

DISASTERS, RELIEF, AND NEGLECT: THE DUTY TO  
ACCEPT HUMANITARIAN ASSISTANCE AND  
THE WORK OF THE INTERNATIONAL  
LAW COMMISSION

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I. INTRODUCTION

On May 3, 2008, Cyclone Nargis struck Myanmar, tearing across the country’s low-lying coastal region and battering its largest city, Yangon.<sup>1</sup> The storm displayed astounding strength, destroying at least 700,000 homes, sinking much of the country’s fishing fleet, and salting one million acres of rice paddies.<sup>2</sup> But the government’s inability to appreciate the extent of the damage, and its failure to accept assistance from other states and international organizations, almost certainly aggravated the damage, leading to a death toll of at least 85,000, with thousands more missing,<sup>3</sup> and leaving one million people in need of help more than a month after the hurricane struck.<sup>4</sup>

International humanitarian actors, when they were eventually allowed into the country, were largely confined to the city of Yangon for weeks following the disaster.<sup>5</sup> The govern-

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1. *A Year after Storm, Subtle Changes in Myanmar*, N.Y. TIMES (Apr. 29, 2009), <http://www.nytimes.com/2009/04/30/world/asia/30myanmar.html> [hereinafter *Subtle Changes*]; Int’l Fed. Red Cross, Myanmar: Cyclone Nargis, Emergency Appeal No. MDRMM002, May 6, 2008, available at <http://www.ifrc.org/docs/appeals/08/MDRMM002EA.pdf>.

2. *Subtle Changes*, *supra* note 1.

3. *Id.*

4. *E.g.*, U.N. to Begin Spraying Larvicide to Fight Dengue in Myanmar, N.Y. TIMES (June 16, 2008), <http://www.nytimes.com/2008/06/16/world/asia/16iht-myanmar.1.13741923.html> (citing United Nations estimates of 78,000 killed and 56,000 missing); Inter-Agency Standing Committee, *Real-Time Evaluation of the Response to Cyclone Nargis*, Dec. 17, 2008, at 5, available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1128739>.

5. *E.g.*, Seth Mydans, *Donors Press Myanmar to Let Aid Workers In*, N.Y. TIMES, May 26, 2008, at A6.

ment insisted on channeling all relief through the military, and even seized supplies distributed by residents.<sup>6</sup> A group of French and U.S. naval ships waited off the coast for two weeks with food, medical supplies, water purification systems, small boats, and helicopters, which were necessary to bring aid to isolated rural areas.<sup>7</sup> Eventually, unable to get permission from the government, the ships withdrew without delivering relief.<sup>8</sup> The Myanmar junta also originally impeded the access of international aid personnel from U.N. agencies and non-governmental organizations, such as World Vision, the Red Cross, and Save the Children.<sup>9</sup> When asked if the Myanmar government was engaging in genocide, U.S. Defense Secretary Robert Gates responded, “This is more akin, in my view, to criminal neglect.”<sup>10</sup>

As humanitarian actors clamored for access to the victims of Cyclone Nargis, the United Nations International Law Commission (ILC) began a multi-year project to develop rules governing international disaster relief.<sup>11</sup> The project, proposed in the wake of the 2004 Indian Ocean Tsunami, one of the deadliest disasters in recent memory, and of Hurricane Katrina, could be expected to address a range of problems relat-

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6. *Id.*

7. *Id.*

8. *Subtle Changes*, *supra* note 1.

9. Mydans, *supra* note 5. Independent organizations were allowed to deploy their local staff, but badly needed international experts were prevented from entering the country. *Id.* However, official documents from the United Nations and specialized agencies paint a more optimistic picture of the international response. See, e.g., World Food Programme [WFP], Myanmar Emergency Operation (EMOP) 10749.0, ¶ 16, [http://one.wfp.org/operations/current\\_operations/project\\_docs/107490.pdf](http://one.wfp.org/operations/current_operations/project_docs/107490.pdf) (“The Government of the Union of Myanmar welcomes international humanitarian assistance and declared a ‘State of Emergency’ for those parts of the country that were most affected.”); THE TRIPARTITE CORE GROUP, POST-NARGIS JOINT ASSESSMENT 37-52, <http://www.aseansec.org/21765.pdf>.

10. Eric Schmitt, *Gates Accuses Myanmar of ‘Criminal Neglect’*, N.Y. TIMES, June 2, 2008, at A5. Problems with aid delivery continued into June. *Burmese Workers Endure in Spite of Junta, Aid Workers Say*, N.Y. TIMES, June 18, 2008, at A1.

11. See generally U.N. Int’l Law Comm’n, *Preliminary Report on the Protection of Persons in the Event of Disasters*, ¶¶ 1–13, U.N. Doc. A/CN.4/598 (May 5, 2008) [hereinafter *First Report*] (by Eduardo Valencia-Ospina); U.N. Int’l Law Comm’n, *Protection of Persons in the Event of Disasters, Memorandum from the Secretariat*, U.N. Doc. A/CN.4/590 (Dec. 11, 2007) [hereinafter *Secretariat Memorandum*].

ing to preparedness, prevention, short-term response, and long-term rehabilitation.<sup>12</sup> An exhaustive preliminary memorandum prepared by the U.N. Secretariat indicated that much of the project would focus on the practical problems of disaster relief, such as obtaining visas, removing bureaucratic barriers to financial aid, and ensuring that foreign actors comply with local laws.<sup>13</sup>

But it remained unclear to what extent the ILC would be willing to tackle what have been called the “big problems of relief.”<sup>14</sup> What can international law do when, as in Myanmar, a state refuses to admit and facilitate international relief efforts, despite widespread and severe human suffering? Recent proposals have included the threat of criminal prosecution,<sup>15</sup> as well as extending the “Responsibility to Protect” to apply to natural disasters.<sup>16</sup> This latter approach poses serious challenges to the principles of sovereignty and non-intervention, and has met resistance from governments, scholars, and members of the International Law Commission.<sup>17</sup> Following in-

12. *First Report*, *supra* note 11, ¶¶ 57–58.

13. *See generally Secretariat Memorandum*, *supra* note 11, ¶¶ 81–248.

14. This phrase is borrowed from Michael Boethe, who commented that the private International Law Association’s work on disasters purposefully did not tackle the “big” problems of whether a state has a duty to “undertake or accept relief.” INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-NINTH CONFERENCE HELD AT BELGRADE 530 (1980).

15. 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*, 38 DENV. J. INT’L L. & POL’Y 227, 236 (2010).

16. *See, e.g.*, T. R. Saechao, *Natural Disasters and the Responsibility to Protect: From Chaos to Confusion*, 32 BROOK. J. INT’L L. 663, 706 (2007); Rebecca Barber, *The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study*, 14 J. CONFLICT & SEC. L. 3, 33 (2009) (“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 . . . .”); Tamika Ruth Jackson, *Bullets for Beans: Humanitarian Intervention and the Responsibility to Protect in Natural Disasters*, 59 NAVAL L. REV. 1, 13 (2010); Ford, *supra* note 15, at 266 (“The aftermath of Cyclone Nargis appears to be the sort of situation that the member states of the United Nations had in mind when they signed the 2005 World Summit Outcome Document and agreed to the responsibility to protect.”).

17. It has been argued that the increasing demand for a right of access to disaster victims is in fact causing states to place greater emphasis on the role of sovereignty and non-intervention in international law. David P. Fidler, *Commentary, Disaster Relief and Governance After the Indian Ocean Tsunami*:

tense debate in 2009, the Special Rapporteur on the ILC project on disaster relief stated that the commission's project would in no way justify the delivery of humanitarian assistance by military force.<sup>18</sup> Thus, the ILC represents the latest in a line of international institutions that have attempted to define the duty of states to accept disaster relief, without going so far as to justify forced humanitarian intervention.

The commission may be able to take a more modest approach based on the principle of international cooperation for the protection of human rights. It is generally understood that humanitarian assistance operations "should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country."<sup>19</sup> But it is neither necessary nor obvious that the affected state retains the unchecked right to withhold its consent in all circumstances. The commission's efforts to develop international law may help address the problems posed by Cyclone Nargis through a rule that defines certain cases in which a state is required to consent to international humanitarian assistance.

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*What Role for International Law?*, 6 MELB. J. INT'L L. 458, 472 (2005) (asserting that states that face potentially adverse consequences from disasters will stress sovereignty rather than consent to legal rules requiring them to accept foreign aid).

18. In a 2009 public session of the ILC, Special Rapporteur Eduardo Valencia-Ospina commented:

There are some serious questions to be addressed regarding what is allowed under international law should the affected State fail to satisfy the rights of individuals, but not all of those questions can be fittingly answered in the Commission's work on the present topic. But nothing can be clearer than the fact that forced intervention is illegal under international law absent a justifiable claim of self-defense or action by the Security-Council, even under some invocation of the responsibility to protect, understood in its original narrow context . . . .

Eduardo Valencia-Ospina, Special Rapporteur on Protection of Persons in the Event of Disasters, Speech to the International Law Commission (July 10, 2009) (prepared remarks on file with author); *see also* Report of the International Law Commission on the Work of its Sixty-First Session, ¶ 178, U.N. GAOR, 64th Sess., Supp. No. 10, U.N. Doc. A/64/10; (2009) [hereinafter 2009 ILC Report] (summarizing the above-quoted remarks).

19. Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, G.A. Res. 46/182, Annex, ¶ 3, U.N. Doc. A/RES/46/182 (Dec. 19, 1991).

This Note examines several previous efforts to formulate and limit the duty of states to accept humanitarian assistance in disasters,<sup>20</sup> eventually concluding that a state should not be allowed to arbitrarily refuse international aid where it is unwilling or unable to respond to a disaster itself. 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.<sup>21</sup> Therefore, this Note does not attempt to determine the customary rule establishing a duty to accept assistance, but rather approaches the problem from this perspective of progressive development. As such, the endeavor here is to analyze previous efforts to codify the duty to accept assistance, and to evalu-

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20. For the purposes of this paper, “assistance,” “relief,” and “aid” are used interchangeably to refer to efforts to provide food, clothing, shelter, and medical services during and in the aftermath of a disaster, as distinguished from long-term rehabilitation. The term “disaster” has been given a range of definitions. This paper adopts, as a working definition, the language employed by the International Law Commission, which reads, “‘Disaster’ means a calamitous event or series of events resulting in widespread loss of life, great human suffering and distress, or large-scale material or environmental damage, thereby seriously disrupting the functioning of society.” U.N. Int’l L. Comm’n, *Protection of Persons in the Event of Disasters: Text of Draft Articles 1, 2, 3, 4 and 5 as Provisionally Adopted by the Drafting Committee*, U.N. Doc. A/CN.4/L.758 (July 24, 2009) [Hereinafter *2009 Draft Articles*]. Note that this definition refers to technological as well as natural disasters, and that it refers only to sufficiently severe events. In addition, this paper provisionally assumes that the term “event or series of events” can be read narrowly to exclude slow-onset events or long-lasting conditions, such as climate change, desertification, the HIV/AIDS epidemic, and economic depressions.

21. *First Report, supra* note 11, ¶ 42; Jiri Toman, *Towards a Disaster Relief Law, in ASSISTING THE VICTIMS OF ARMED CONFLICT AND OTHER DISASTERS* 181, 182 (Frits Kalshoven ed., 1989). The term “progressive development” refers to “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 . . . .” Statute of the International Law Commission, G.A. Res. 174 (II), art. 15, U.N. Doc. A/519 (Nov. 21, 1947). The statute of the ILC envisions a process for progressive development that is distinct from the procedure used to codify existing customary legal norms. *Id.* arts. 16-24. However, the two concepts have been consolidated in practice, with the commission taking on projects that require some codification and some progressive development. U.N. INT’L L. COMM’N, *THE WORK OF THE INTERNATIONAL LAW COMMISSION*, at 45, U.N. Sales No. E.07.V.9 (7th ed. 2007) [hereinafter *WORK OF THE ILC*].

ate the various approaches, both in terms of how much protection they afford to victims and the extent to which they infringe on state sovereignty and self-determination.

To this end, Part Two provides a theoretical justification for the duty to accept disaster assistance. I argue for a rather traditional justification, based on principles of international cooperation, solidarity, and human rights, as opposed to a more radical reinterpretation of sovereignty that is associated with the “Responsibility to Protect.” Part Three briefly discusses the state of international disaster response law, and argues that the International Law Commission provides the appropriate forum for addressing the duty to accept relief. Part Four engages in a comparative study of existing international instruments that have attempted to define this duty. Expanding on this analysis, Part Five proposes a rule that states may not arbitrarily refuse assistance when they are unable or unwilling to respond to disasters.

## II. SOVEREIGNTY, RESPONSIBILITY AND HUMAN RIGHTS

The desire to use the apparatus of a state to help those suffering in foreign countries has always figured prominently in international politics. Emerich de Vattel wrote forcefully of the common “offices of humanity,” owed by all states to each other.<sup>22</sup> In his historical survey of humanitarian interventions—the use of force to provide assistance over the objections of a sovereign—V. S. Mani notes support for the practice dating back hundreds of years across a wide range of cultures,<sup>23</sup> though he remains critical of the doctrine. Writing in 1625, Hugo Grotius expressed some support for interventions to help neglected populations: “The final and most wide-reaching cause for undertaking wars on behalf of others is the mutual tie of kinship among men, which of itself affords suffi-

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22. EMERICH DE VATTEL, *THE LAW OF NATIONS* bk II, § 2 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758).

23. See V. S. Mani, “*Humanitarian Intervention Today*,” 313 *RECUEIL DES COURS* 9 (2005) (placing the modern use of force in humanitarian intervention into historical context); see also Malvina Halberstam, *The Legality of Humanitarian Intervention*, 3 *CARDOZO J. INT’L & COMP. L.* 1, 2-3 (1995) (covering discussions on humanitarian intervention in the pre-World War II period).

cient ground for rendering assistance.”<sup>24</sup> It should come as no surprise that Grotius resurfaced in the public discourse in the wake of Cyclone Nargis.<sup>25</sup>

Though states have never stopped using humanitarian pretexts for intervening in the affairs of others, the intellectual tide shifted in the eighteenth century. The Peace of Westphalia, concluded nineteen years after Grotius’s seminal work, laid the groundwork for modern notions of sovereign equality and non-intervention, and influenced much of the subsequent intellectual tradition. Though convinced that states had the duty to give aid to others in time of disaster,<sup>26</sup> Vattel expressed disdain for Grotius’s position on intervention, emphasizing its tendency to legitimate imperialism.<sup>27</sup> “But though a nation be obliged to promote, as far as lies in its power, the perfection of others,” Vattel argues, “it is not entitled forcibly to obtrude these good offices on them. Such an attempt would be a violation of their natural liberty.”<sup>28</sup> Thus, the concept of sovereignty, of the state’s right to refuse unwanted incursions into its territory for whatever purpose, came to be seen as crucial to protecting the liberty and dignity of societies and individuals.

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24. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, 582 (James Brown Scott ed., Francis Kelsey trans., Carnegie Endowment for Int’l Peace 1925) (1625); *see also id.* at 506 (quoting Seneca: “If a man does not attack my country, but yet is a heavy burden to his own, and although separated from my people he afflicts his own, such debasement of mind nevertheless cuts him off from us.”).

25. *E.g.* MICHAEL A. NEWTON, *SEEKING JUSTICE FOR BURMA: A CASE FOR REVOKING THE CREDENTIALS OF THE SPDC 1* (2008), *available at* [http://www.humansecuritygateway.com/documents/VANDERBILT\\_SeekingJusticeForBurma.pdf](http://www.humansecuritygateway.com/documents/VANDERBILT_SeekingJusticeForBurma.pdf); Michael Ignatieff, *The Duty to Rescue*, *NEW REPUBLIC ONLINE* (Sept. 11, 2008), [http://www.powells.com/review/2008\\_09\\_11.html](http://www.powells.com/review/2008_09_11.html) (reviewing GARY J. BASS, *FREEDOM’S BATTLE: THE ORIGINS OF HUMANITARIAN INTERVENTION* (2008)).

26. VATTEL, *supra* note 22, bk. II, § 4 (stating that “when a neighboring nation is unjustly attacked by a powerful enemy who threatens to oppress it,—if you can defend it without exposing yourself to great danger, unquestionably it is your duty to do so.”).

27. VATTEL, *supra* note 22, bk. II, § 7 (alleging that Grotius’ opinion “opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts”). To his credit, Grotius did indeed express serious concern about this possibility. *See* GROTIUS, *supra* note 24, bk. II, ch. XXV, § VIII(4) (acknowledging concerns about using intervention as a pretext to seek one’s own ends, but stating that the right of intervention does not cease to exist because it has the potential to be abused).

28. VATTEL, *supra* note 27.



Seemingly, Vattel's conception admits of no middle ground: international law either allows a state to willfully or ignorantly starve its own population, or the law becomes a tool in the hands of would-be emperors and conquerors.<sup>29</sup>

This section demonstrates that developments in international law now make possible a third way, in which the principles of sovereignty and non-intervention can stand alongside a concern for populations who are neglected by their own government. We know that modern developments in international law—human rights, protection of victims in armed conflict, international minimum standards of treatment, *jus cogens* and *erga omnes* norms—have once again created international rules governing a state's conduct on its own territory. But what rules govern peacetime disaster relief? I argue that the modern international legal paradigm may not condone a broad doctrine of humanitarian intervention, but it is also deeply concerned with situations such as Cyclone Nargis, in which states refuse international aid to the grave detriment of their citizens.

This section reviews the developments most closely relevant to disaster relief, and outlines two distinct, if not unrelated, ways in which the obligation to accept humanitarian assistance can sit alongside notions of sovereignty and non-intervention. The first suggestion is more radical, reinterpreting the notion of state sovereignty to include a notion of responsibility to the local population; to the extent a state neglects this responsibility, its sovereignty is likewise undermined. While novel, and perhaps necessary for situations such as genocide, this principle is unsuited to the context of disaster relief, in part because of its close connection to humanitarian intervention. A second, more traditional understanding argues that the principle of international cooperation for the protection of human rights acts as a side constraint on the exercise of sovereignty, and that the law may thus require a state to open its borders in certain extreme circumstances. I argue that this

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29. Vattel raises the example of the conquest of the American Indians: "Those ambitious European States who attacked the American nations, and subjected them to their greedy dominion, in order, as they pretended, to civilize them, and have them instructed in the true religion,—those usurpers, I say, grounded themselves on a pretext equally unjust and ridiculous." *Id.*

second conception provides a more suitable basis for the development of international disaster response law, noting specific developments that create the legal space for an obligation to accept humanitarian assistance.

### A. *Traditional Sovereignty: Internal and External Dimensions*

As discussed above, the conception of sovereignty that developed with the Peace of Westphalia played a central role in the development of international law. It manifests itself in both external and internal dimensions. The external aspect of sovereignty, which may be captured by the term “sovereign equality,” holds that a state maintains its independence in its relationships with other states, and that its external relations are not subordinated by law to the will of any other actor.<sup>30</sup> It is captured by Vattel’s statement that a “dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom,”<sup>31</sup> and the principle enjoys a central place in Charter of the United Nations.<sup>32</sup> With respect to the international system, the internal dimension of sovereignty refers to a *domaine réservé* of competence where in-

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30. See generally Juliane Kokott, *States, Sovereign Equality*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2007), available at <http://www.mpepil.com> (providing a historical overview of the development of sovereign equality and the explaining the role of independence, sovereignty within the law, consent, jurisdictional immunity, and comity in defining the concept of sovereign equality).

31. VATTEL, *supra* note 22, preliminaries, § 18. Max Huber’s statement in the *Palmas* case likewise captures this dimension, by defining sovereign independence as “exclusive competence of the State in regard to its own territory.” *Island of Palmas Case (U.S. v. Neth.)*, 2 R. Int’l Arb. Awards 829, 838 (Perm. Ct. Arb. 1928). This is not a reference to an exclusive set of things about which international law may not speak, but to an understanding that a state is sovereign over its territory “to the exclusion of all others.” *Id.*

32. U.N. Charter art. 2, para. 11 (“The Organisation is based on the principle of the sovereign equality of all its Members.”). This principle has subsequently been reaffirmed as fundamental to the international legal order. *E.g.*, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), pmbl, U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc A/8028 (Oct. 24, 1970) (stressing the importance of sovereign equality to the maintenance of international peace and the achievement of the U.N.’s purposes).

ternational law cannot reach.<sup>33</sup> The external and internal aspects are intertwined, but disaggregating them can be helpful. Sovereign equality entails a robust rule against forced intervention or domination by other states. Meanwhile, the principle of internal sovereignty refers in part to the right of a state to decide what is best for its people, including whether to accept international aid. Taken to its logical extreme, internal sovereignty demands that international law leave the decision to admit or refuse humanitarian assistance exclusively to the government of the state affected by a disaster.<sup>34</sup>

But modern international law now severely limits the range of permissible decisions that states can make with respect to their populations, even as the law continues to recognize sovereign equality to a greater extent.<sup>35</sup> The following approaches to disaster relief take distinct approaches to this development. The Responsibility to Protect reinvents both the internal and external dimensions of sovereignty; an approach based in human rights and cooperation takes advantage of an eroding *domaine réservé*, while maintaining some respect for the external dimensions of sovereignty. The advantages of each approach are discussed below.

### B. *Reinventing Sovereignty: The Responsibility to Protect*

In contemporary discussions, this traditional notion of sovereignty faces challenges from a conception that rests on the state's responsibility to people on its territory. This is not a new notion; in 1949, ICJ Judge Alejandro Álvarez, writing separately in the *Corfu Channel* case, argued, "By sovereignty, we understand the whole body of rights and attributes which a

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33. U.N. Charter art. 2, para. 7. See generally Katja S. Ziegler, *Domaine Réservé*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2008), available at <http://www.mpepil.com> (describing state activities solely within a state's domestic jurisdiction or competence and free from international obligations).

34. VATTEL, *supra* note 22, preliminaries § 21.

35. See Georg Nolte, *Sovereignty as Responsibility?*, 99 AM. SOC. INT'L L. PROC. 389, 389 (2005) (describing these as the "equality" and "liberty" dimensions of sovereignty); cf. Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 31 (1995) (noting developments in human rights that have undermined traditional notions of sovereignty). Henkin focuses on the "internal" dimensions of sovereignty, such as the right of a state to legislate in particular areas, though he notes the increasing tendency for multilateral intervention. *Id.* at 32, 43.

State possesses in its territory to the exclusion of all other States . . . Sovereignty confers rights upon States and imposes obligations on them.”<sup>36</sup>

The project to re-imagine sovereignty began in earnest following the trauma of Rwanda, Srebrenica, and Kosovo. The International Commission on Intervention and State Sovereignty (ICISS), commissioned by the Canadian government, first articulated the concept of a “Responsibility to Protect” (RtoP) in 2001.<sup>37</sup> The ICISS rejected discussion of a state “right to intervene,” instead emphasizing the “primary responsibility” of the affected state to protect its citizens.<sup>38</sup> However:

[A] residual responsibility also lies with the broader community of states. This fallback responsibility is activated when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator of crimes or atrocities; or where people living outside a particular state are directly threatened by actions taking place there. This responsibility also requires that in some circumstances action must be taken by the broader community of states to support populations that are in jeopardy or under serious threat.<sup>39</sup>

This is the essence of this revised conception of sovereignty. Sovereignty entails the principle of non-intervention, but also a responsibility to the population.<sup>40</sup> Where the affected state neglects this responsibility, all other states hold a

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36. *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. 4, 43 (Apr. 9) (separate opinion of Judge Alvarez). Max Huber also conflated sovereignty and responsibility in the *Palmas* case, stating that territorial sovereignty “has as corollary a duty: the obligation to protect within the territory the rights of other States.” *Palmas*, 2 R. Int’l Arb. Awards at 839.

37. See generally INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001) [hereinafter ICISS] available at <http://www.iciss.ca/pdf/Commission-Report.pdf> (addressing whether there is a right to protect and if so how, when, and under whose authority it should be exercised).

38. *Id.* § 2.29.

39. *Id.* § 2.31.

40. See generally FRANCIS M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (1996) (analyzing conflict in Africa and arguing that sovereignty should be understood as encompassing not only protection from external interference but also accountability to domestic and external constituencies).

secondary obligation to provide the necessary protection. The Responsibility to Protect has preventive and non-military dimensions, but its greatest and most controversial innovation has been its justification for intervention into countries experiencing “large scale loss of life” or ethnic cleansing.<sup>41</sup>

The Responsibility to Protect has been endorsed by the United Nations, although in doing so the organization has limited it significantly. First, it found that only the Security Council had the right to exercise the Responsibility to Protect and authorize intervention.<sup>42</sup> This consensus is obviously built on much narrower grounds than the ICISS report, and may boil down to nothing more than reaffirming that massive human tragedies threaten international peace and security, thus implicating Chapter VII of the U.N. Charter.<sup>43</sup> Second, the General Assembly limited the Responsibility to Protect to four substantive situations: genocide, war crimes, ethnic cleansing, and crimes against humanity, eliding the range of other events that may cause “large scale loss of life.”<sup>44</sup> Finally, the World Summit Outcome makes no mention of sovereignty as responsibility, essentially filtering out this theoretical notion and perhaps limiting the Responsibility to Protect to an affirmation that the Security Council should protect the subjugated and vulnera-

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41. ICISS, *supra* note 37, § 4.19.

42. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter World Summit Outcome]; *see also* Report of the High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, ¶ 203, U.N. Doc. A/59/565 (Dec. 2, 2004) (endorsing the emerging norm that there is a collective international Responsibility to Protect, exercisable by the Security Council authorizing military intervention as a last resort).

43. The original ICISS report found that the General Assembly and even regional organizations have authority to authorize intervention. ICISS, *supra* note 37, §§ 6.28-40. It further noted that there may be situations in which intervention by a single state or an ad hoc coalition would be legitimate. *Id.* §§ 6.36-37.

44. *Compare* World Summit Outcome, *supra* note 42, ¶ 138 (outlining a state’s Responsibility to Protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity and indicating that the international community should help and encourage states to fulfill this responsibility), *with* ICISS, *supra* note 37, § 4.19 (arguing that military intervention is justified in two broad circumstances: first, to stop large-scale loss of life, with or without genocidal intent, that is a product of purposeful state action, state neglect or inability to act, or a failed state; and second, to halt large-scale ethnic cleansing).

ble.<sup>45</sup> This outcome indicates the limited political will for an expansive notion of the Responsibility to Protect.

There are at least three reasons why RtoP, based on a notion of sovereignty as responsibility, would be a flawed basis for the obligation to accept disaster assistance. The first is merely political: states will not accept it, nor will many states endorse any treaty or customary rule that explicitly applies the Responsibility to Protect to natural disasters. Second, a humanitarian argument exists, to the effect that the Responsibility to Protect, with its orientation toward military intervention, may be appropriate for genocide and war crimes but not for peacetime disasters. Finally, a strong theoretical argument may be made that concepts of sovereignty and human dignity should remain separate. Each proposition will be briefly considered.

The political resistance to extending the Responsibility to Protect to natural disasters remains intense. A range of states representing various regions, economic interests, and political dispositions have argued that this concept is inappropriate for disaster relief.<sup>46</sup> This position was taken up by the secretary-general of the United Nations in 2009,<sup>47</sup> and endorsed by the

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45. This is one interpretation. It should be noted that the Secretary General's 2009 report on RtoP emphasized the principle's roots in the notion of sovereignty as responsibility. See U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Rep. of the Secretary-General*] (arguing that the responsibility to protect is a core element of sovereignty and its attendant duties). The General Assembly did not endorse or adopt this interpretation. The Responsibility to Protect, G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009).

46. In debates surrounding the International Law Commission's work on the topic, the use of the Responsibility to Protect was predictably opposed by China, U.N. GAOR, 63d Sess., 23d mtg. ¶ 29, U.N. Doc. A/C.6/63/SR.23 (Nov. 3, 2008), but it was also opposed by New Zealand and the Netherlands, among others. See, e.g., U.N. GAOR, 63d Sess., 24th mtg. ¶ 11, U.N. Doc. A/C.6/63/SR.24 (Nov. 4, 2008) (New Zealand); U.N. GAOR, 63d Sess., 22d mtg. ¶ 62, U.N. Doc. A/C.6/63/SR.22 (Oct. 31, 2008) (the Netherlands); U.N. GAOR, 64th Sess., 22d mtg. ¶ 12, U.N. Doc. A/C.6/64/SR.22 (Nov. 2, 2009) (Ghana); U.N. GAOR, 64th Sess., 20th mtg. ¶ 43, U.N. Doc. A/C.6/64/SR.20 (Oct. 30, 2009) (Czech Republic); U.N. GAOR, 64th Sess., 21st mtg. ¶ 54, U.N. Doc. A/C.6/64/SR.21 (Oct. 30, 2009) (Sri Lanka).

47. In his report on implementing the Responsibility to Protect, Secretary-General Ban Ki-Moon deferred to the express will of member states, noting:

[t]he responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: geno-

International Law Commission in its work on disaster response law.<sup>48</sup> As the ultimate aim of this Note is to propose a codified rule for the duty to accept disaster relief assistance, it should not be based on politically untenable principles. Such widespread skepticism among states and at the United Nations would alone be enough to counsel restraint with respect to the Responsibility to Protect and natural or technological disasters.

In addition to the calculated political reasons for avoiding the Responsibility to Protect, the doctrine's close connection with military force raises serious humanitarian concerns that make it inappropriate for disaster relief. Advocates of RtoP have taken great pains to de-emphasize this aspect of the concept, both by playing up its protective and capacity-building dimensions, and by stressing the importance of peaceful dispute settlement.<sup>49</sup> Nonetheless, what it means to invoke RtoP remains unclear, especially where the principle is invoked to justify something other than forced intervention.<sup>50</sup> Because foreign military intervention is both the final consequence

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cide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.

*Rep. of the Secretary-General, supra note 45, ¶ 10(b).*

48. Special Rapporteur, *Second Rep. on the Protection of Persons in the Event of Disasters*, Int'l Law Comm'n, ¶ 14, U.N. Doc. A/CN.4/615 (May 7, 2009) (by Eduardo Valencia-Ospina) [hereinafter *Second Rep.*]; see also 2009 ILC Report, *supra* note 18, ¶ 164 (although some members of the commission urged that the ILC's work should not prejudice any future relevance of the Responsibility to Protect). However, recent developments at the ILC seem to endorse the sovereignty as responsibility principle by noting that a state, "by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory." Int'l Law Comm'n, *Protection of Persons in the Event of Disasters*, art. 9, U.N. Doc. A/CN.4/L.776 (July 14, 2010) [hereinafter 2010 Draft Articles].

49. Both defenses are deployed in the Secretary-General's 2009 report. See *Rep. of the Secretary-General, supra note 45*, at ¶¶ 11, 51 (suggesting that the Responsibility to Protect rests on three pillars: protection responsibilities of the state, international assistance and capacity building, and timely and decisive response, and that the third pillar encompasses "a wide range of non-coercive and non-violent response measures.").

50. See Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 42 ETHICS & INT'L AFF. 143, 162-66 (2010) (describing the wide range of analyses regarding the possible purposes of the RtoP and its effectiveness).

and one of the only clear options triggered by RtoP, the concept tends dangerously toward this solution. Alex De Waal, for example, correlates the failure of peace processes in Darfur with the emphasis that RtoP places on military force.<sup>51</sup>

This connection with the use of armed force makes RtoP particularly problematic for disaster response operations. In the context of genocide, crimes against humanity, ethnic cleansing, or war crimes, there is a clear need for military force to separate warring parties, defend victims against use of force by the state, and apprehend international criminals. However, in natural disasters *per se*, a military might intervene simply to provide humanitarian aid rather than to perform a security function.<sup>52</sup> This raises the possibility that, where the Responsibility to Protect is invoked, aid delivery will be conducted primarily by military forces, rather than by neutral and impartial humanitarian organizations. Many humanitarian actors express serious doubt that militaries can prioritize aid delivery over political goals, and it is feared that military involvement in relief activity can actually destabilize areas and undermine the efforts of independent NGOs and the Red Cross.<sup>53</sup>

Finally, a convincing theoretical argument may be made that the work done by RtoP may be accomplished by other means at a far more acceptable cost to the international system. At the heart of this argument lies the premise that the traditional principle of sovereignty carries, in and of itself,

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51. Alex De Waal, *Darfur and the Failure of the Responsibility to Protect*, 83 INT'L AFF. 1039, 1043-49 (2007).

52. This happens with increasing frequency. See generally Stockholm Int'l Peace Research Inst. [SIPRI], *The Effectiveness of Foreign Military Assets in Disaster Response*, (2008) (evaluating how and when military assets should be used in disaster relief based on six aspects of effectiveness: timeliness, appropriateness and competence, efficiency, absorptive capacity, coordination and costs).

53. See, e.g., Steering Comm. on Humanitarian Response [SHCR], *SHCR Position Paper on Humanitarian-Military Relations* (2010), available at <http://www.act-intl.org/media/documents/153-SCHRPositionPaperonHumanitarianMilitaryRelationsJanuary2010.pdf> (arguing that using military forces as providers of humanitarian assistance endangers civilians and limits long-term assistance); Nicolas de Torrente, *Humanitarian NGOs Must Not Ally with Military*, EUR. AFF. (May 1, 2006), available at <http://europeaninstitute.org/Spring/Summer-2006/humanitarian-ngos-must-not-ally-with-military.html> (arguing that there is a "fundamental incompatibility between waging a war and conducting humanitarian work").



some normative significance. Jean L. Cohen, for example, notes that “sovereignty protects the special relationship between a citizenry and its government that may involve domestic constitutionalism and democracy,” and that it thus preserves a space for self-determination.<sup>54</sup> It may be further noted that this normative value lies primarily in the external (or equality) dimensions of sovereignty, which protect states from being subordinated to the will of another state.<sup>55</sup>

As Georg Nolte points out,<sup>56</sup> conflating sovereignty and responsibility undermines the normative importance of sovereignty by failing to distinguish between the external and internal dimensions. RtoP, as originally conceived, “invites states not to recognize the sovereignty of a particular state as far as that state, in the opinion of the other states, has not properly exercised its responsibilities derived from sovereignty.”<sup>57</sup> Indeed, the ability of RtoP to disengage, or lessen, the sovereignty of irresponsible nations may tend to undermine the processes of self-determination and the struggle for constitutionalism in these nations.

Moreover, the traditional notion of sovereignty provides a more than adequate basis for controlling state behavior, and even for sanctioning intervention in extreme cases. First, the traditional conception is flexible, and does not imply an absolutist interpretation.<sup>58</sup> Second, when state sovereignty is seen as distinct from human rights, it becomes necessary to fully consider the limits of both principles, and their relationship with each other. As Cohen writes, “The issue is when the sovereignty argument should be suspended and outside interven-

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54. Jean L. Cohen, *Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective*, in THE PHILOSOPHY OF INTERNATIONAL LAW 261, 279 (Samantha Besson & John Tassoulians eds., 2010). Timothy Endicott makes a similar argument in the same volume. See generally Timothy Endicott, *The Logic and Freedom of Power*, in PHILOSOPHY OF INTERNATIONAL LAW, *supra*, at 245 (examining the relationship between authority and personal autonomy).

55. See Nolte, *supra* note 35, at 390.

56. *Id.*

57. *Id.* at 391.

58. Sovereignty “not only enables states to restrict their liberty in exchange for advantages, but it can also tolerate international law conceiving of rules which bind states without their consent.” *Id.* at 389 (citing *SS Wimbledon (U.K. v. Ger.)*, 1923 P.C.I.J. (ser. A) No. 1, at 15 (June 28)).

tion legally permitted, not the redefinition of sovereignty.”<sup>59</sup> In other words, a robust consideration of sovereignty, as well as of human rights and human dignity, will lead to a deeper understanding of the requirements of each.

Even if one remains committed to the Responsibility to Protect for the crimes enumerated by the United Nations, the above argument carries a powerful message for disaster response. A state affected by a disaster normally retains the right to coordinate all disaster relief on its territory.<sup>60</sup> This rule reflects the fact that the state is in the best position to understand the needs of its citizens—it knows the infrastructure, understands the habits and special needs of the population, and knows what aid items might be inappropriate to the circumstances. In determining that a state is not fulfilling its responsibilities, and relying on the “residual responsibility” of third states, the notion of sovereignty as responsibility might tend to inappropriately undermine local control. This is not so much a concern when the state’s refusal of international aid amounts to extermination (a crime against humanity) or starvation of civilians as a method of warfare (a war crime). However, one can easily imagine a case in which a government, out of a failure to realize the gravity of the situation or diplomatic miscalculation, refuses humanitarian aid, as was the case with the Ethiopian famine of 1973 (and possibly with Cyclone Nargis).<sup>61</sup> In this case, the best-case scenario might be for the government to be convinced (or pressured) to consent to assistance while retaining its local coordinating role. Thus, while one may argue that the cost to sovereign equality is an acceptable price to pay for the protection of genocide victims, the picture is not so clear in the case of natural or technological disasters.

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59. Cohen, *supra* note 54, at 277.

60. G.A. Res. 46/182, *supra* note 19.

61. Zama Coursen-Neff finds that Ethiopia’s failure to seek international assistance was based on the desire to maintain agricultural exports and tourism revenue, either from a failure to appreciate the full extent of the problem or a more sinister motive. Zama Coursen-Neff, Note, *Preventive Measures Pertaining to Unconventional Threats to the Peace such as Natural and Humanitarian Disasters*, 30 N.Y.U. J. INT’L L. & POL. 645, 677 (1998). If this is so, then the country’s admittedly grim cost-benefit analysis might have been altered if it could have been said to be clearly breaching international law. Similarly, varying interpretations are offered for the motives of the Myanmar junta in 2008. See generally Ford, *supra* note 15.

C. *Constraining Sovereignty: International Cooperation for the Protection of Human Rights*

What I call the more traditional basis for the duty to accept disaster relief does not attempt to redefine sovereignty, but simply to constrain it, as a large number of international legal norms do. This account draws on the spirit of article 1 of the United Nations Charter, which aims, *inter alia*, to “achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights.”<sup>62</sup> The development of international legal norms that protect the individual at the expense of state sovereignty is familiar.<sup>63</sup> It should suffice to say that international law has developed a variety of mechanisms: human rights law, by treaty and custom, binds the state in its relationship with its own citizens; *erga omnes* norms allow any state to invoke the responsibility of any other; and *jus cogens* norms may bind states almost irrevocably and against their will. This section, instead, notes the most relevant developments in international human rights and the principle of interstate cooperation, and argues that these changes create the necessary legal space for a duty to accept disaster relief, though they may not require such a rule. First, this section sketches areas of human rights law that point to a right to humanitarian assistance. Then, it briefly demonstrates that developments in international cooperation make possible an obligation to open a state’s borders to foreign aid. This section is not intended to prove that such an obligation *does* exist, only that the proper legal space exists for its progressive development.

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62. U.N. Charter art. 1, para. 3.

63. Such accounts range from the moderate and state-centric to the more transformative. Compare Santiago Villalpando, *The Legal Dimension of the International Community*, 21 EUR. J. INT’L L. 387 (2010) (describing the development of *erga omnes*, *jus cogens*, and individual responsibility in terms of “community interest”), with THEODOR MERON, INTERNATIONAL LAW IN THE AGE OF HUMAN RIGHTS: GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 26 (2003) (arguing that human rights have shifted the focus of international law from the state to the individual).

## 1. *Rights to Humanitarian Assistance*

Humanitarian assistance is deeply linked with the individual's right to life, which stands at the center of modern human rights law.<sup>64</sup> Specifically, the Covenant on Civil and Political Rights holds, "No one shall be arbitrarily deprived of his life," and it notes that this right may not be suspended even amid a "public emergency that threatens the life of the nation."<sup>65</sup> This provision may be read narrowly to suggest that the right is limited to acts of state, such as law enforcement,<sup>66</sup> or that sovereignty and self-determination necessarily elide any right to receive *foreign* assistance.<sup>67</sup> The Human Rights Committee, however, has chosen a more expansive interpretation, holding that the right to life has both positive and negative dimensions, implying that a state must take affirmative measures to protect the lives of people on its territory.<sup>68</sup> This interpretation has been seized upon by many commentators and practitioners to argue that refusal to consent to an offer of relief

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64. See, e.g., Universal Declaration of Human Rights art. 3, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 at 72 (Dec. 10, 1948) ("Everyone has the right to life, liberty and security of person."); International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

65. ICCPR, *supra* note 64, arts. 4, 6(1).

66. This would be supported by the law enforcement paradigm that pervades the rest of ICCPR art. 6. *Id.* (elaborating provisions relating to capital punishment and genocide).

67. The right to self-determination is articulated in article 1 of the ICCPR, *supra* note 64.

68. Human Rights Committee [HRC], General Comment No. 6: The Right to Life, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.7 (Apr. 30, 1982). In upholding the positive dimension of the right to life, the Committee stated 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." *Id.* This decision draws on a body of human rights theory that finds all rights to have such positive dimensions. Often, human rights have been said to entail an obligation to respect the rights of others, to protect those rights by preventing violations, and to fulfill those rights by providing the goods or services necessary for their exercise. See, e.g., *Comment on Types of State Duties Imposed by Human Rights Treaties*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT (Henry J. Steiner, Philip Alston & Ryan Goodman eds., 3d ed., 2007); HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 35-64 (2d ed. 1996). But it should be noted that decisions of the Human Rights Committee are not generally considered binding.

might amount to a violation of the right to life, at least under certain conditions.<sup>69</sup>

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. The Covenant on Economic, Social, and Cultural Rights articulates, *inter alia*, the right “to an adequate standard of living . . . . . including adequate food, clothing and housing,” “the right to be free from hunger,” and the right to “the highest attainable standard of physical and mental health.”<sup>70</sup> Moreover, the Covenant requires that a state take steps to realize these rights “to the maximum of its available resources”;<sup>71</sup> the Committee on Economic, Social and Cultural Rights has stated that the drafters meant this to include not only domestic resources but also international assistance.<sup>72</sup> With respect to the right to food, the Committee specifically articulated an obligation to accept foreign aid:

Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. . . . A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to

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69. *E.g.*, Representative of the Secretary General, *Guiding Principles on Internal Displacement*, Comm’n on Human Rights, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (by Francis M. Deng); Katja Luopajarvi, *Is There an Obligation to Accept Humanitarian Assistance to Internally Displaced Persons Under International Law?*, 15 INT’L J. REFUGEE STUD. 678 (2003); PETER MACALISTER-SMITH, INTERNATIONAL HUMANITARIAN ASSISTANCE: DISASTER RELIEF OPERATIONS IN INTERNATIONAL LAW AND ORGANIZATION 165-66 (1985).

70. International Covenant on Economic, Social, and Cultural Rights, arts. 11, 12, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; *see also id.* art. 12(2)(d) (obliging states parties to undertake steps toward the “creation of conditions which would assure to all medical service and medical attention in the event of sickness”).

71. *Id.* art. 2.

72. Comm. on Economic, Social, and Cultural Rights [CESCR], General Comment No. 3: The Nature of States Parties Obligations, ¶ 13, U.N. Doc. E/1991/23 (Dec. 14, 1990).

obtain international support to ensure the availability and accessibility of the necessary food.<sup>73</sup>

The fact that economic and social rights, coupled with the right to life, have not led to general agreement on the obligation to accept humanitarian aid can be attributed to two factors: first, interpretations by the treaty bodies, which provide much of the most persuasive language here, are not generally thought to be binding under international law;<sup>74</sup> second, the two main human rights covenants have not achieved universal ratification.

Finally, recent trends in human rights law indicate that the international community is coming to recognize a distinct right to request and receive humanitarian assistance. Such a right has long been espoused by the Red Cross Movement, which holds that “[t]he right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries.”<sup>75</sup> The African Charter on the Rights and Welfare of the Child provides that refugee and internally displaced children shall receive “*appropriate* protection and humanitarian assistance,”<sup>76</sup> and the Convention on the Rights of Persons with Disabilities contains a provision protecting disabled persons in disaster situations.<sup>77</sup> The Convention on the Rights of the Child also ensures humanitarian assistance for children seeking refugee sta-

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73. CESCR, General Comment No. 12: The Right to Adequate Food, ¶ 17, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

74. INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 68, at 185-188.

75. Int’l Fed’n of the Red Cross and Red Crescent Societies, The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief, princ. 1, *available at* <http://www.ifrc.org/Docs/pubs/disasters/code-conduct/code-english.pdf>.

76. African Charter on the Rights and Welfare of the Child art 23, OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999) (emphasis added).

77. The provision states, in full:

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.

United Nations Convention on the Rights of Persons with Disabilities art. 11, GA Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

tus.<sup>78</sup> The right to humanitarian assistance has also been espoused in some soft law instruments.<sup>79</sup>

## 2. *Cooperation for the Sake of Human Rights*

The principle of international cooperation finds its basis in the United Nations Charter, which commits states to “take joint and separate action in co-operation” with the U.N. to promote universal respect for human rights.<sup>80</sup> Articles 55–56 create a space for the development of legal norms that benefit the individual at the expense of absolute sovereignty. Moreover, the general duty to cooperate has been articulated by the General Assembly in the Declaration on Friendly Relations, which purports to offer an authoritative interpretation of the Charter.<sup>81</sup> Writing in 1985, Peter MacAlister-Smith noted that the principle of cooperation holds a central place in the United Nations Charter, such that the foundational principles of sovereignty, territorial integrity, and non-intervention should be balanced against the duty to cooperate for the sake of human rights and fundamental freedoms.<sup>82</sup> The duty to cooperate plays a central role in many foundational instruments

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78. Convention on the Rights of the Child art. 22(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

79. International Institute of Humanitarian Law, *Guiding Principles on the Right to Humanitarian Assistance*, 297 INT’L REV. RED CROSS 519 (1993); L’INSTITUT DE DROIT INTERNATIONAL, *Humanitarian Assistance*, Sept. 2, 2003, in 71-2 L’INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 262 (2004) [hereinafter *Bruges Resolution*].

80. U.N. Charter arts. 55-56.

81. The relevant provision states:

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.

G.A. Res. 25/2625, *supra* note 32, pmb. The Declaration also notes that states have the duty to promote universal respect for human rights. *Id.* It should also be pointed out, however, that these provisions come alongside a full-throated endorsement of sovereignty, non-intervention, and territorial integrity. *Id.*

82. MACALISTER-SMITH, *supra* note 69. For another detailed discussion, see Luopajarvi, *supra* note 69, at 698-700 (discussing the general duty to cooperate under international law).

of international law,<sup>83</sup> and it likewise holds a prominent place in several international treaties relating to disaster relief.<sup>84</sup> However, it may be noted that, in the instruments on disaster relief, cooperation tends to refer to the affected state's obligation to accord some legal facilities (such as customs exemptions) to an assisting actor, without clearly establishing a general obligation to accept relief.<sup>85</sup> Still, the central role afforded to international cooperation in disaster response,<sup>86</sup> coupled with the Charter's clear demand for cooperative action to promote human rights, creates a coherent conceptual framework for developing an obligation to accept aid.

### 3. *Reinventing Disaster Response Law with "Traditional" Tools*

This "traditional" conceptual framework creates a space for a rule that looks significantly different than that which follows from conceiving sovereignty as responsibility. Under the latter regime, a state that fails to allow for sufficient disaster relief is, in some sense, less of a state. When aid does arrive, the host state is not perceived as being in a position to coordi-

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83. The Draft Articles on State Responsibility, which are widely held to codify customary international law, note that states are obliged to cooperate to end violations of *jus cogens* norms. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. GAOR 56th Sess., Annex, U.N. Doc. A/RES/56/83 (Dec. 12, 2001). The Montreal Protocol, among the most successful environmental law treaties, establishes a general duty to cooperate in sharing research and technology relating to the health of the ozone layer, and it establishes a financial mechanism for this purpose. Montreal Protocol on Substances that Deplete the Ozone Layer art 13, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 29. Cooperation from Member States also plays a vital role in the operation of the International Criminal Court. Rome Statute of the International Criminal Court art. 86, July 17, 1998, 2187 U.N.T.S. 90. See also U.N. Convention on the Law of the Sea arts. 100, 118, 123, 197-201, 242-44, 270-74, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 (establishing a duty to cooperate on a variety of subjects, including the conservation of the environment, transfer of technology, marine research, and the suppression of piracy).

84. See, e.g., Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations art. 3, June 18, 1998, 2296 U.N.T.S. 5; Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency art. 1, Sep. 26, 1986, 1457 U.N.T.S. 133.

85. See David Fisher, *Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflicts: A Comparative Analysis*, 89 INT'L REV. RED CROSS 345, 354-55 (2007).

86. The UN Secretariat noted that it is the "*sine qua non*" of effective disaster relief. *Secretariat Memorandum, supra* note 11, ¶ 18.



nate its distribution or direct the reconstruction plan in accordance with national priorities. The approach taken in this paper does not entail such consequences. Indeed, sovereign equality remains an active and relevant principle, and in some cases it will justify a state's demand to coordinate assistance operations on its territory. Still, this approach allows for a crucial legal development, which holds that providing or facilitating disaster relief is part of a state's obligations to its own citizens, and that this obligation entails the duty to cooperate with the international community where domestic resources are insufficient.<sup>87</sup>

### III. DISASTER RESPONSE LAW AND THE WORK OF THE ILC

This section briefly sketches the current state of disaster response law, in order to demonstrate that the International Law Commission provides the most appropriate available venue for addressing the obligation of states to accept disaster relief. The international community has long recognized the need for coordination and cooperation in disaster response, but efforts to codify the law of disaster response face a field that is littered with prospective and proposed norms, while lacking almost any universally applicable, bright-line legal rules.<sup>88</sup> Currently, it is possible to identify three approaches to disaster response law: fragmented approaches, which deal only with specific regions or subject matter; bottom-up approaches, which attempt to generate common practice by developing norms at the national and regional levels; and top-down approaches, which address the problem with universal norms on all aspects of disaster assistance. This section works in two parts, first describing the broad field of disaster relief law, and then situating within it the current work of the ILC.

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87. Principles of human rights and international cooperation may also give rise to a rule requiring that states offer humanitarian assistance to other states in need, as Vattel articulated in the eighteenth century. VATTEL, *supra* note 22, bk. II § 261. Such a rule falls outside the scope of this paper.

88. See *First Report*, *supra* note 11, ¶¶ 31–40 (noting the lack of universal comprehensive instrument but discussing treaties, domestic legislation and other key instruments dealing with specific aspects of protection).

### A. *The State of Disaster Response Law*

Top-down rulemaking promises desperately needed clarity and cohesion for international disaster response, but all previous efforts at formulating general, universal, binding rules have failed. In 1922, the League of Nations took up a project to establish an International Relief Union (IRU), to furnish aid and coordinate relief operations in the event of disasters.<sup>89</sup> Twenty-four states attended the first meeting of the IRU, but the institution soon foundered under a lack of funding and growing isolationism and rearmament, both symptoms of the global depression of the 1930s.<sup>90</sup> The second major attempt to formulate a convention was scrapped before the process truly began. In 1984, the Office of the United Nations Disaster Relief Coordinator (UNDRO) submitted a Draft Convention on Expediting the Delivery of Emergency Assistance<sup>91</sup> to the Economic and Social Council, but, despite initial expressions of support, the Council never took action on it.<sup>92</sup>

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89. Convention and Statute Establishing an International Relief Union art. 2, July 12, 1927, 135 L.N.T.S. 247 (no longer in force).

90. See MACALISTER-SMITH, *supra* note 69, at 20–21 (noting the general economic depression that “doomed the original intentions of the Union’s promoters.”).

91. U.N. Secretary-General, *Report of the Secretary-General, Addendum: Proposed Draft Convention on Expediting the Delivery of Emergency Relief*, pp. 5–18, U.N. Doc. A/39/267/Add.2 (June 18, 1984).

92. DAVID FISHER, INT’L FED’N OF RED CROSS AND RED CRESCENT SOCIETIES, LAW AND LEGAL ISSUES IN INTERNATIONAL DISASTER RESPONSE: A DESK STUDY 27–28 (2007) [hereinafter DESK STUDY], available at <http://www.ifrc.org/Docs/pubs/idrl/desk-study/113600-idrl-deskstudy-en.pdf>. The failure of this second convention provides useful lessons for future attempts to establish a common legal regime for disaster relief. The convention usefully established detailed regulations for the quality, labeling, importation, and transportation of assistance, and would have obliged parties to exempt relief from customs duties, burdensome documentation requirements, and health and hygiene regulations that would delay their delivery. *Id.* Despite the fact that this convention provided useful measures to speed the delivery of aid and equipment, it was opposed by some states who thought it went too far beyond existing agreements. DESK STUDY, *supra*, at 28. On the other side, the Red Cross organizations argued that the convention over-emphasized sovereignty and the control of the affected State. *Id.* See also YVES BEIGBEDER, THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS: THE RIGHT AND DUTY TO HUMANITARIAN ASSISTANCE 378–79 (1991). The success of any future multilateral convention will depend on whether any medium can be found between these two positions.

More recent efforts at top-down rulemaking have all constituted non-binding guidelines and statements of principle—what is known as “soft law.” The General Assembly and the International Law Association offer relatively early examples of such attempts.<sup>93</sup> More recently, the *Institut de Droit International*<sup>94</sup> published a resolution regarding the rights and obligations of states and assisting actors in the event of natural and man-made disasters, including armed conflicts.<sup>95</sup> This resolution and other soft-law instruments draw on existing practice in the field of disaster relief, and refer to analogous rules and principles in the laws of armed conflict, human rights law, and refugee law.<sup>96</sup> By and large, these guidelines attempt to develop and solidify new legal norms governing international disaster response, although some efforts, such as the Guiding Principles on Internal Displacement,<sup>97</sup> detail the sources from which their rules are derived, making a stronger case that they represent existing rules of customary international law.

Where universal, top-down rulemaking has failed to develop binding treaty norms, fragmented processes have had considerably more success. A range of bilateral and plurilateral treaties govern specific interstate relationships during natural and technological disasters, and still more treaties have been developed to cope with specific issues, such as respond-

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93. *E.g.*, G.A. Res. 46/182, *supra* note 19 Annex; INTERNATIONAL LAW ASSOCIATION, *supra* note 14. For a valuable scholarly effort, see Peter MacAlister-Smith, Max Planck Inst. for Comparative Law and Int'l Law, *International Guidelines for Humanitarian Assistance Operations* (1991), available at <http://www.ifrc.org/Docs/idrl/I356EN.pdf>.

94. The Institute of International Law is a private body founded in 1873 dedicated to the “gradual and progressive codification of international law.” L’Institut de Droit International, *Statute of the Institute of International Law*, available at [http://www.idi-iil.org/idiE/navig\\_statutes.html](http://www.idi-iil.org/idiE/navig_statutes.html). See generally L’Institut de Droit International, *IDI History*, [http://www.idi-iil.org/idiE/navig\\_history.html](http://www.idi-iil.org/idiE/navig_history.html) (last visited Feb. 2, 2010). Institute resolutions are said either to codify customary international law, or to represent statements about what the law should be, and they are distributed to state governments upon publication. *Id.* In debates at the Institute, it was argued that many of the resolution’s provisions reflected existing customary law. 71-1 L’INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 168 (2004) (comments of Thomas Franck).

95. *Bruges Resolution*, *supra* note 79, art. 2.

96. *Cf. First Report*, *supra* note 11, ¶¶ 22–29 (noting that these bodies of law are relevant for the Commission’s work).

97. *Guiding Principles on Internal Displacement*, *supra* note 69.

ing to nuclear accidents or providing telecommunications assistance.<sup>98</sup> Regional agreements in the Asia-Pacific, the Caribbean, and Latin America may suggest that general, top-down rulemaking is possible at the regional level, where the parties are more accustomed to dealing with one another.<sup>99</sup>

The International Federation of Red Cross and Red Crescent Societies (IFRC) has pioneered a bottom-up approach to disaster response law. In 2007, the IFRC published a set of guidelines on the domestic facilitation of disaster relief, addressing the necessary preconditions for international aid, as well as the granting of legal facilities, such as customs exemptions, domestic legal personality, and privileges and immunities, to international relief personnel.<sup>100</sup> The IFRC has worked to have these guidelines incorporated into the working procedures of international and regional organizations, and, most importantly, it has urged states to incorporate them into their domestic legal systems.<sup>101</sup> Although these guidelines are expressly non-binding, their widespread adoption would generate customary law on disaster relief from the bottom up, or would at least harmonize disaster response laws and reduce the need for universal international legal rules.

It has been suggested that this kind of rulemaking may replace or obviate the need for an international treaty on disaster response. The treaty-making route is fraught with the same obstacles that existed in 1984, and scholars have argued

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98. See, e.g., Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency, *supra* note 84; Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, *supra* note 84; Framework Convention on Civil Defense Assistance, May 22, 2000, 2172 U.N.T.S. 231.

99. See, e.g., ASEAN Agreement on Disaster Management and Emergency Response, July 26, 2005, available at <http://www.aseansec.org/17579.htm>; Agreement Establishing the Caribbean Disaster Emergency Response Agency, Feb. 26, 1991, 2256 U.N.T.S. 53; Organization of American States [OAS], Inter-American Convention to Facilitate Disaster Assistance, June 7, 1991, Gen. Secretariat O.A.S. A-54, available at <http://www.oas.org/juridico/english/treaties/a-54.html>.

100. Int'l Fed'n of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, 30th Int'l Conf. IFRC 30IC/07/R4 Annex (Nov. 30, 2007), available at <http://www.ifrc.org/Docs/pubs/idrl/guidelines/guidelines.pdf> [hereinafter *IFRC Guidelines*].

101. DESK STUDY, *supra* note 92, at 160.

that a convention is not the most effective way to strengthen the legal framework of relief activities.<sup>102</sup> The IFRC also seems to take this line, arguing that domestic and regional adoption of its guidelines presents the best way forward.<sup>103</sup> Viewed from this perspective, the work of the International Law Commission, which is currently developing a draft convention on the subject,<sup>104</sup> may be considered redundant.

But top-down rulemaking is particularly suited to a rule such as the obligation to accept disaster relief. As a practical matter, the field of disaster response is already strewn with guidelines, statements of principles, criteria, declarations, and resolutions, with very few binding treaties, suggesting that a renewed attempt at treaty-making could play a valuable role. In addition, the rule would develop in a manner that affects all states equally, in some sense reaffirming the external dimensions of state sovereignty. Finally, the obligation to accept disaster relief, a duty that is grounded in fundamental rights and operationalized through international cooperation, should aspire to the same universality as the international human rights regime. The rule argued for in this paper could be developed slowly through a “bottom-up” approach, but the obligation to protect vulnerable individuals implies a universal aspiration that should not be overlooked.

B. *“Protection of Persons in the Event of Disasters” at the International Law Commission*

By design, the International Law Commission is in some ways well-suited to the development of a rule governing the duty of states to accept assistance.<sup>105</sup> First, it operates in a

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102. See BEIGBEIDER, *supra* note 92.

103. DESK STUDY, *supra* note 92, at 159; *cf.* BEIGBEIDER, *supra* note 92, at 384 (“[T]he Red Cross and other NGOs have chosen to encourage states to implement what they have already agreed to in various international instruments.”).

104. *Cf.* *Second Report*, *supra* note 48 (proposing three draft articles). The effort to draft a binding treaty is against the advice of some states. See, e.g., U.N. GAOR, 63d Sess., 22d mtg. at ¶ 60, U.N. Doc. A/C.6/63/SR.22 (Nov. 20, 2008) (comments of Germany); U.N. GAOR, 63d Sess., 23d mtg. at ¶ 21, U.N. Doc. A/C.6/63/SR.23 (Nov. 21, 2008) (comments of India); *id.* at ¶ 64 (comments of the United Kingdom).

105. The United Nations General Assembly established the International Law Commission to promote “progressive development of international law

manner that is somewhat detached from the hard-edged diplomacy of states. The ILC consists of legal experts who are at least nominally, and often actually, independent from their governments. It also works on projects for a long period of time, allowing it to take a more detached view of the subject matter.<sup>106</sup> On the other hand, the commission's procedures allow states to involve themselves in the drafting process, through annual reviews in the U.N. General Assembly, which are taken seriously by the members of the ILC.<sup>107</sup> This procedure, in which states play something of a consultative role, gives the commission's final drafts more legal credibility than the work product of other codification bodies, such as the *Institut*.

It should be noted that the commission's particular competence could also be said to hinder its ability to come up with a working set of rules. First, many aspects of disaster response are highly technical, requiring a specialized knowledge absent among the generalist members of the ILC. This weakness, however, is more relevant to the operational rules of disaster relief, and is not particularly apropos when the question is the state's duty to accept aid—an issue that raises rather traditional international law questions of sovereignty and human rights. Second, the ILC generally deals with more traditional topics of international law, such as treaties and responsibility, and despite some notable examples,<sup>108</sup> it is not used to addressing subjects that are primarily aimed at the protection or empowerment of the individual. However, the commission's work on diplomatic protection and international criminal law indicate that it may be up to this challenge, and the "protection of persons" project will serve as a useful test.

In addition, the ILC has already developed a useful framework for addressing the issue of consent in its preliminary

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and its codification." Statute of the International Law Commission, G.A. Res. 174 (II), *supra* note 21, art. 1.

106. WORK OF THE ILC, *supra* note 21, at 46-47.

107. *Id.* at 47.

108. *E.g.*, *Draft Statute for an International Criminal Court*, in Report of the International Law Commission on the Work of Its Forty-sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, at 43, U.N. Doc. A/49/10 (1994); Convention on the Reduction of Statelessness, *opened for signature* Aug. 30, 1961, 989 U.N.T.S. 175 (based on an ILC draft).

work on the topic.<sup>109</sup> Draft article 2, on the purpose of the project, grounds the work in the rights of individual persons, and the special rapporteur has argued that this provision reflects a “rights-based approach” to the topic.<sup>110</sup> Also central to the project is the duty of states to cooperate with each other, with the United Nations, and with civil society to protect individuals affected by a disaster (draft article 5).<sup>111</sup> Read in light of draft article 2 (“Purpose”), this article indicates that states must cooperate with one another and with other international actors to fulfill essential needs and fully respect the rights of disaster victims, and it recalls the general obligation to cooperate that is spelled out in the U.N. Charter. Finally, the Special Rapporteur has rejected the direct applicability of the Responsibility to Protect to this topic.<sup>112</sup> Taken together, these developments demonstrate that the International Law Commission is developing a framework for disaster response that is based in

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109. The Commission has considered eight draft articles, all concerning general principles and other scope-setting issues. *See 2009 Draft Articles, supra* note 20 (scope, objective, definition of disaster, relationship with international humanitarian law, and duty to cooperate); *2010 Draft Articles, supra* note 48 (humanitarian principles, human dignity, primary responsibility of the affected state).

110. *2009 Draft Articles, supra* note 20, art. 2; *Second Report, supra* note 48, ¶¶ 16-17; *see also First Report, supra* note 11, ¶¶ 12, 25-26 (discussing a “rights-based approach” as defining not only needs but also societal obligations in the disaster context). *See generally* Declaration on the Right to Development, G.A. Res. 41/128, Annex, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/RES/41/128/Annex (Dec. 4, 1986). The rights-based approach to development and humanitarian assistance emphasizes the participation of the local population, transparency and accountability, and targeting the systemic causes of poverty and vulnerability through information-gathering, consultation with the local population, and policy advocacy. *See generally* PETER UVIN, HUMAN RIGHTS AND DEVELOPMENT (2004) (arguing that a rights-based approach to development shifts the focus inward, to local governments and NGOs as partners in development); REINVENTING DEVELOPMENT? TRANSLATING RIGHTS-BASED APPROACHES FROM THEORY INTO PRACTICE (Paul Gready & Jonathan Ensor eds., 2005) (looking at regional case studies to demonstrate how development efforts find the most success at the local level).

111. *2009 Draft Articles, supra* note 20, art. 5.

112. *2009 Report of the ILC, supra* note 18, ¶ 164. However, it should be noted that the most recent draft article, on the primary responsibility of the affected state, creates some marginal space for the conception of sovereignty as responsibility. It notes that the state, “*by virtue of its sovereignty,*” has the primary role in coordinating disaster relief on its territory. *2010 Draft Articles, supra* note 48, art. 9(a) (emphasis added).

human rights and oriented toward international cooperation, and that it seems to be leaving aside more radical reinventions of sovereignty.

#### IV. THE OBLIGATION TO ACCEPT HUMANITARIAN ASSISTANCE: A COMPARATIVE ANALYSIS

Historically, most efforts to develop principles and rules of disaster response have not attempted to establish that states or individuals have a right to relief. The first multilateral convention to address international peacetime disaster relief, the 1927 Convention Establishing an International Relief Union, emphasized that all assistance operations must be subject to the consent of the state.<sup>113</sup> Though this organization failed, the consent rule survived, virtually unqualified, in a host of subsequent regional and multilateral treaties.<sup>114</sup> The General Assembly has also noted the importance of consent in international relief operations.<sup>115</sup> Still, it does not necessarily follow that a state can refuse aid for any reason.

Section Two established a conceptual framework for the development of a rule that requires states to consent to humanitarian aid operations on their territory, and Section Three demonstrated that the ILC is working within this framework to some degree. But a state certainly should not be required to accept international aid at any time. The offer of assistance may be redundant; the state may already have the situation under control; or the aid might be culturally or logistically inappropriate. The actor making the offer might be disreputable, or motivated by military or economic goals. The rest of this paper is devoted to piecing together the details that would limit and define a state's duty to accept aid.

Various treaties and soft-law instruments have attempted to perform the delicate tailoring required to codify an obligation to accept humanitarian aid, and they are reviewed be-

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113. Convention Establishing an International Relief Union, *supra* note 89, art. 4.

114. E.g., *Report of the Secretary-General, Addendum: Draft Convention on Expediting the Delivery of Emergency Assistance*, *supra* note 91, art. 3(a) (asserting that assistance shall be carried out with respect for the sovereignty of the affected state and for the principle of non-intervention); Tampere Convention, *supra* note 84, art. 4(5).

115. G.A. Res. 46/182, *supra* note 19, Annex, ¶ 3.



low.<sup>116</sup> Section 4.1 examines the relevant rules according to the content of the obligation. Some instruments, for example, require states to conclude relief agreements or to admit assisting actors; others phrase the obligation in the negative, requiring that states refrain from refusing certain offers of aid. The following sections (4.2 and 4.3) examine the relevant instruments according to the circumstances that “trigger” the obligation to consent. These may include the response capacity of the affected state, its disposition regarding the affected population, or the intentions of the assisting actor.

### A. *Nature of the Obligation*

At the outset, some thought must be given to the content of the obligation on states. The goal is to place humanitarian actors on the ground inside the territory of a state affected by a disaster, but what exactly should the state be required to do? Even in the laws of war, where the duty to accept humanitarian assistance is well-established, the receiving state retains the primary responsibility for coordinating and controlling the relief effort, and a general obligation to unconditionally accept all offers of assistance would undermine the coordinating role by preventing the host government from enforcing reasonable limitations on the activities of aid workers. The provisions surveyed offer three general solutions to this question: positive obligations to agree to relief schemes, positive obligations merely to seek or request assistance, and negative obligations

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116. Note that nearly all of the instruments considered in this analysis apply to armed conflict and draw on the principles of the law of armed conflict. Although warfare poses many of the same problems to civilian populations as peacetime natural disasters, international law has developed specialized rules relating to armed conflict for over a century, and it is not clear how applicable these rules and principles are to disaster relief. In any event, when considering the following instruments, it is worth bearing in mind Professor Yoram Dinstein’s statement that attempting to apply one set of norms to disasters and armed conflicts addresses “a whole rainbow of peacetime and wartime issues looking for common denominators where none exist.” 71-2 INSTITUTE DE DROIT INTERNATIONAL, *supra* note 79, at 158. Dinstein’s counter-proposal, however, was simply to delete references to armed conflict in the definition of “disaster,” and he indicated that the Bruges Resolution as it stood represented a welcome expression *de lege ferenda* of the law on disaster response. *Id.* at 158–59.

constraining the abilities of states to refuse assistance.<sup>117</sup> The discussion demonstrates that more recent instruments are beginning to take the approach that states may not arbitrarily refuse assistance.

### 1. *Obligation to Agree to Relief Schemes*

Traditionally, rules that provide for an obligation to accept relief state this obligation in affirmative terms. The treaty law governing relief operations during armed conflicts, for example, tends to establish a positive obligation on states to agree to relief schemes. The Fourth Geneva Convention, referring to civilians in occupied territory, offers the strongest formulations of this duty, holding that an "Occupying Power *shall agree* to relief schemes" on behalf of the civilian population.<sup>118</sup> These schemes shall provide for, in particular, the provision of food, medical supplies, and clothing.<sup>119</sup> This provision, which is triggered when an occupier cannot adequately provide the supplies mentioned above, severely limits the discretion of the occupying state in deciding whether to agree to relief operations by international actors, while maintaining significant flexibility in the actual terms of such agreements. It should be noted that this strongly worded obligation arises in the context of a military occupation, in which the occupier has extensive and detailed responsibilities to the civilian population under international law of armed conflict.<sup>120</sup> In other sit-

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117. Some lesser positive obligations may also be noted. These include the obligation to consider offers of assistance in good faith and the obligation to cooperate.

118. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 59, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (emphasis added).

119. *Id.*; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 69, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (widening relief to include bedding, means of shelter, other supplies essential to the survival of the civilian population, as well as objects for worship).

120. Belligerent occupation is generally understood to be a temporary situation, in which the occupying power holds the territory in anticipation of a peace settlement. See Hague Convention Respecting the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land arts. 42–56, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631. This fact, as well as the temporary disruption of state sovereignty that accom-

uations of armed conflict, the obligation to accept relief is more qualified, but the law may still require the state to accept relief in some circumstances.<sup>121</sup>

In the field of disaster response, only one set of guidelines of those surveyed for this paper seeks to establish a positive obligation on affected states to allow relief operations. These guidelines are contained in the draft international agreement on “principles of international relief in natural disaster situations” by Rohan J. Hardcastle and Adrian T. L. Chua.<sup>122</sup> The principles would establish that, where victims do not receive necessary assistance, “the receiving State is obliged to allow” international relief efforts.<sup>123</sup> The strong, positive language of this provision appears more modest, however, in light of some unusual features of Hardcastle and Chua’s Draft Principles. Primarily, the provision obliges states to accept aid only from “qualified organizations.”<sup>124</sup> The term includes only nongovernmental organizations that are not associated with any government, that have “a proven record” in effective humanitarian relief, and that are placed on a roster maintained by the United Nations Office for the Coordination of Humanitarian Affairs.<sup>125</sup> This limited pool of actors arises from the authors’

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panies occupation, accounts for the particularly heightened obligations on the occupying state.

121. In the case of territory that is controlled, but not occupied, by a party to an international armed conflict, Additional Protocol I to the Geneva Conventions requires that “relief actions . . . shall be undertaken, subject to the agreement of the Parties concerned . . .” Additional Protocol I, *supra* note 119, art. 70. In the context of internal armed conflicts, the Conventions offer an even weaker formulation, holding that relief actions shall be “subject to the consent” of the party concerned. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 18(2), June 8, 1977, S. TREATY DOC. NO. 100-2 (1987), 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

122. Rohan J. Hardcastle & Adrian T. L. Chua, *Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters*, 325 INT’L REV. RED CROSS 589 (1998). However, an early draft of the Bruges Resolution of the Institut de Droit International would have established such an obligation where the affected state was unable to provide for its population. 71-1 INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 575 (2003).

123. Hardcastle & Chua, *supra* note 122, Annex, princ. 3(b).

124. *Id.*

125. *Id.* princ. 2.

understanding that “[i]t is unrealistic to expect States to agree to a multilateral convention requiring them to provide third States with a right of access to their territories even in times of natural disaster,”<sup>126</sup> and from an effort to strike a balance between the right of victims to humanitarian assistance and states’ national sovereignty. The authors thus offer an interesting and original proposal, but it is unlikely that their strong formulation of the duty to accept international disaster relief efforts would be acceptable if such a rule allowed access to states and intergovernmental organizations.

## 2. *Obligation to Seek Assistance*

Some non-binding instruments dealing with disaster response do attempt to place a positive obligation on affected states to seek or to request assistance from international actors. A formulation of this rule may be found in the 2003 Bruges Resolution on humanitarian assistance by the *Institut de Droit International*, which holds that a state “shall seek assistance from competent international organizations and/or from third States” when it cannot provide such assistance on its own.<sup>127</sup> In the debates surrounding the development of this provision, some members of the *Institut* argued that this obligation reflected customary international law, regardless of whether the relevant catastrophe is an armed conflict or a natural or man-made disaster.<sup>128</sup> This obligation also appears in the IFRC guidelines on disaster relief.<sup>129</sup>

The United Nations Secretariat has considered that an obligation to request assistance “would likewise constrain [a state’s] ability to decline offers of assistance, and would suggest that consent should not be arbitrarily withheld,”<sup>130</sup> but there is no *a priori* reason why this would be the case. An equally reasonable interpretation would be that international law requires an affected state to put out a call for offers of

126. Hardcastle & Chua, *supra* note 122.

127. *Bruges Resolution*, *supra* note 79, pt. III.3.

128. See, for example, the comments of Thomas Franck. 71-2 INSTITUT DE DROIT INTERNATIONAL, *supra* note 79, at 168.

129. “If an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons.” *IFRC Guidelines*, *supra* note 100, Guideline 3(2).

130. *Secretariat Memorandum*, *supra* note 11, ¶ 65.

assistance, while leaving it the plenary right to refuse any offer for any reason. In this respect, it is worth noting that an early draft of the Bruges Resolution required states to “seek and accept” offers of humanitarian aid, and that the reference to acceptance was deleted without explanation in the drafting process.<sup>131</sup>

### 3. *Restrictions on Refusal*

Recent instruments addressing humanitarian assistance operations exhibit a trend toward phrasing the duties of the affected state in the negative; that is, constraining its ability to *refuse* offers of humanitarian aid. The Bruges Resolution, for example, holds that affected states “are under the obligation not arbitrarily and unjustifiably to reject” good-faith offers of assistance,<sup>132</sup> and the Guiding Principles on Internal Displacement require that consent “shall not be arbitrarily withheld.”<sup>133</sup> These formulations are substantially similar, though the Bruges Resolution’s inclusion of the word “unjustifiably” suggests that states may perhaps be required to show their reasons for refusing assistance. According to the ICRC commentary to Additional Protocols I and II, similar obligations exist in the international law of armed conflicts.<sup>134</sup>

The rule articulated by the Guiding Principles and the *Interim Statute* allows a flexible, context-specific inquiry to determine

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131. Compare INSTITUT DE DROIT INTERNATIONAL, *supra* note 122, pt. III.3 (“seek and accept”), with *Bruges Resolution*, *supra* note 79, pt. III.3 (deleting “and accept”).

132. *Bruges Resolution*, *supra* note 79, pt. VIII.1.

133. WALTER KALIN, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS 116 (rev. ed. 2008) [hereinafter IDP PRINCIPLES].

134. The commentary to Additional Protocol I notes that earlier drafts of the article 70 had stated an obligation to accept relief, provided that certain conditions were met. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 819 (Yves Sandoz et al., eds, 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]. The conditions were that relief be humanitarian, impartial, and non-discriminatory in character. Though the clause requiring agreement was added out of a concern for state sovereignty, the commentary argues that the negotiations surrounding the provision clearly established that a Party refusing its agreement to relief must do so “for valid reasons.” *Id.* The commentary to Additional Protocol II lays out criteria for situations where “relief actions must take place,” strongly implying that a state must give consent under certain circumstances. *Id.* at 1479.

whether a refusal was wrongful. These particular obligations apply whether or not a state is able or willing to provide adequate help to the population in its territory, though the Guiding Principles on Internal Displacement note that this duty is particularly important where “authorities concerned are unable or unwilling to provide the required humanitarian assistance.”<sup>135</sup> The Bruges Resolution, however, adds a second phase to the inquiry by specifying that a state is only in breach if it denies a “*bona fide* offer exclusively intended to provide humanitarian assistance.”<sup>136</sup>

It is unclear whether customary international law currently prohibits arbitrary refusals of humanitarian assistance, and efforts to establish its existence in positive law are frustrated by the fact that this rule is most widely recognized in the specialized context of armed conflict. In deliberations of the *Institut*, Antonio Cassese argued that the Bruges Resolution’s statements on the matter represented rules that, while normatively desirable, required the *Institut* to tread carefully.<sup>137</sup> Many other members of the *Institut* agreed that, while other portions of the Bruges Resolution codified customary international disaster response law, this provision represented only a useful attempt at progressive development.<sup>138</sup> Others expressed skepticism about the rule.<sup>139</sup>

Much of the justification for the rule relies upon references to the law of armed conflict,<sup>140</sup> which, because of the specialized nature of the laws of war, cannot provide more than useful analogy in deducing the rules governing response

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135. KALIN, *supra* note 133, at 171.

136. *Bruges Resolution*, *supra* note 79, pt. VIII.1. This obligation also prohibits refusing access to victims, presumably once it has already given consent to humanitarian activity on its territory.

137. INSTITUT DE DROIT INTERNATIONAL, *supra* note 122, at 534 (reply of Mr. Antonio Cassese (Sept. 13, 2002)).

138. *See* INSTITUT DE DROIT INTERNATIONAL, *supra* note 79, at 161 (stating that most of the Resolution is *lex lata* but Pt. VIII and law pertaining to non-acceptance of assistance is *lege ferenda*).

139. *E.g.*, INSTITUT DE DROIT INTERNATIONAL, *supra* note 122, at 530-31 (reply of Mr. Orrego-Vicuña (Sept. 9 2002)) (arguing that if a state refuses assistance, a valid reason such as political or ideological differences is presumed).

140. *See, e.g.*, IDP PRINCIPLES, *supra* note 133, at 115-17 (emphasizing that humanitarian assistance shall not be diverted for military or political reasons).

to natural and man-made disasters. For example, as mentioned above, the commentaries to Additional Protocol II note:

The fact that consent is required does not mean that the decision is left to the discretion of the parties. If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and nondiscrimination is able to remedy this situation, relief actions must take place. . . . The authorities responsible for safeguarding the population in the whole of the territory of the State cannot refuse such relief without good grounds.<sup>141</sup>

The commentary to Additional Protocol I contain a similar statement, noting that Parties concerned do not have “absolute and unlimited freedom to refuse their agreement to relief actions. A Party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones.”<sup>142</sup> The Guiding Principles on IDPs rely heavily on the arguments from the commentaries to the Geneva Conventions and their protocols.<sup>143</sup> Thus, although the rule would provide useful guidance in disaster relief, its roots in the laws of armed conflict invite the objection that wartime is a situation *sui generis*, and that the rule should not be extended to peacetime disasters.

The most significant problem related to this obligation is determining who is entitled to assess when a refusal to cooperate is arbitrary. This problem could arise in cases where a state struck by a serious disaster selects from a range of offers, accepting some and refusing many. Professor Sompong Sucharitkul noted that was the case, for example, in the Kobe earthquake of 1995 in Japan, and he wondered who would sit in judgment over Japan’s decisions.<sup>144</sup> Several potential annotations or additional rules could bolster the clarity of this provision. One solution would be to require the state to publicly

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141. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 134, at 1479.

142. *Id.* at 819.

143. IDP PRINCIPLES, *supra* note 133, at 116 (citing COMMENTARY ON THE ADDITIONAL PROTOCOLS).

144. INSTITUT DE DROIT INTERNATIONAL, *supra* note 79, at 160; *see also id.* at 156 (comments of Alexander Yankov) (wondering “who was to determine under the Bruges Resolution whether a rejection of an offer of humanitarian assistance was arbitrary or unjustifiable”).

give reasons for its refusal. This could have the dual effect of discouraging states from abusing their discretion, and of providing concrete grounds on which to judge the validity of a state's refusal to cooperate.<sup>145</sup> In addition, a non-exhaustive list of valid reasons for refusal might provide guidance. Valid reasons might include imperative national security concerns, a showing that a relief plan was poorly prepared or inappropriate to the needs of the local population, or the fact that the assisting organization or state has a history of discrimination.<sup>146</sup> Institutional mechanisms may also be available. A provision could empower the Security Council specifically to decide on whether a refusal in such circumstances is arbitrary.<sup>147</sup>

### B. *Criteria Triggering the Obligation: Characteristics of the Affected State*

After understanding the varying obligations placed on states with regard to accepting humanitarian assistance, we may ask what set of facts may trigger this obligation to seek, to accept, or not to refuse such aid. Existing instruments that address this question vary in focus. Some look to the characteristics and capacities of the state affected by the disaster, asking, for example, whether the state is unable or unwilling to help a population within its territory. Others look to the facts on the ground, asking whether a population is in fact inadequately supplied. Instruments may also examine the characteristics of the offered assistance, asking whether it was offered in good faith or with a primarily humanitarian purpose. Provisions may include objective elements that may be determined from examining the manifest facts of the affected state or of

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145. This was suggested by Antonio Cassese in the early preparation of the Bruges resolution. See INSTITUT DE DROIT INTERNATIONAL, *supra* note 122, at 535 (reply of Mr. Antonio Cassese (Sept. 13, 2002)).

146. The principles of humanity, neutrality, and impartiality, as articulated in the Statutes of the International Red Cross and Red Crescent Movement, offer the most obvious sources for valid reasons for refusing assistance, in that if an assisting actor can credibly be said to violate one of these principles, it may be denied entry. See Statutes of the International Red Cross and Red Crescent Movement (1986), pmb., available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/\\$File/Statutes-EN-A5.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/$File/Statutes-EN-A5.pdf).

147. Cf. *Bruges Resolution*, *supra* note 79, pt. VIII.3.



the offered assistance, as well as subjective elements that reference the purpose of an offer or refusal of humanitarian assistance. Many provisions contain elements from more than one of the aforementioned categories, but for the sake of comparison, each category will be considered separately. The comparison demonstrates that recent instruments are beginning to consider a state's obligations to accept aid both in light of objective and subjective criteria.

### 1. *Hardships Suffered by the Population*

The relief provisions of the Geneva Conventions focus exclusively on the actual and manifest hardships experienced by the affected population. In situations of military occupation, an occupying power must agree to relief schemes wherever "whole or part of the population of an occupied territory is inadequately supplied . . . ."<sup>148</sup> In internal conflicts, relief operations must take place where civilians suffer "undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies."<sup>149</sup> While the commentary notes that it would be impossible to develop an exhaustive list of situations of undue hardship, it suggests that the "usual standard of living of the population concerned" should be taken into account in making this determination.<sup>150</sup> The comments to analogous provisions for occupied territory and international conflicts do not mention such a consideration. The only set of guidelines specifically relating to disaster response to take this approach is, again, the Draft Principles developed by Hardcastle and Chua,<sup>151</sup> which provide that an affected state must allow international assistance operations

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148. Fourth Geneva Convention, *supra* note 118, art. 59. The language of Additional Protocol I is similar, holding that relief activities must be undertaken where the population is "not adequately" provided for. Additional Protocol I, *supra* note 119, art. 70.1.

149. Additional Protocol II, *supra* note 121, art. 18.2.

150. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 134, at 1479.

151. The Bruges Resolution of the Institut de Droit International, however, does include some references to the actual circumstances that affected populations face. In establishing an obligation not to arbitrarily refuse assistance, the Resolution notes that this obligation is particularly important where "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." *Bruges Resolution*, *supra* note 79, pt. VIII.1.

when “victims in the receiving State do not receive the humanitarian assistance necessary to sustain life and dignity in natural disasters.”<sup>152</sup>

The focus on the actual circumstances affecting a population offers some strong attractions. First, this formulation places the individual, or at least a group of individuals, at the center of the legal analysis. This would be consistent<sup>153</sup> with the rights-based approach to this topic adopted by the International Law Commission, which seeks to gauge the success of disaster relief operations by determining to what extent the rights of victims are respected, protected, and fulfilled.<sup>154</sup> Second, as a practical matter, this approach most directly addresses the problem that aid often does not reach people who need it or are entitled to it. An inquiry that does not focus on the adequacy of supplies, but rather on the capacities and intentions of affected states, seems one step removed from this question. History offers examples of states that have more than sufficient resources to help disaster victims, but nevertheless fail to reach whole sectors of the population.<sup>155</sup> The rule offered by the Geneva Conventions may offer a way to compel international relief efforts in such situations.

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152. Hardcastle & Chua, *supra* note 122, princ. 3(b). Section 4.1, *supra*, discusses the unique nature of Hardcastle and Chua’s proposal.

153. Though a focus on individuals and populations indicates a rights-based approach, it would also be consistent with the needs-based approach advocated by the Red Cross. It could be argued that the provisions of the Geneva Conventions and the Additional Protocols, while focusing on the concerns of individuals rather than states, do not implicate human rights at all, but simply the essential needs of persons affected by conflict. This line of argument would be less persuasive with respect to the proposal by Hardcastle and Chua, which employs human dignity as a central concept. In international law, dignity is inextricably linked with human rights. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III), *supra* note 64 (“All human beings are born free and equal in dignity and rights.”).

154. *See 2009 ILC Report, supra* note 18, ¶ 178 (stating that a rights-based approach creates space to assess the legal situation, in light of both the state’s sovereignty and duty to ensure the rights of individuals in its territory).

155. Newspapers offer a range of accounts in the wake of Hurricane Katrina, demonstrating massive failure to deliver resources to those in need. *See, e.g.*, Editorial, *Actually, It Was FEMA’s Job*, N.Y. TIMES, Oct. 2, 2005, at 11; Stephanie Strom, *Foreign Experts Criticize U.S. Red Cross on Katrina*, N.Y. TIMES, Apr. 5, 2006, <http://www.nytimes.com/2006/04/05/us/nationalspecial/05cross.html>; Scott Shane & Eric Lipton, *Stumbling Storm-Aid Effort Puts Tons of Ice on Trips to Nowhere*, N.Y. TIMES, Oct. 2, 2005, at A1.

But the rules developed in the Geneva Conventions and Additional Protocols are susceptible to several criticisms, particularly with respect to natural disasters. First and most significantly, this criterion would represent remarkable involvement by the international community in the peacetime affairs of a sovereign state. Whereas even internal armed conflict is widely understood to be a subject of international legal regulation, such an understanding is only now developing with respect to disaster response. Moreover, the law of armed conflicts operates in a context in which the sovereignty of one or more states has already been severely disrupted.<sup>156</sup> Many disasters, whether natural or man-made, may be said to be more analogous to riots and internal disturbances, which are not *per se* considered to be armed conflicts under international law.<sup>157</sup> As in these situations, a state facing a disaster often remains in complete control of its territory, and, unlike in many situations of divisive internal strife, the controlling government may truly desire to help its entire population. States would surely balk at a provision that, on its face, requires them to accept international actors within their borders, even if they are acting in good faith and with adequate supplies to reach all disaster victims.

The Geneva rules also present a problem from a humanitarian perspective. Because of their focus on the facts on the ground, the rules embodied in the Geneva Conventions seem to require that the international community wait until an occupying or controlling power fails to adequately supply the local population before compelling it to accept international assistance. This may be sound policy where no one expected

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156. Save some specific and important provisions, such as Common Article 3, all four Geneva Conventions and Additional Protocol I apply only to international armed conflicts, implying transboundary military operations and invasions. Even the treaty law of internal armed conflicts applies only when an organized armed group gains control of a part of a state's territory, enabling it to conduct sustained operations. Additional Protocol II, *supra* note 121, art. 1. However, customary international law governing armed conflicts may not require such a high threshold; it is generally understood that that the conflict need only be protracted. See Rome Statute of the International Criminal Court, *supra* note 83, art. 8(2)(f) (applying to internal armed conflicts "when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.").

157. Rome Statute of the International Criminal Court, *supra* note 83, arts. 8(2)(d), 8(2)(f).

that a state would have inadequate resources or will to help its population. But consider the case in which a state is known to have insufficient supplies to respond to a major natural disaster, such as Haiti in 2010.<sup>158</sup> Absent a creative construction, a Geneva-type provision would appear to require that the international community wait until the affected population begins to starve, or suffer from inadequate clothing supplies or medicine, before states and other actors may use this provision as leverage to obtain access to the victims.<sup>159</sup> This position would seem untenable for a body of law whose ultimate purpose is to provide for the rights or needs of individuals and populations. Disaster victims deserve a law that provides that, where a state has, for example, clearly manifested its unwillingness to help a particular population, the international community can compel access to that population before a hurricane even makes landfall.

## 2. *Capacities and Disposition of the Affected State*

The above problem introduces another set of criteria that considers the capacities and characteristics of the affected state. Provisions that take this approach inquire about an affected state's ability to care for disaster victims in its territory, and sometimes about its willingness to do so. These provisions may be further divided into objective criteria, which consider manifest facts within affected states, and subjective criteria that attempt to divine the disposition of the states. Recent instruments to address the problem of international disaster relief often contain some provision of this type, with a mixture of subjective and objective elements.

The most common objective criterion is the affected state's inability to assist its own population. The resolution by the *Institut de Droit International*, for example, requires a state to seek international assistance if it "is unable to provide suffi-

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158. By the morning after the 2010 earthquake in Haiti, U.N. Secretary-General Ban-Ki Moon was prepared to announce, "There is no doubt that we are facing a major humanitarian emergency and that a major relief effort will be required." U.N. Secretary-General, Opening Remarks to the Press on the Earthquake in Haiti (Jan. 13, 2010), [http://www.un.org/apps/news/in-focus/speeches/search\\_full.asp?statID=697](http://www.un.org/apps/news/in-focus/speeches/search_full.asp?statID=697).

159. Of course, such a provision would not prevent states from attempting to negotiate access through normal diplomatic and treaty-making channels.

cient humanitarian assistance to . . . victims.”<sup>160</sup> The resolution’s understanding of “humanitarian assistance” catches a wide-ranging set of goods and services necessary for survival and for the essential needs of the victims.<sup>161</sup> It is unclear whether a state can fail to provide some of these services to its own population, such as psychological assistance, and still be considered having “sufficient” capacity for the purposes of this obligation; this question seems to require a context-specific inquiry.<sup>162</sup>

The Mohonk Criteria establish a similar provision, but with a more limited scope, obliging the international community to step in where the government is unable “to provide *life-sustaining aid*.”<sup>163</sup> This criterion is more clearly limited to essentials such as food, drinking water, bedding, clothing, medical supplies, and shelter, and leaves open only the question of how much starvation or deprivation is sufficient to show that a state is unable to provide for its population.

The guidelines for disaster response developed by the International Federation of Red Cross and Red Crescent Societies included a more deferential standard, under which a state should seek international assistance when it “determines that a disaster situation exceeds national coping capacities.”<sup>164</sup> The conditions under which a state ought to accept offers of aid from other states and international organizations is primarily a question of state-to-state relations, and thus it may not belong

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160. *Bruges Resolution*, *supra* note 79, pt. III.3. In an earlier draft, a state was required to accept assistance under these conditions. INSTITUT DE DROIT INTERNATIONAL, *supra* note 122, at 574.

161. *Bruges Resolution*, *supra* note 79, pt. I.1. It includes not only foodstuffs, shelter, and medical supplies, but also vehicles, spiritual and psychological assistance, voluntary return of refugees, de-mining, and decontamination. *Id.*

162. *Cf.* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 134, at 1479.

163. Jon M. Ebersole, *The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance*, 17 HUM. RTS. Q. 192, 197, princ. II.4 (1995) (emphasis added) [hereinafter *Mohonk Criteria*].

164. *IFRC Guidelines*, *supra* note 100, at 3(2). This deference to the findings of the local government may be explained by the guidelines’ purpose: to create legal frameworks capable of responding quickly and efficiently to disasters, providing appropriate regulation of foreign assistance while removing unnecessary red tape. *Id.*, intro.

in an instrument that is intended to inspire domestic legislation.

A provision that focuses on the characteristics of the affected state may also consider the subjective attitude of that state toward disaster victims. The Guiding Principles on Internal Displacement provide that a state shall not arbitrarily refuse offers of aid “particularly when authorities concerned are unable *or unwilling* to provide the required humanitarian assistance.”<sup>165</sup> This kind of criterion, however, would lead to an inquiry by the international community into the “mental state” of a particular government, and it is worth noting that the unwillingness of a state does not play an operative role in the Guiding Principles, but merely emphasizes that the obligation not to arbitrarily withhold consent to assistance is particularly important when an authority is unable or unwilling to help.<sup>166</sup> Objective criteria may be developed to help infer unwillingness: this approach is suggested by the Mohonk Criteria, which provide that relief actions shall take place where the affected state is “*manifestly unwilling*” to provide aid.<sup>167</sup>

The “unable or unwilling” criteria do solve some of the problems posed by the Geneva-type provisions discussed above. If a state clearly lacks the stockpiled supplies or infrastructure to deal with a serious disaster, then a legal judgment may be made that it is obliged to seek or accept international assistance in the very early stages of a disaster. Likewise, if a state has made clear that it wants nothing to do with a particular region or ethnic group within its territory, this kind of provision could aid in efforts to pressure states to agree to relief schemes, even before a disaster has occurred.

Still, state sovereignty objections remain. It could be persuasively argued that such criteria, particularly an investigation into the “willingness” of a state to assist its population, may constitute an illegal interference in the internal affairs of a state. This approach also poses evidentiary problems when determining a state’s ability to provide assistance. A state’s precise capacity for stockpiling food and medicine, transporting

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165. IDP PRINCIPLES, *supra* note 133, at 116, princ. 25(2) (emphasis added).

166. *Id.*

167. *Mohonk Criteria*, *supra* note 163, at princ. II.4 (emphasis added). Criteria for determining unwillingness are discussed in Section V, *infra*.

personnel, and coordinating relief efforts is unlikely to be a matter of public knowledge at the international level. In this respect, this approach meets the same humanitarian objections that apply to the Geneva-type provisions: that many people will have to be exposed to malnutrition or disease before the international community can determine that the state is in fact incapable of meeting the needs of its population.

C. *Criteria Triggering the Obligation: Characteristics of the Offer*

An obligation to accept, or not to arbitrarily refuse, humanitarian assistance may be further limited to certain offers. Instruments that take this approach generally require states to accept only offers of assistance that are calculated to provide relief without adverse distinction or partiality, or to allow only offers that are given without ulterior motive. This subsection considers several efforts to address both the subjective and objective characteristics of an offer of humanitarian aid, and it rejects each of them. However, the discussion here will provide a helpful basis for determining when a refusal of assistance is not arbitrary.

This type of limitation can be traced to the decision of the International Court of Justice in the *Military and Paramilitary Activities in and Against Nicaragua* case, where the Court noted in an oft-quoted passage that “strictly humanitarian aid to persons or forces in another country . . . cannot be regarded as unlawful intervention, or as in any other way contrary to international law.”<sup>168</sup> The Court, citing the fundamental principles of the Red Cross, further explained what it meant by “strictly humanitarian aid”:

[I]f the provision of “humanitarian assistance” is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely “to prevent and alleviate human suffering”, and “to protect life and health and to ensure

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168. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 242 (June 27). As with many of the other documents discussed in this section, it should be noted that the *Nicaragua* decision was decided in the context of armed conflict, with the laws of war as a backdrop, and it is not clear how applicable these principles are to the context of disaster relief.

respect for the human being"; it must also, and above all, be given without discrimination to all in need in Nicaragua.<sup>169</sup>

Thus, in the reasoning of the ICJ, we see a mixture of subjective and objective criteria for humanitarian assistance. On one hand, the relief must be distributed without discrimination *in fact*.<sup>170</sup> On the other, its purposes must be limited to alleviating suffering and protecting life and health. Only by meeting both of these criteria, in the reasoning of the ICJ, can a unilateral assistance operation avoid implicating the principles of territorial sovereignty and non-intervention.<sup>171</sup> The Court's reasoning in this case appears to form the basis for the criteria elaborated in later instruments on humanitarian assistance.

Objective criteria focus on the nature or character of the relief actions themselves, as opposed to the motives or mental state of the offering state or organization. The relief provisions in the Additional Protocols to the 1949 Geneva Conventions take this approach, with Additional Protocol I requiring that such international aid operations be "humanitarian and impartial in character and conducted without any adverse dis-

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169. *Id.* at ¶ 243.

170. In this sense, non-discrimination may be understood as at least a partially objective criterion. The issue before the ICJ in *Nicaragua* was the fact that the United States was providing aid to Contras and Contra sympathizers, and had argued that the assistance did not constitute intervention because it was humanitarian in character. *Id.* The Court's findings in the quoted passage support its conclusion that the U.S. operations were not purely humanitarian, because they were limited to one particular group, and were not offered without condition or adverse distinction. *Id.* In this context, the aid operations were discriminatory in fact, leaving aside any question of discriminatory intent.

171. It could be argued that this passage from the Court's decision establishes some ground for unilateral humanitarian intervention, perhaps even by force. See Mary Ellen O'Connell, *Continuing Limits on U.N. Intervention in Civil War*, 67 *IND. L.J.* 903, 906 (1992) (stating that humanitarian aid distributed against the wishes of a government in control may not constitute unlawful intervention). But the Court's conclusion in this case is of questionable value to those seeking to establish a right of humanitarian intervention in international law; in the twenty-three years since this decision, not even the Security Council has asserted such broad authority. Coursen-Neff, *supra* note 61, at 693. The question remains to what extent a natural disaster situation can be considered a threat to international peace and security by the Security Council.



inction.”<sup>172</sup> Additional Protocol II, referring to internal armed conflicts, adds that the operations must be of an “exclusively humanitarian and impartial nature.”<sup>173</sup> The commentary to this latter provision notes that the requirements of humanity, impartiality, and non-discrimination “provide every guarantee of non-intervention.”<sup>174</sup> The commentary also makes clear that these provisions relate to the actual facts of the relief operations, and do not entitle states parties to the Protocols to begin guessing as to the intentions of the state or organization offering relief.<sup>175</sup>

The problem with the obligations as they are phrased in the Geneva Protocols is one of timing. If a state party can only refuse aid “on a factual basis,”<sup>176</sup> then in most cases the state will not be able to deny access to partial or discriminatory relief actions until after they have begun operating.<sup>177</sup> Few states would be willing to bear the public relations nightmare of taking down temporary hospitals and sending aid workers packing after a few days, even if they are committing serious violations of humanitarian norms, such as using aid to compel religious conversions or promote political agendas. Humanitarian actors are in any case under an obligation to respect local laws,<sup>178</sup> and the state could certainly bring its domestic courts and administrative power to bear in controlling their conduct. But this would be an extremely costly enterprise. In the current context, in which an astounding number and variety of international actors respond to major disas-

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172. Additional Protocol I, *supra* note 119, art. 70(1).

173. Additional Protocol II, *supra* note 122, art. 18(2).

174. SANDOZ, *supra* note 134, at 1476.

175. *See id.* at 817–18 (“such cases must be assessed on a factual basis, and the humanitarian character of an action could not be contested merely on the basis of its intention: the only ground for refusing an action would be the failure to comply with the required criteria.”).

176. *Id.*

177. Of course, there may be some situations in which a state’s relief plan or operating history clearly indicates that the action will be partial or discriminatory, or will fail to comply with basic humanitarian standards.

178. *E.g.*, Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations, *supra* note 84, art. 5(7).

ters,<sup>179</sup> even a state that is in dire need of assistance should be given some discretion as to whom it chooses to allow within its borders.

Subjective criteria, based on the intention of the actor who is offering the assistance, solve the above problem, but create their own unique challenges. The most recent version of this kind of criterion was offered by the *Institut de Droit International*, whose Bruges Resolution held that states could not arbitrarily refuse a “*bona fide* offer exclusively intended to provide humanitarian assistance.”<sup>180</sup> This draws on the “exclusive” language used in Additional Protocol II, but also adopts the subjective approach that the International Court of Justice hinted at in the *Nicaragua* decision. As opposed to the Geneva-type provisions discussed above, the approach taken by the Bruges Resolution appears to leave the affected state with broad discretion to refuse offers. It is unclear where the burden of proof lies with respect to showing that an offer of assistance is made in good faith, or with exclusive intent to provide humanitarian assistance. Because of this vagueness, this language becomes an escape clause that allows a state to refuse any offer it wishes. In addition, the requirement that an offer be “exclusively intended” to provide humanitarian assistance may be too restrictive. International organizations and states act with a range of motives, including establishing regional stability and gaining a reputation as reliable peacekeepers and humanitarians, that, while self-serving, are not the kind of motives that entirely undermine the delivery of assistance. On the other hand, another phrase, such as “primarily intended,” could be overly inclusive.

A solution to this problem is to place clear requirements on assisting actors. These may include general principles, such as the duty to act impartially and without distinction,<sup>181</sup> and to respect local laws,<sup>182</sup> as well as specific rules of conduct, such as obligations to inspect all goods to ensure quality and appropriateness,<sup>183</sup> and to communicate appropriate informa-

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179. DESK STUDY, *supra* note 92, at 29–30 (the number of NGOs responding to high-profile disasters has been increasing at an alarming rate, and this trend is expected to continue).

180. *Bruges Resolution*, *supra* note 79, pt. VIII.1.

181. *E.g.*, *IFRC Guidelines*, *supra* note 100, guideline 4(2).

182. *E.g.*, *id.*, guideline 4(1).

183. *E.g.*, *id.*, guideline 17(3).

tion regarding the distribution of relief materials.<sup>184</sup> These obligations could be framed under international law, or they may be incorporated into the domestic laws of states.<sup>185</sup>

In addition, the fact that a particular state or organization has a fundamentally flawed relief plan or a history of meddling in internal affairs will almost certainly constitute legitimate grounds for refusing consent. Thus, the subjective and objective criteria discussed here may form legitimate, prototypical reasons for refusing humanitarian aid, which cannot be considered arbitrary. I will return to this thought in Part Five.

## V. WRITING THE RULES

Drawing on the previous efforts at codifying the rules of disaster response, this section develops its own approach to the question. In so doing, it is important to recall the discussion of sovereignty, human rights, and cooperation in Section II. A rule requiring states to consent to foreign assistance should be based in human rights, and it should enhance and facilitate international cooperation. The rule should, as far as possible, work within the framework of sovereignty, though it need not prejudice the development of future, narrowly drawn norms that sanction humanitarian interventions. As human rights norms do, this rule may limit the freedom of states to act vis-à-vis their own populations, but it should not treat the occurrence of a large-scale, or even overwhelming, natural disaster as a trigger that undermines sovereign equality and subordinates one state to others.

In practical terms, these principles can be respected through the following three considerations. First, any rule should be calculated to meet the needs of disaster victims. Second, it should be capable of being implemented in real-world settings, avoiding or reconciling some of the operational problems noted in the analysis of Part Four. Finally, it should as far as possible respect the power of states to make informed and reasonable choices regarding the relief operations on their territory. This section develops a rule based on these weighty considerations.

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184. *E.g.*, U.N. Doc. A/39/267/Add.2, *supra* note 91, art. 9.

185. *E.g.*, *IFRC Guidelines*, *supra* note 100, guideline 1(3).

### A. *The Constituent Elements*

The comparative analysis in Part Four has identified four trends that I argue best map a route between the protection of human rights and the preservation of sovereign equality. First, it seems generally understood that a state must at least request assistance when it is unable or unwilling to help its own population. The IFRC Guidelines, which generally take a relatively conservative approach to the state-to-state questions of disaster response, espouse this obligation.<sup>186</sup> In addition, in the debates surrounding the Bruges Resolution of the *Institut*, this obligation was found to be broadly acceptable.<sup>187</sup> This provides a positive step in the direction of a duty to accept humanitarian assistance. Although the wording of the obligation leaves the state with the ultimate discretion as to whether to accept any offers of assistance, it at least implies that a state must consider such offers in good faith.

Second, experts, scholars, and international institutions are increasingly taking the position that a state may not arbitrarily refuse international assistance. This kind of prohibition has been criticized as a step back from more rights-based, positive obligations to ameliorate suffering, and it has been argued that the provision is “inevitably vague.”<sup>188</sup> But on the other hand, it may be the most progressive basis possible for any rulemaking that relies on the input of states. This prohibition was widely regarded as *de lege ferenda* in 2003,<sup>189</sup> and its inclusion in the Bruges Resolution was even criticized for straying from the Resolution’s foundations in positive customary law.<sup>190</sup> Even the author of the rule expressed skepticism that it could survive negotiations in a diplomatic setting, and he urged its adoption on the grounds that:

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186. *IFRC Guidelines*, *supra* note 101, guideline 3(2).

187. *See generally* L’INSTITUT DE DROIT INTERNATIONAL, *supra* note 79, at 153-73.

188. Luopajarvi, *supra* note 69, at 707-08.

189. L’INSTITUT DE DROIT INTERNATIONAL, *supra* note 79, at 161, 168; 71-1 L’INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 534 (2004) (comments of Antonio Cassese).

190. 71-1 L’INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 156 (2004) (comments of Professor Alexander Yankov: “A clear mechanism was provided for — offer, acceptance by consent and cooperation. But . . . Article VIII deviated from this mechanism by introducing novelties.”).

[t]he Institute should have a body of rules based on existing international law but be able to go further. This would separate the Institute from the work of the International Law Commission, which can only elaborate texts which are likely to be adopted at a diplomatic conference.<sup>191</sup>

But perhaps this has changed. It is possible that the immense suffering surrounding Cyclone Nargis may have led to a more general understanding that the kind of “criminal neglect”<sup>192</sup> displayed in 2008 is unacceptable. If so, the prohibition offered by the *Institut* represents a middle road between protecting sovereignty and preventing massive suffering.

Third, a greater number of instruments have used some variation on the “unable or unwilling” formulation to trigger the obligation to accept relief. The focus on state capacity, which may be well-known in advance of a disaster, best facilitates the rapid response necessary after catastrophes such as the 2010 Haiti earthquake. In addition, some of the approaches analyzed above take into account the willingness of a state to give assistance to its population. This approach may be necessary to address situations such as Cyclone Nargis in Myanmar, or the unwillingness of North Korea to acknowledge the 1997 famine.<sup>193</sup>

Finally, the documents surveyed show a continuing concern with the intentions and conduct of the actor (state or non-state) making the offer of assistance. The decision of the International Court of Justice in the *Nicaragua* case, for example, suggests subjective criteria that limit the obligation to accept aid to offers that are impartial, non-discriminatory, and exclusively intended for humanitarian purposes. However, recent instruments such as the IFRC Guidelines also show that international law can also develop comprehensive rules governing the practice of assisting actors. Thus, it may be possible to avoid subjective criteria by packaging an obligation to accept assistance with specific rules governing the conduct of assisting states and organizations. This approach could empha-

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191. *Id.* at 183.

192. Schmitt, *supra* note 10, at A5.

193. See Coursen-Neff, *supra* note 61, at 678-80 (highlighting North Korea’s reluctance to acknowledge that agricultural problems beyond flooding had contributed to food shortages).

size that even a state whose response capacity is overwhelmed retains the primary responsibility for coordinating and overseeing disaster relief on its territory.<sup>194</sup>

To conclude, I propose that, when a disaster-affected state is unable or manifestly unwilling to provide sufficient humanitarian assistance to persons on its territory, it: (1) shall seek assistance from other states, international organizations, and NGOs; and (2) shall not arbitrarily withhold consent to assistance.

The first obligation, to seek assistance when a state is unable or unwilling to help its population, may perhaps be said to have the strongest grounding in customary international law. The second obligation reflects more recent trends in the law, but because it is limited to situations in which the state is unable or unwilling to help its population, this formulation is more limited in scope than other instruments that seek to articulate this duty. In addition, while a state is required to seek offers from the international community, it retains the discretion to choose among the offers it receives.

### B. *Commentary*

The proposed rule raises three problems, each of which require a response. First, how is it determined whether a state is able or “willing” to accept humanitarian aid? Second, it is important to elaborate criteria for determining whether a refusal of aid is “arbitrary.” Third, it is important to ask who judges violations of this rule. The remainder of this section attempts to provide a “commentary” of sorts to elaborate on these aspects of the proposed rule.

A possible solution to the first problem may be to provide more detailed objective criteria in assessing what facts would indicate unwillingness and inability. Such factors have been developed, for example, by the Rome Statute of the International Criminal Court.<sup>195</sup> Indicators of unwillingness may in-

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194. *E.g.*, GA Res 42/182, *supra* note 19.

195. The Rome Statute lays out the following criteria for assessing inability and unwillingness:

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

clude: (a) there is a regular failure on the part of the state to deliver humanitarian aid, development aid, or social services to a particular geographic area, or to a particular gender, ethnic or political group, or religious sect; (b) there has been unjustified delay in delivery of assistance which in the circumstances is inconsistent with an attempt to meet the needs of the affected population; and (c) assistance is not being delivered in accordance with internationally recognized principles of humanity, neutrality, impartiality, and non-discrimination. Inability may be assessed according to objective capacities, supplies, and infrastructure, or a government may be found to be unable to respond due to a total or partial collapse, or a lack of effective control over part of its territory. In 2010, the complete collapse of Haiti's infrastructure after the January earthquake provides a paradigmatic example of a state that is "unable" to assist its own population.<sup>196</sup> According to these factors, inability in other cases may be found even before a hurricane makes landfall.

The rule's prohibition on arbitrariness likewise implies a demand for public justification when a state refuses aid. The relative inexperience, or non-neutrality, of a humanitarian organization would provide reasonable grounds for refusal, whereas a refusal to acknowledge the existence of a disaster

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(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Rome Statute of the International Criminal Court, *supra* note 83, art. 17.

196. See INTER-AGENCY STANDING COMMITTEE, *THE RESPONSE TO THE HUMANITARIAN CRISIS IN HAITI 7-8* (2010) (describing the heavy damage sustained by the government in the quake).

would not.<sup>197</sup> This provision also provides a framework in which a state's obligations would also be strengthened by a state's other international legal commitments. For example, a state party to the International Covenant on Economic, Social, and Cultural Rights would be committed to using the "maximum of its available resources" to support its population, which would entail the resort to outside assistance.<sup>198</sup> Defective reasons could be used to shame a state into compliance, or to justify a Security Council-authorized intervention. Katja Luopajarvi has described language similar to that proposed here as "rather weak,"<sup>199</sup> but this criticism undersells the provision's potential. When the law requires states to step into the international arena to justify their behavior vis-à-vis their own citizens, it creates new pathways for states to be evaluated, criticized, and shamed, and for actors to be persuaded and socialized into adopting new approaches.<sup>200</sup>

The question of who can judge violations remains the most challenging. In this context, it is worth distinguishing between two settings. In one case, an individual is seeking reparations *post facto* from her domestic government, arguing that it wrongfully refused assistance following a major disaster. In this case, the problem is not so difficult. A domestic, regional or international tribunal, or a treaty monitoring body, could review the historical record and determine whether the government's refusal was arbitrary. In the second case, states and international actors are clamoring for access to victims in the immediate aftermath of a disaster. The Security Council or another body may be empowered to declare that a state is acting arbitrarily.<sup>201</sup> Alternatively, understanding the rule as an obligation *erga omnes* would allow each state to make its own

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197. As in the situation in Ethiopia in 1973. See Coursen-Neff, *supra* note 61, at 677–78.

198. ICESCR, *supra* note 70, art. 2; General Comment 13, *supra* note 73.

199. Luopajarvi, *supra* note 69, at 707.

200. The news agency of the U.N. Office for the Coordination of Humanitarian Affairs recently noted that the Myanmar junta is cooperating more readily with the U.N. and NGOs. *Myanmar: A Fragile Trust between Junta and Aid Workers*, IRIN, July 16, 2010, <http://www.irinnews.org/Report.aspx?ReportId=89856>. This development may indicate that the junta's public shame in 2008 has in fact wrought changes for the better.

201. The Security Council is suggested by the Bruges Resolution, *supra* note 79, and by the World Summit Outcome, *supra* note 42. The International Commission on State Sovereignty argues persuasively for greater in-



determinations and to take sanctions individually or collectively against the refusing state. This creates another problem, in that it risks 192 states imposing countermeasures individually and without coordination. However, the threat of this kind of action might result in a net positive impact on state behavior in disaster situations.

This obligation meets some of the most serious humanitarian concerns in the context of disaster. It would demonstrate that governments have an obligation to their populations and, potentially, to the international community,<sup>202</sup> to provide effective and adequate disaster relief. It may also aid the organs of the United Nations and the Security Council in putting pressure on governments in situations like that following Cyclone Nargis, and it may entitle states to take reasonable countermeasures against an uncooperative affected state. With respect to individuals, it also provides a principled basis for asserting that they have an absolute right to humanitarian assistance, and may form part of the grounds for a post facto claim for reparations. This obligation does not solve all the problems of international disaster relief, and in some cases many people will die needlessly before this obligation can be invoked. However, it would provide an additional protection to individuals against the mismanagement and neglect all too often displayed in the aftermath of disasters.

## VI. CONCLUSION

This paper proposes a basic rule for international disaster assistance, which, from the vantage point of individual human rights and human dignity, should seem long overdue. Such a rule would have at least three distinct effects on a situation like Myanmar. First, the rule's arbitrariness standard creates a framework within which the affected government must publicly justify its conduct. After Cyclone Nargis, the Myanmar government stated that it would "welcome any assistance and aid [that is] provided with genuine good will from any country

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volvement by regional organizations, and somewhat less so for unilateral action. ICSS, *supra* note 37, at §§ 6.31-40.

202. This essay does not discuss the *erga omnes* character of this obligation, but debates in the *Institut de Droit International* provide a good point of departure for further discussion. INSTITUT DE DROIT INTERNATIONAL, *supra* note 79, at 161-68.

or organization, provided that there are no strings attached nor politicization involved.”<sup>203</sup> The rule proposed here would allow the government to deny aid offers that carried certain untenable conditions, but it would force the government to provide clear evidence and justifications for this statement. As other scholars have noted, a requirement for public justification may have a positive impact on a state’s strategies.<sup>204</sup> Second, the rule firmly connects the denial of humanitarian assistance to human rights, something that has not been done explicitly in any binding instrument. The proposal could thus fill a key gap in victims’ claims before national tribunals or binding and non-binding international human rights bodies. Finally, the rule provides an additional normative basis on which the Security Council may act under Chapter VII of the U.N. Charter to force a state to accept aid in extreme circumstances.<sup>205</sup>

But the discussion above also raises as many questions as it answers. Most importantly, the consequences for violating this rule must be explored. *Erga omnes* obligations are said to entitle all other states to take countermeasures, but it will be difficult to design countermeasures against a disaster-affected state that do not further endanger the lives of the affected population. Moreover, it remains entirely plausible that international law should sanction military intervention in some natural disaster situations, particularly where the government is engaging in genocide or crimes against humanity. In addition, the increasing role of military actors in disaster response threatens to blur the lines between assistance and intervention,<sup>206</sup> and it

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203. Mydans, *supra* note 5.

204. See ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISIS AND THE ROLE OF LAW 105-06 (1974) (noting that a government’s acceptance of “the obligation of legal justification in any particular instance makes that obligation harder to avoid the next time round.”).

205. Louis Henkin in 1995 noted the increasing tendency of the Security Council to declare that human rights violations constitute threats to international peace and security. Henkin, *supra* note 35, at 43. This tendency has only increased in the fifteen years since his writing. See generally JOSE ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 169-83 (2005).

206. The 2010 Haiti earthquake response saw contributions from thirty-four national militaries, in addition to the U.N. peacekeeping force in the country. GLOBAL HUMANITARIAN ASSISTANCE, GHA REPORT 2010, at 9 (2010). The militarization of humanitarian assistance presents a relatively novel and possibly alarming trend. For general information on the chal-

sharpens the question of whether rules governing state consent to foreign aid should be different with respect to different actors—other states, IOs, NGOs, etc.<sup>207</sup> These questions, as well as the range of operational aspects currently being investigated by the International Federation of Red Cross and Red Crescent Societies,<sup>208</sup> deserve greater attention from international legal scholars.

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lenges posed, see generally SIPRI, *supra* note 52; David Fisher, *Law of International Disaster Response: Overview and Ramifications for Military Actors*, 38 ISRAEL Y.B. ON HUM. RTS. 115 (2008).

207. Specifically, it raises the question of whether the proposal to create a “roster” of acceptable humanitarian organizations should be revived. See Hardcastle & Chua, *supra* note 122 (raising the possibility of drafting an International Relief Convention). This issue was also brought up at the 2009 proceedings of the International Law Commission. See generally 2009 ILC Report, *supra* note 18.

208. See generally DESK STUDY, *supra* note 92.

