant committees to require remedial action on the part of States.[26] Whilst there may well be practical barriers to the filing of individual complaints owed not least to the disastrous situation, the fact that such a process could exist for affected populations is encouraging nonetheless. It may even be the case that NGOs are able to assist in overcoming some of these practical issues, and in that regard it is beneficial that treaty

24 It is often said that the modern system of treaties can be traced to the 1648 Treaties of Westphalia. In that regard, the shift in international relations to one dictated by the free consent of States gave rise to the treaty as an instrument for the communication of that consent. On the evolution of the 'Westphalian system', see Rainer Grote, 'Westphalian System' (June 2006) MPEPIL.

25 See in particular Chapter 3, section 3.1.3 and 3.2.3.

26 That remedies may extend to rehabilitative relief, satisfactory measures, and injunctive relief as well as economic compensation and restoration of the infringed right is significant in so far as the potential for remedies to adequately address the harm is concerned.

bodies have historically ensured an important participatory role for NGOs. With such a role, NGOs may serve not only to facilitate the filing of individual complaints with the treaty bodies, but also to ensure that the treaty bodies have sufficient information to make decisions in this regard (bearing in mind that NGOs are often on the ground before States and that they are usually well placed to conduct needs assessments).

Finally, it is also worth noting that such a treaty body (either provided for in the convention itself or an optional protocol, as was the approach taken with the ICCPR and ICESCR,[27] for example) would also serve to (help to) answer the recurring question of 'Who decides?', which is an underlying practical concern when it comes to the implementation of disaster law[28] just as it is with the implementation of many other areas of international law. That questions over the lawfulness of a State's refusal must take a position on the capacity of the State to meet the needs of the affected population (recall that a State that can provide the requisite goods and services itself will not be

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27 Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. Current parties: 116. Optional Protocol to the International Covenant on Economic Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc A/63/435. Current parties: 23.

28 It may be the case that the IFRC would be suited to the task of determining questions such as 'What constitutes a refusal?' and 'Has the affected State provided adequate assistance itself (such that international assistance would not be needed)?' in any given case. If the IFRC serves such a role, the parameters for such may be able to be modelled on that of the ICRC when it comes to assessments of humanitarian need in armed conflicts. Indeed, the ICRC is understood to have a broad right of initiative in international and non-international armed conflicts. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forced in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, arts 3(2) and 9; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, arts 3(2) and 9; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, arts 3(2) and 9; Geneva Convention Relative to the Protection of Civilian Persons in Times of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, arts 3(2) and 10; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I) art 81. See also François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (ICRC 2003) 1161 ff.

seen as refusing international assistance unlawfully[29]) highlights the necessity of having an entity that is placed to make such a determination. As Chapter 5 warned, allowing affected States themselves to be the ones that make that determination is problematic.[30] Having a treaty body that is able to deploy assessment teams (somewhat akin to the existing Special Procedures mechanism in the UNHRC[31]) or otherwise give greater weight to the assessment missions of NGOs would certainly be of significant practical benefit in this regard.

Demonstrably, then, there are considerable practical benefits entailed by a treaty, and assuming the requisite levels of State consent, these arrangements may well provide the international community with more effective means of addressing refusal. Considering the frustrations that have been experienced on the ground before, States may, ultimately, be persuaded by these possibilities. At the present time, however, it remains the case that States are not wholly convinced that a treaty is the way forward. This confirms the importance of other eventual outcomes and methodologies, as explored in the penultimate section of Chapter 5.

29 Chapter 1, section 1.1.5(b).

30 See Chapter 5, section 5.3.3.

31 The special procedures system forms part of the broader UN human rights machinery. Special Rapporteurs report and advise on human rights under various thematic and country mandates (of which there are presently 44 and 12 respectively). It may well be possible for a disaster treaty body to have comparable independent experts that report on disaster situations, including refusal. On the special procedures system in general, see Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (Intersentia 2005); Bertrand G Ramcharan, *The Protection Roles of the UN Human Rights Special Procedures* (Martinus Nijhoff 2009); Aoife Nolan, Rosa Freedman, and Thérèse Murphy (eds), *The United Nations Special Procedures System* (Brill 2017).

6.1.2 The potential *of* a new international convention

The second form of 'potential' relevant here is that which relates to the potential of a new international convention based on the PPED draft articles to improve the existing regulation of refusal considering the present state of the rules to be contained therein. In this regard, there are three parts to the analysis, concerning: (a) the nature of the legal rules entailed by a convention; (b) the adequacy of the existing rules informing the convention rules; and (c) the suitability of the rules – once deemed adequate – for inclusion in a convention in the first place.

(a) The nature of the legal rules entailed by a convention

Having explicit language on refusal in a new international convention of general application to disasters would be a highly desirable addition to or modification of existing rules.

In the first instance, if explicit rules were drafted into a convention of more general application, it would considerably broaden the direct regulation of refusal, which in terms of explicit rules in hard law agreements presently only exists in the Tampere Convention (a treaty of limited application to telecommunications assistance).[32]

32 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (adopted 18 June 1998, entered into force 8 January 2005) 2296 UNTS 5 (Tampere Convention) art 4(5).

Secondly, such explicit hard law rules would give effect to provisions in the GPID[33] and the Bruges Resolution,[34] which were relied upon extensively in the work of the ILC on PPED. A firmer grounding in law in this regard would serve to elevate those presently non-binding principles into a form (hard law) that would ensure their wider and more impactful application, both in terms of encouraging compliant behaviour from the outset of a disaster as well as responding to instances of allegedly unlawful refusal throughout.

Thirdly, where the human rights aspects of those explicit rules are concerned, the existence of the rules in a convention would serve to ensure that the disaster-related aspects of human rights were given a basis in primary obligations. This in and of itself is critical to ensuring that disaster law 'takes at its very heart the people affected by disasters.'[35] Recall from Chapter 3 that there were difficulties in ensuring the protection of human rights in the disaster context not least because disaster-related aspects of those human rights were not explicit in the relevant primary obligations, but instead in largely non-binding interpretations thereof (recall that there were only very limited examples of binding interpretations in the ECtHR).[36] In having the human rights aspects of disaster response entrenched in primary obligations, the relevant courts and human rights bodies would have a stronger legal basis to recommend to affected States

33 UN Commission on Human Rights, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add (GPID).

34 Institute of International Law, 'Resolution on Humanitarian Assistance' Bruges Session (2 September 2003) (Bruges Resolution).

35 Marie Aronsson-Storrier and Karen da Costa, 'Regulating disasters? The role of international law in disaster prevention and management' (2017) 26(5) Disaster Prevention and Management 502, 503.

36 See Chapter 3, section 3.4.

that the acceptance of international assistance may be a means of ensuring compliance with human rights obligations.

Fourthly, explicit rules involving co-operation could cement the relevance and applicability of the law of co-operation to the disaster context. This is certainly something that would be desirable, and something that States have already begun to do by including relevant obligations of co-operation in certain binding agreements (as identified in Chapter 2).[37] In this regard, while a convention would not necessarily change the co-operative obligations of States, it would certainly cement the importance of the law of co-operation in the disaster context.

Critical to enjoying the benefits of this form of regulation, however, is the adequacy of the underlying rules in the PPED draft articles that are to serve as the inspiration for such a convention.

(b) The adequacy of the existing rules informing the convention rules

If the PPED draft articles are to serve as inspiration for a new international convention, it stands to reason that those rules should be adequate (in the sense of being free from substantive weaknesses) in so far as their treatment of refusal is concerned. In this regard, four weaknesses of the PPED draft articles – as identified in Chapter 5 – are particularly relevant and merit brief repetition here.

Firstly, it is imperative that the term 'arbitrary' is substantiated further before it is transposed into a new international convention. As it stands, several States have

37 See Chapter 2, section 2.4, 2.4.1, and 2.4.2.

voiced concerns over what arbitrariness means in the refusal context,[38] and in the absence of further attention to this matter, this issue is bound only to arise again in the diplomatic negotiation of such a convention. If this issue is not resolved, one could reasonably expect delays in the drafting process, which, ultimately, may lead to States losing interest in the convention and abandoning the project, as has happened before in relation to the 1984 Draft Convention, for example.[39] Whilst the elaborations by the ILC are undoubtedly useful in this respect, it stands to reason that should the term 'arbitrary' play its proposed central role in the qualified consent regime, as reflected in draft article 13(b),[40] then a more detailed explanation of what an 'arbitrary refusal' actually entails is necessary (and, of course, a meaningful degree of State consensus on such a meaning[41] would have to be secured).

Secondly, it is crucial that any references to the human rights obligations of affected States are substantiated in a new international convention, or at the very least in its commentary. The critical aspects to be substantiated in this regard were detailed in Chapter 5.[42] That the ILC has fallen short in its ultimate elaboration of key aspects of relevant human rights means that the ILC draft articles – as they stand, at least – do

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38 Recall from Chapter 5, section 5.2.2 that certain States considered that 'it was not clear how arbitrariness could be ascertained.' ILC, 'Report of the ILC on the work of its sixty-eighth session (2016): Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-first sessions, prepared by the Secretariat' UN Doc A/CN.4/703, para 113.

39 See Chapter 1, section 1.1.2(b).

40 Draft article 13(b) states that: 'Consent to external assistance shall not be withheld arbitrarily.' PPED draft articles, with commentaries (n 11) art 13(b).

41 It is perhaps unrealistic to expect States to agree fully on the meaning of a term like 'arbitrary', but such consensus need not be absolute for the term to have useful meaning in this context. Indeed, disaster situations require flexible responses, so it may actually be a benefit that such a term has a degree of flexibility in its definition. Such flexibility, however, is impractical without meaningful consensus on the core of the definition, and as such this chapter's submission that the term should be further substantiated should be seen as an important precursory or antecedent development in the legal use of the term 'arbitrary'.

42 See Chapter 5, section 5.3.1.

not provide sufficient content to those obligations to serve as inspiration for new treaty-based rules. Indeed, a new convention absent more detailed elaboration of relevant human rights obligations would fall foul of the general trend toward the 'humanisation'[43] of international disaster relief that been initiated through, for example, the UN's Human Rights up Front[44] (HRuF) policy and the IFRC's increasing tendency to promote human rights in its disaster studies and advocacy work.[45]

Thirdly, it is crucial, too, that obligations of co-operation as relevant to the disaster context are elaborated such that their substantive requirements are clear. At the present time, it is clear that an affected State has a duty to co-operate in the disaster context, but as Chapter 5 identified – it is unclear precisely with whom that State

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43 That there have been efforts to incorporate more extensively human rights in disaster relief operations is not, of course, to say that human welfare has not been an historic motivation of assisting actors. Rather, it acknowledges the widespread support for the condemnation of humanitarian activities where the motivations of donors were not strictly humanitarian. One example is where States have been criticised for contributing official development assistance (ODA) for the purposes of improving their standings in the Organisation for Economic Co-operation and Development (OECD) Development Assistance Committee (DAC) tables, which, in consideration of the fact that many States sent money without a close degree of scrutiny as to where the money was spent, shows greater concern for the political standing of the State than it does for the beneficiaries of such assistance. For an overview of ODA problems, see Gilles Carbonnier, 'Official development assistance under fire from critics' (Katherine Mann Jackson tr) (2010) 1 International Development Policy 137; William Hynes and Simon Scott, 'The Evolution of Official Development Assistance: Achievements, Criticisms and a Way Forward' (2013) OECD Development Co-operation Working Papers, No 12.

44 The HRuF policy was an initiative of Secretary-General Ban Ki-moon. The objective of the policy is to ensure that the UN meets its responsibilities to prevent and respond to human rights abuses. That objective is to be achieved by, *inter alia*, ensuring that human rights protections are integral to UN activities across the board and engaging with States to ensure the protection of human rights in all situations. IASC, 'Human Rights Up Front: An Overview' (UN) <https://interagencystandingcommittee.org/system/files/overview_of_human_rights_up_front_july_2015.pdf> accessed 26 September 2018.

45 A good example is the IFRC's Information Sheet on Human Rights in Disasters. Therein, the IFRC stresses that: 'International human rights law is equally applicable in disasters. So local, regional and national authorities have the responsibility to protect, respect and fulfil the human rights of all those affected by disasters. If a state cannot fulfil its minimum core obligations towards those in need, it has an obligation to accept or request assistance from other states. This Information Sheet highlights the inherent dignity of humans set out in international human rights law, and examines specific rights in disaster contexts.' 'Information Sheet: Human Rights in Disasters' (*IFRC* 2018) <https://media.ifrc.org/ifrc/document/human-rights-disasters-information-sheet/> accessed 26 September 2018.

should co-operate and in what manner. Whilst it may be satisfactory, in the end, to leave the forms of co-operation to be determined by the affected State (as is the position in existing international law and in the draft articles on PPED), it is important that any new convention addresses whether a State's obligation to co-operate extends not only to other States and to the UN (which on account of there being 193 Member States of the UN are materially the same actors), but also whether such co-operation should extend to other assisting actors, such as humanitarian organisations or even individuals. It may be relatively uncontentious that a State should co-operate with the IFRC in disasters in the same way that States co-operate with the ICRC[46] in armed conflicts (or are expected to in any case), but much less clear is whether States would find it satisfactory that they should co-operate with organisations or individuals outside of the RCRC family. Recall that States had commented that they were unclear on, *inter alia*, the legal basis for this co-operation in existing international law,[47] so any such adoption of a legal requirement to co-operate with other actors would depend heavily on the willingness of States to create such an obligation.

Finally, if it is ultimately decided that a duty to seek assistance in the event that the national capacity of the affected State is exceeded is suitable for inclusion in a new international convention, then two key issues must be resolved: one relates to the meaning of the word 'seek', and the other to the determinants of a situation in which the capacity can be said to be 'exceeded' for the purposes of rules on refusal. Recall from Chapter 5 that the word 'seek' was particularly problematic because if the affected

46 Recall n 28 above on, *inter alia*, the role and protection of the ICRC in the four 1949 Geneva Conventions and Additional Protocol I.

47 State views have been anonymised. See ILC, 'Report of the ILC on the Work of its 61st Session' (4 May-5 June and 6 July-7 August 2009) UN Doc A/64/10, 334.

State can discharge its obligations by virtue of having 'attempted to find' or 'asked for' assistance, then there is little to stop a refusing State from feigning requests for assistance, only to ignore or reject offers later on.[48] Chapter 5 also identified several concerns that arose as a result of the affected States being the ones to determine when their capacity is exceeded. On account of those very States being the ones to draft any new international convention, it is unlikely that they will relinquish their sovereignty in this regard, which – as explained in section 6.1.1 above – prompts the question of 'Who decides?'[49] Without significant attention and revision, this provision – if included – may actually provide refusing States with an opportunity to escape their obligations, not a reason to perform them.

These issues warrant considerable attention, and it may well be the case that extensive further development and clarification is needed to achieve State consensus on the issues such that they might be included in any new international convention. That such a high level of detail is required, however, leads to the questioning of whether a convention might actually be the appropriate form of regulation in this area in future. Whilst this enquiry demands a much fuller explanation before its conclusions can be relied upon – which, in addition to the areas outlined below in section 6.2, may be suitable as an area for future research – it is nonetheless useful to highlight some pertinent issues here.

48 See Chapter 5, section 5.3.3(b).

49 See Chapter 5, section 5.3.3. Recall also text to n 28 above regarding the 'Who decides?' question.

(c) The suitability of the rules for inclusion in a convention

As explained above, should the development and clarification of the relevant rules be achieved such that States are willing to agree on the presently-divisive points, then it may actually be the case that a convention of more general application – even with some of the benefits outlined above in section 6.1.1 – would not be the most appropriate form for the eventual rules on PPED.

To resolve many of the concerns highlighted in the preceding two sections, a high degree of specificity would be required. This specificity (which may, for example, prescribe situations that might be deemed 'arbitrary' or internal arrangements for determining existing capacity) may not actually be suitable for a more general convention, and in that respect, specificity may dissuade States from engaging in the negotiation and conclusion of a treaty. The negotiation and conclusion of treaties is, after all, a major undertaking for States (and may be a prohibitively burdensome one for some smaller or less developed States, who may not have the same resources to dedicate to diplomacy as their larger or more developed counterparts).[50]

In consideration of, *inter alia*, the specificity required, it may be more appropriate that a framework convention be drafted on the basis of the draft articles and the discretion be granted to States to choose how best to implement those obligations (through bilateral agreements or changes to their national law, for example). This is certainly something that may be possible if a high-profile institutional sponsor took up the cause of furthering treaty-making activity in this area. Indeed, should the IFRC – with its long-established involvement in disaster law and its prestige

50 This concern is especially acute considering that it is mostly smaller or less developed States that tend to experience 'disastrous' events in the first place.

as a major independent international organisation – decide to facilitate the negotiation and conclusion of an agreement, then a framework convention that builds upon its existing work and the PPED draft articles would be a likely and perhaps a popular outcome. The majority of States already have a high degree of trust in the expertise of the IFRC,[51] so its furthering of treaty-making activity may well garner significant levels of support. Such an undertaking would also fit well within the mandate of its existing Disaster Law Programme,[52] which has had considerable success in collaborating with States to improve their regulation of international disaster relief. Indeed, over one hundred detailed studies in that respect already exist,[53] along with model rules and guidelines[54] that have – as Chapter 1 demonstrated – proven influential in the conclusion of new domestic legislation and resolutions of international organisations.[55]

Regardless of *how* it comes about, if a framework convention did come into existence as a result of, *inter alia*, the ILC's draft articles, then such a convention may in any case lead to a streamlining of the existing direct regulation of refusal at the

51 This trust is demonstrated not least by the fact that States invite IFRC experts to review their existing domestic legislation for the purposes of improving international disaster relief. See, for example, IFRC, *International Disaster Response Law (IDRL) in Indonesia* (IFRC 2014); IFRC, *International Disaster Response Law (IDRL) in Malawi* (IFRC 2015); IFRC, *International Disaster Response Law in Grenada* (IFRC 2018).

52 'About the Disaster Law Programme' (IFRC) <www.ifrc.org/en/what-we-do/disaster-law/about-idrl/> accessed 26 September 2018.

53 'Disaster law publications' (IFRC) <www.ifrc.org/en/what-we-do/disaster-law/research-tools-and-publications/disaster-law-publications/> accessed 26 September 2018.

54 Examples include the IDRL Guidelines – as mentioned in Chapters 1 and 2 – as well as the Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (2013) and the Draft Model Emergency Decree for the Facilitation and Regulation of International Disaster Relief and Initial Recovery (2014). 'IDRL Guidelines' (*IFRC*) <www.ifrc.org/what-we-do/disaster-law/about-disaster-law/international-disaster-response-laws-rules-and-principles/idrl-guidelines/> accessed 20 June 2018 (IDRL Guidelines); 'Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (with commentary)' (*IFRC*, 2013) <www.ifrc.org/docs/IDRL/MODEL%20ACT%20ENGLISH.pdf> accessed 26 September 2018; 'Draft Model Emergency Decree' (*IFRC*) <www.ifrc.org/what-we-do/idrl/draft-model-emergency-decree/> accessed 26 September 2018.

55 See Chapter 1, section 1.1.3(b).

international level: existing regional or bilateral agreements could be modified to include the range of issues and obligations identified as important by the framework convention. If this approach were taken, States themselves could secure the necessary detail required to give effect to the obligations in a framework convention by concluding bilateral agreements or other forms of agreement that are less formal in that respect, such as joint communiqués or memorandums of understanding. This is something that has not been possible in the past because – until the ILC's draft articles on PPED – there had not been an extensive elaboration of international legal rules and suggestions (direct or indirect) for how they might be drafted into treaty texts.[56] Indeed, it is again significant in this regard that the ILC writes its draft articles in the language and form of treaties,[57] as previous efforts such as the IFRC's Model Act[58] were drafted with the improvement of national legislation in mind.

Whilst in Chapter 2 it was remarked upon somewhat regrettably that there were so many bilateral instruments in existence, it would not be problematic for there to be more bilateral agreements in existence if those agreements were uniform (or uniform in key respects in any case). If uniformity with, for example, the ILC's draft articles were achieved, then it may actually lead to the more general concretisation of the obligations anyway, either by paving the way for a multilateral convention in the short-term (States may be more inclined to agree to a multilateral convention if they are already bound by similar obligations in bilateral agreements) or through the crystallisation of customary norms on the topic in the long-term.

56 Recall the narrower efforts described in Chapter 1, section 1.1.
57 See text to n 13 above.
58 ibid.

Of course, this short analysis engages some fundamental questions about the development of international law and some assumptions about the will of States to see such law-making acquire uniformity, but the salient point is that – in the end – should the necessary development and clarification of the obligations arise, either some very concise and effective drafting incorporating such developments would need to be achieved in a new convention, else another form of regulation might be necessary altogether. This once again invites an appreciation of the other potential outcomes of the ILC's work and methodologies for its interpretation, which was discussed in Chapter 5.[59]

6.2 Areas for Future Research

Researching refusal necessitated not only a broad enquiry into the development of disaster law, which has evolved significantly throughout the course of this doctorate itself, but also a review of other relevant areas of international law. These areas are State responsibility and the role of non-State actors, and both would make fruitful areas for future research.

6.2.1 State responsibility

For the primary obligations considered here to have a restrictive effect in practice, other rules of international law become relevant. Indeed, if the breach of a primary

59 See Chapter 5, section 5.4.

obligation had no consequences, those obligations would have little – if any – restrictive effect. In this regard, the law of State responsibility – in providing secondary rules that would make refusal *wrongful* – are instructive.

For the conduct of a State to give rise to international responsibility, the act of the State must be considered internationally wrongful,[60] which entails first that the conduct is attributable to the State and second that the conduct breaches an international legal obligation of that State.[61] The application of the rules of responsibility to the norms applicable in times of disasters, however, is not straightforward.

As with many other areas of international law, the rules on attribution especially are difficult. Research for this project identified that, in particular, issues arise because of the broad range of actors involved in refusal, which in responsibility terms raises issues of attribution of conduct to the affected State. Refusal can occur at various levels of the State and with varying degrees of input from that State. *Corfu Channel* confirmed that to be regarded as imputable, the acts or omissions in question need not actually be directly perpetrated by the State concerned,[62] thus it stands to reason that non-State actors should, too, be subject to scrutiny. In this respect, international law

60 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 539. That '[e]very internationally wrongful act of a State entails the international responsibility of that State' is the core of the customary law of State responsibility, which is why, as worded here, that maxim was given prominence in article 1 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). ILC, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April – 1 June and 2 July – 10 August 2001) UN Doc A/56/10, 59-365 (ARSIWA, with commentaries).

61 ARSIWA, with commentaries (n 60) art 2. This reflects a long-standing jurisprudence. The Permanent Court of International Justice (PCIJ), for example, specified these elements in considering international responsibility to be linked to an 'act being attributable to the State and described as contrary to the treaty right[s] of another State' in *Phosphates in Morocco* (*Italy v France*) (Preliminary Objections) (1938) PCIJ Ser A/B No 74, 28. The ICJ mirrored these comments in *United States Diplomatic and Consular Staff in Tehran* (Judgment) (1980) ICJ Rep 3, 29.

62 *Corfu Channel Case* (*UK v Albania*) (Merits) [1949] ICJ Rep 4, 22-3, 36.

is presently lacking. The research for this thesis revealed that it is indeed possible for the existing rules of international responsibility to be applied to the context of refusal, just as with other areas of international law, but the fact that there exist such issues with attribution means that refusal stands out as one area in which additional scholarly attention would be welcome. In particular, such attention should concentrate on the role of non-State actors and the extent to which their refusing conduct could be attributed to the affected State.

Situations of refusal in and of themselves do not pose any particular issues for breach. As the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) commentary has confirmed, '[t]here is no such thing as a breach of an international obligation in the abstract',[63] and so, in any given case of refusal, what is crucial is to apply the 'basic principles'[64] of the ARSIWA rules on breach to the situation at hand in consideration of the primary obligations that are alleged to have been breached. For the purposes of this thesis, however, the two basic principles relating to continuing and composite acts respectively do warrant some further attention.

In respect of the existence of a breach of an international obligation, the basic principle is that that '[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.'[65] Turning to the types of acts that refusal might constitute, it must be stressed that an affected State's refusal is usually a complex

63 ARSIWA, with commentaries (n 60) commentary to Chapter III Breach of an International Obligation, para 2.

64 These basic principles are contained in articles 12 to 15 of the ARSIWA (n 60): the existence of a breach of an international obligation (article 12), intertemporality (article 13), continuing acts (article 14), and composite acts (article 15). ibid.

65 ibid art 12.

factual matter. This is clear from the examples of refusal considered throughout this thesis. Rarely will it be the case that a single act or omission of the affected State is sufficient to constitute 'wrongful refusal' (assuming of course that the other elements of international responsibility are present), or even to raise complaints about the refusal.

Instead, it is likely to be the case that claims about any wrongfulness in an affected State's refusal is the result of an act or omission that has continued over a period of time, or a series of acts or omissions. In recent years in Venezuela, for example, President Maduro has, through executive statements, made clear that his administration will not accept outside assistance (an act of refusal that has continued over a period of time) but there has also been evidence of ignorance of offers of aid from external actors, refusal to co-operate with the UN, arrests of humanitarian workers by police forces, and so on (a series of acts or omissions that constitute refusal).[66] In the language of responsibility, these are continuing and composite acts respectively. Whilst those categorisations in and of themselves are not issues for State responsibility, their consequences may well be. In that respect, additional scholarly attention would also be welcomed.

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66 The situation in Venezuela was introduced in Chapters 1 and 3. See also Nicholas Casey, 'Concern as Venezuela Refuses to Accept Aid' *New York Times* (New York City, 28 September 2016) <www.nytimes.com/2016/09/28/world/americas/venezuela-refuses-us-aid.html> accessed 26 September 2018, and Geoff Ramsey, 'Could Venezuela Accept International Humanitarian Aid to Address its Crisis?' (*Advocacy for Human Rights in the Americas*, 5 April 2017) <www.wola.org/analysis/venezuela-humanitarian-crisis-aid/> accessed 26 September 2018.

6.2.2 The role of non-State actors

Several times throughout this thesis, the role of non-State actors was considered. In this work, however, only the role of non-State actors in relation to the primary obligations of the affected State was elaborated upon in any detail. For the broader goal of securing effective humanitarian access through improved rules on refusal, however, the role of non-State actors will prove critical.

In particular, future research could consider the obligations of non-State actors when it comes to the acceptance or refusal of international assistance (what would be the legal consequences, for example, of the UN refusing to channel international assistance from one particular State to an affected State?) and on their responsibility for refusal. Work such as the SHARES Project[67] is certainly laying the groundwork for shared responsibility for wrongful conduct between, for example, States and international organisations, and it would be instructive for theoretical and practical purposes if these and related issues were investigated further in the refusal context.

67 The SHARES Project, led by Professor André Nollkaemper, examines the allocation of international responsibility among multiple States and other actors. See 'SHARES Research Project on Shared Responsibility in International Law' (*University of Amsterdam*) <www.sharesproject.nl/> accessed 27 September 2018. See André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017). See also Seline Trevisanut, 'Shared Responsibility Aspects of Search and Rescue Operations at Sea' in Nollkaemper and Plakokefalos (n 67), demonstrating the relevance of shared responsibility to the disastrous situations involving persons found at sea in the danger of being lost and peoples in distress.

6.3 Final Remarks

Disasters have taught us that ineffable human tragedy is at once predictable and unpredictable, and that if we have any hope of constraining that tragedy through law, we must be at once rigid and responsive in our approach to disaster regulation.

The regulation of refusal in particular demands that law-makers carefully balance the corollaries of State sovereignty so as to ensure the protection of affected States as well as affected populations. Ultimately, there is no question that sovereignty should continue to protect States from intervention, as it has long served to do, but the human costs of refusal betoken that sovereignty cannot serve as an impenetrable shield for refusing States. That refusal engenders such misalignment in protection priorities reminds us that striking the appropriate balance is a complex task, and that progression in resolving issues in this regard will demand not only continued attention from international law experts, but also a significant commitment from States.

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