

Institut für Öffentliches Recht
Völkerrecht und Rechtsvergleichung



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Freiburger Informationspapiere zum Völkerrecht und Öffentlichem Recht

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Freiburg 6/2015
ISSN 2192-6077



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EBOLA - INTERNATIONAL DISASTER RESPONSE TO A GLOBAL HEALTH EMERGENCY

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Freiburg 6/2015

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Freiburger Informationspapiere zum Völkerrecht und Öffentlichen Recht
ISSN 2192-6077
www.fiponline.de

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I. Introduction: A short history of Ebola

"I always thought that Ebola, in comparison to AIDS or malaria -- didn't present much of a problem because the outbreaks were always brief and local. Around June [2014] it became clear to me that there was something fundamentally different about this outbreak. At about the same time, the aid organization Doctors Without Borders sounded the alarm. We Flemish tend to be rather unemotional, but it was at that point that I began to get really worried."¹

¹ Interview with Ebola discoverer Peter Piot: 'It Is What People Call a Perfect Storm', Der Spiegel, September 26, 2014, <<http://www.spiegel.de/international/world/interview-with-peter-piot-discoverer-of-the-ebola-virus-a-993111.html>>.

On September 18, 2014, the United Nations (UN) Security Council adopted Res 2177 (2014) and determined “that the unprecedented extent of the Ebola outbreak in Africa constitutes a threat to international peace and security”.² It had become undeniable that the spread of Ebola in Western Africa since spring 2014 constituted an issue of global concern and just as much a challenge for both the international community and international law as civil wars, earthquakes and tsunamis. Before summer 2014, Ebola haemorrhagic fever or Ebola virus disease (EVD) had been an ‘exotic’ disease. Scientists did not deem it to be capable of becoming a global health concern. EVD had been discovered in 1976 by a group of international microbiologists following an outbreak of an unknown type of haemorrhagic fever in former Zaire and Sudan with high mortality rates.³ The disease, which was named after the river Ebola in proximity to the village where the first patient lived, aroused the scientific community but did not trigger much international attention. The first blood and tissue samples of the Ebola virus arrived in Europe in 1976 on board of a commercial air carrier without any security restrictions – this seems grotesque when one looks at the dramatic pictures of medical aid personnel in protective suits and the futuristic isolating units used in Western countries for homecoming infected aid workers. The World Health Organization (WHO) did set up an International Commission on October 18, 1976, but it was terminated on January 29, 1977.⁴ After Ebola reached a peak in September and October 1976, case numbers dropped and the disease eventually disappeared except for one case in Congo in 1977 and a minor outbreak in Sudan in 1979.⁵ Between 1976 and 2013, there were only 2,352 registered cases and 1,497 deaths caused by Ebola worldwide.⁶

² UN Security Council, Res 2177 (2014) (Peace and security in Africa) (September 18, 2014) UN Doc. S/RES/2177 (2014) Preambular-Clause 5.

³ JOHNSON/WEBB/LANGE/MURPHY, *Isolation and characterization of a new virus (Ebola virus) causing acute hemorrhagic fever in Zaire*, 309 THE LANCET (1977), 569.

⁴ *Ebola haemorrhagic fever in Zaire in 1976: Report of an International Commission*, 56 BULLETIN OF THE WORLD HEALTH ORGANIZATION (1978), 271 (272, 290).

⁵ PETERS/LEDUC, *An Introduction to Ebola: The Virus and the Disease*, 179 J INFECT DIS. (1999), ix.

⁶ Centers for Disease Control and Prevention, *Outbreaks Chronology: Ebola Virus Disease* (March 24, 2015), available at <http://www.cdc.gov/vhf/ebola/outbreaks/history/chronology.html>.

Today, there are five species of Ebola viruses, of whom only the Reston-type on the Philippines is harmless for humans. The most dangerous virus types, which were responsible for the outbreak in Western Africa, show a fatality rate of 25-90%.⁷ EVD is transmitted to humans via wild animals, especially through consumption of or close contact with chimpanzees, gorillas, fruit bats, monkeys, forest antelopes and porcupines.⁸ The disease is not airborne but spreads through human-to-human transmission throughout the population, i.e. by means of direct contact with blood, secretions, organs or other bodily fluids of infected people, but also through contact with surfaces and contaminated materials.⁹ EVD is extremely infectious because the viral load is very high in terminally ill persons.¹⁰ Furthermore, the virus can survive for a long time even in convalescent patients, e.g. in seminal fluids,¹¹ and has even been found in the ocular fluid of survivors nine weeks after reconvalescence.¹² Traditional practices in the affected African States foster the quick transmission, e.g. at traditional burials of Ebola victims where it is common to touch the deceased, but also through public transport or shared use of sanitary facilities.

The largest Ebola outbreak in history started in December 2013 and continues until today. As of April 2015, there have been 26,312 cases and 10,899 deaths not only in rural areas, but also in large cities.¹³ Geographically, Ebola occurred in six West African countries, namely Guinea, Sierra Leone, Liberia, Mali, Senegal and Nigeria. In May 2015, no cases have occurred in the latter four countries for the duration of two maximum periods of incubation.¹⁴ Singular cases occurred in the United States, Spain, United

⁷ All medical information on Ebola taken from WHO, Ebola Virus Disease, Fact Sheet No. 103 (April 29, 2015), available at <http://www.who.int/mediacentre/factsheets/fs103/en/>.

⁸ Ibid.

⁹ Ibid.

¹⁰ DOWELL/MUKUNU/KSIAZEK/KHAN/ROLLIN/PETERS, *Transmission of Ebola Hemorrhagic Fever: A Study of Risk Factors in Family Members, Kikwit, Democratic Republic of the Congo, 1995*, 179 J INFECT DIS. 1999, S87 (S90).

¹¹ BAUSCH/TOWNER/DOWELL/KADUCU/LUKWIYA/SANCHEZ ET AL., *Assessment of the Risk of Ebola Virus Transmission from Bodily Fluids and Fomites*, 196 J INFECT DIS. (2007), S142 (S145).

¹² VARKEY/SHANTA/CROZIER/KRAFT/LYON/MEHTA ET AL., *Persistence of Ebola Virus in Ocular Fluid during Convalescence*, THE NEW ENGLAND JOURNAL OF MEDICINE, Online Publication (May 7, 2015), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMoa1500306>.

¹³ World Health Organization, Ebola Situation Report (April 26, 2015) available at <http://apps.who.int/ebola/en/ebola-situation-reports>.

¹⁴ Robert Koch Institut, Aktuelle Informationen zu Ebolafieber in Westafrika, zur Situation in Deutschland und in anderen Ländern, available at http://www.rki.de/DE/Content/InfAZ/E/Ebola/Kurzinformation_Ebola_in_Westafrika.html;

Kingdom and Germany following the infection of aid personnel who were nationals of the respective countries.¹⁵

This paper will analyze the mechanisms current international law has at hand in order to deal with infectious diseases, both with regard to the affected States, but also under consideration of the role played by non-affected States and international organizations. At first, Ebolas's classification as "disaster" in the law of international disaster relief will be discussed (II.). Then the role and legal duties of the affected States will be outlined (III.) before looking at the existence of legal duties of the international community vis-à-vis a disaster-affected State (IV.). The paper will close with a short summary and outlook on future developments in public health and disaster management (V.).

II. Ebola and its classification as disaster in terms of International Disaster Relief Law

The Ebola outbreak in Western Africa continues to fulfill the requirements of all definitions of a disaster currently used in international law.¹⁶

The International Law Commission (ILC), which has been engaged in developing a body of draft articles concerning the protection of persons in

Liberia Is Declared Free of Ebola, but Officials Sound Note of Caution, The New York Times, May 9, 2015, available at http://www.nytimes.com/2015/05/10/world/africa/liberia-is-free-of-ebola-world-health-organization-declares.html?_r=0.

¹⁵ Robert Koch Institut, *ibid.*

¹⁶ The regime of International Disaster Relief Law has recently become considered a new special field of interest in international law, although some lawyers are hesitant to use it as a description of a new field of law such as International Humanitarian Law. Troppmann, *Auf dem Weg zu einem Recht der Internationalen Katastrophenhilfe - die Regelungsvorschläge der Rotkreuz- und Rothalbmondbewegung*, HUMANITÄRES VÖLKERRECHT - INFORMATIONSSCHRIFTEN/JOURNAL OF INTERNATIONAL LAW OF PEACE AND ARMED CONFLICT (1/2008), 17 (18) supports the existence of a new international legal regime; Matz-Lück, *Solidarität, Souveränität und Völkerrecht: Grundzüge einer internationalen Solidargemeinschaft zur Hilfe bei Naturkatastrophen* (2012) 150 and Pronto, *Consideration of the Protection of Persons in the Event of Disasters by the International Law Commission*, 15 ILSA J. INT'L & COMP. LAW (2008-2009), 449 (454) as well as Clement, *International Disaster Response Laws, Rules, and Principles: A Pragmatic Approach to Strengthening International Disaster Response Mechanisms*, in *Caron/Kelly/Telesetsky (Hrsg.), THE INTERNATIONAL LAW OF DISASTER RELIEF* (2014), 67 deny the existence of such a new regime in international law.

the event of disasters since 2007¹⁷, defines a disaster as 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.”¹⁸

The International Federation of the Red Cross (IFRC), which has the most practical expertise in dealing with national and international disaster relief approaches through its national societies and which can thus be considered comparable to an association of most highly qualified publicists of international law in terms of Art. 38 lit. c of the Statute of the International Court of Justice¹⁹, adopts a similar approach. It defines a disaster as “a serious disruption of the functioning of society which poses a significant, widespread threat to human life, health, property or the environment, whether arising from accident, nature or human activity, whether developing suddenly or as the result of long-term processes, but excluding armed conflict.”²⁰ Biological events, which are defined as disease epidemics as well as insect/animal plagues, are explicitly provided as examples for the interpretation and *de facto* application of the definition.²¹ With several thousand casualties in six countries, the Ebola outbreak constitutes a disease epidemic²² and fulfills the quantitative criteria of both definitions. Their

¹⁷ Draft Articles on the Protection of Persons in the Event of Disasters, ILC, 'Protection of persons in the event of disasters. Memorandum by the Secretariat', (December 11, 2007) UN Doc. A/CN.4/590.

¹⁸ Art. 3, ILC, Texts and titles of the draft articles adopted by the Drafting Committee on first reading (Protection of persons in the event of disasters) [2014] (UN Doc. A/CN.4/L.831) (May 15, 2014).

¹⁹ Statute of the International Court of Justice, June 26, 1945, 15 UNCTAD 355.

²⁰ Art. 2, IFRC, Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, 30th International Conference of the Red Cross and Red Crescent, Genf (30IC/07/R4 annex).

²¹ IFRC, Types of disasters: definition of hazard, available at <https://www.ifrc.org/en/what-we-do/disaster-management/about-disasters/definition-of-hazard/>. See also the explanatory commentary to the Guidelines, which states “HIV crises” as an example of the definition, IFRC, Annotations to the Draft Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, October 27, 2007, available at <https://www.ifrc.org/PageFiles/41203/annotations.pdf>, 7.

²² According to the Dictionary of Epidemiology edited for the International Epidemiological Association, an epidemics is the “occurrence in a community or region of cases of an illness, specific health-related behavior, or other health-related events clearly in excess of normal expectancy. The community or region and the period in which the cases occur must be specified precisely. The number of cases indicating the presence of an epidemic varies according to the agent, size, and type of population exposed; previous experience or lack of exposure to the disease; and time and place of occurrence. Epidemicity is thus relative to usual frequency of the disease in the same area, among the specified population, at the same season of the year.” (PORTA (ed.), A Dictionary of Epidemiology, OUP (6th ed. 2014), p. 93). The number of deaths by Ebola in West African States in 2014 exceeded the numbers

requirement of a “disruption of society” sets a high threshold on the qualitative element of this definition, which makes it less useful for operative disaster relief and places many disasters outside the definition’s scope, was fulfilled as well in the case of EVD: Since medical personnel had been infected in all of the affected countries, physicians could not operate properly anymore and many hospitals were closed. Patients with other diseases such as malaria and typhus could not be treated.²³ Public health care, which had already been very basic and fragile in the affected States before the Ebola epidemic²⁴, ceased to exist. Public transport was also severely affected, as people were frightened to come into contact with infectious persons on buses or trains. The infrastructure, which had also been very elementary before 2014 due to years of civil war²⁵, was brought to a standstill.

Ebola also fulfilled all formal requirements of the EM-DAT criteria.²⁶ EM-DAT was founded by the WHO with support from the Belgian government in 1988. The database is the largest disaster database and currently lists more than 18,000 disasters from 1900 until present and is updated through a variety of sources, such as the UN. It is a very important source for pre- and in-crisis information for disaster relief organizations such as the UN Office for the Coordination of Humanitarian Affairs (OCHA).²⁷

For a disaster to be entered into EM-DAT, at least one of the following criteria must be fulfilled:

- ten (10) or more people reported killed or
- hundred (100) or more people reported affected or
- a declaration of a state of emergency must have been issued or

evidenced in almost four previous decades since the discovery of Ebola in 1976 on a large scale.

²³ Westafrika: Ebola-Epidemie fordert fast 11.000 zusätzliche Malaria-Tote, Der Spiegel (April 24, 2015), available at <http://www.spiegel.de/gesundheit/diagnose/malaria-ebola-fuehrt-zu-millionen-zusaetzlichen-faellen-a-1030254.html>.

²⁴ WHO, Factors that contributed to undetected spread of the Ebola virus and impeded rapid containment, January 2015, available at <http://www.who.int/csr/disease/ebola/one-year-report/factors/en/>.

²⁵ Ibid.

²⁶ EM-DAT: The International Disaster Database, Centre for Research on the Epidemiology of Disasters (CRED), available at <http://www.emdat.be>.

²⁷ OCHA, Multi-Cluster/Sector Initial Rapid Assessment (MIRA), March 2012, available at https://docs.unocha.org/sites/dms/Documents/mira_final_version2012.pdf, 13.

- a call for international assistance must have been released.²⁸

Ebola affected more than 20,000 people and killed more than 10,000. Guinea, Liberia and Sierra Leone each declared a state of emergency in August 2014 and all affected countries issued public appeals for disaster aid to the international community.

Finally, the WHO classified Ebola as a Public Health Emergency of International Concern (PHEIC) in September 2014.²⁹ A PHEIC is a serious, extraordinary public health event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response.³⁰ The Ebola outbreak surprised even microbiologists because of its sudden extreme case numbers. It carried implications for public health in all affected States beyond their national borders as travel and trade restrictions were imposed. Its unprecedented scale and the very difficult local conditions required immediate international actions and thus the criteria for a PHEIC were met.

III. Legal obligations of the affected State in dealing with disaster response

This section analyzes the general legal duties of affected States during disasters pursuant to customary international law and human rights treaties (1. and 2.) before examining the specific international and national legal obligations applicable to the Ebola-affected countries (3.).

1. Primary role of the affected State during disasters as evidenced in customary international law

According to international law, the affected State has the primary role in disaster relief on its territory. This is the starting point for all legal arguments

²⁸ EM-DAT: The International Disaster Database, Centre for Research on the Epidemiology of Disasters (CRED), Explanatory Note, available at <http://www.emdat.be/explanatory-notes>.

²⁹ WHO, Statement on the 1st meeting of the IHR Emergency Committee on the 2014 Ebola outbreak in West Africa, World Health Organization, (August 8, 2014), available at <http://www.who.int/mediacentre/news/statements/2014/ebola-20140808/en/>.

³⁰ WHO, IHR Procedures concerning public health emergencies of international concern (PHEIC), available at <http://www.who.int/ihr/procedures/pheic/en/>.

in the areas of international law dealing with disaster response. It can be derived from the concept of State sovereignty. Sovereignty encompasses rights and duties for States³¹, making them the first and foremost actors in disaster relief with respect to their population. Customary international law reaffirms the application of this general rule to disaster relief as evidenced by State practice and *opinio juris*.³² State practice can be deduced from the immediate behaviour of States following the occurrence of a disaster. The affected State and its public authorities are the first entities to respond to a disaster which occurred under their jurisdiction. Their governments react, for instance, by declaring a state of emergency in accordance with their national laws, the issuance of official disaster reports and the set-up of disaster management units. The declaration of a state of emergency indicates that the respective State accepts its responsibility for dealing with the consequences of the disaster. A regional example for the standardization and thus general acceptance of such practice is the procedure for invoking the derogation clause under Art. 15 of the European Convention of Human Rights (ECHR)³³. Affected States have wide discretion in undertaking the primary evaluation of all circumstances in this respect as there is no judicial or quasi-judicial authority to conclusively determine whether all requirements of an emergency are fulfilled.³⁴ Most States have their own procedure for the declaration of a state of emergency. During the Ebola epidemic, all three especially affected States – Guinea, Sierra Leone and Liberia – declared a state of emergency in accordance with their national legislation and administrative procedures.³⁵ National emergency management agencies frequently issue disaster warnings and declarations, such as the US Federal Emergency Management Agency (FEMA) or the German Bundesamt für Katastrophenschutz (BBK), and thereby express their initiative and responsibility. Furthermore, the statements of State representatives in ILC-meetings unanimously confirmed the primary role of the affected State

³¹ CRAWFORD, *The creation of states in international law* (Oxford University Press 1979) 26; ICJ, *Advisory Opinion, Reparations for injuries suffered in the service of the United Nations* (April 11, 1949), ICJ Reports 1949, 174, 180.

³² Cf. for an in-depth analysis of customary international law HÜBLER, *Völkerrechtliche Verhaltenspflichten von Staaten und internationalen Organisationen im Katastrophenfall*, Univ. Diss. Freiburg, will be published in 2016, Chapter 4, p. 3-7.

³³ November 4, 1950, 213 UNTS 221.

³⁴ KRIEGER, *Kapitel 8: Notstand, in Grote/Marauhn (eds.)*, EMRK/GG KONKORDANZ KOMMENTAR (2006), para. 7, 8.

³⁵ See below III.3.

during disasters.³⁶ Such statements can also be taken as evidence of State practice.

International treaty law confirms the primary role of affected States during disasters. Almost all regions of the world have multilateral treaties which emphasize the primary role of affected States during disasters and oblige them to implement, coordinate, control and supervise disaster relief. Examples are Art. XXII of the Agreement Establishing a Caribbean Disaster Emergency Management Agency³⁷, Art. IV lit. a of the Inter-American Convention to Facilitate Disaster Assistance,³⁸ Art. 3 (2) ASEAN Agreement on Disaster Management and Emergency Response³⁹ and Art. 6 (1) of the Community Civil Protection Mechanism in the European Union.⁴⁰ Many thematically specialized multilateral treaties also stress the important primary role of the affected State, such as Art. 3a of the Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency⁴¹ and Annex X of the Convention on Transboundary Effects of Industrial Accidents⁴². State practice is accompanied by the necessary *opinio juris* of being obliged to act in case of a disaster, as especially evidenced in *soft law* documents such as resolutions of the UN General Assembly (UNGA). Since the 1980s, they have been stressing the primary role of affected States during national disasters.⁴³

³⁶ Cf. the statements in International Law Commission (ILC), Statement of the Chairman of the Drafting Committee (62nd session 2010, Protection of Persons in the Event of Disasters) (July 20, 2010) , p. 10; ILC, 'Provisional summary record of the 3055th meeting', (June 2, 2010) UN Doc. A/CN.4/SR.3055 , p. 19, 21, 22; ILC, 'Provisional summary record of the 3056th meeting', (June 3, 2010) (2010) , p. 6, 10, 13, 17; ILC, 'Provisional summary record of the 3057th meeting', (June 4, 2010) UN Doc. A/CN.4/SR.3057 , p. 11.

³⁷ July 1, 2008, provisionally applied since July 4, 2008, available at http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_cdema.pdf.

³⁸ July 6, 1991, OAS A-54, available at <http://www.oas.org/juridico/english/treaties/a-54.html>.

³⁹ July 26, 2005, 2005 ASEAN Document Series 157, entered into force December 24, 2009,.

⁴⁰ Council Decision of 8 November 2007 establishing a Community Civil Protection Mechanism (recast), 2007/779/EC, Euratom, OJ L 314/9.

⁴¹ September 26, 1986, 1457 UNTS 133, entered into force February 26, 1987.

⁴² March 17, 1992, 2105 UNTS 457, entered into force April 19, 2000.

⁴³ E.g. UNGA, Res 36/225 (December 17, 1981) , Preambular-Clause 8; UNGA, Res 43/131 (December 8, 1988) , para. 2; UNGA, Res 63/141 (December 11, 2008) UN Doc. A/RES/63/141 , Preambular-Clause 4; UNGA, Res 65/264 (January 28, 2011) UN Doc. A/RES/65/264 , Preambular-Clause 5; UNGA, Res 66/227 (December 23, 2011) UN Doc. A/RES/66/227, Preambular-Clause 6. C.f. ILC, 'Third report on the protection of persons in the event of disasters by Mr. Eduardo Valencia-Ospina, Special Rapporteur', (March 31, 2010) UN Doc. A/CN.4/629, para. 77.

2. Special legal obligations of affected States during disasters

The meaning of the primary role of the affected State can be substantiated through specific legal obligations. First and foremost, affected States are under an obligation to protect the lives of their population. This is enshrined in Art. 6 (1) (II) International Covenant on Civil and Political Rights (ICCPR)⁴⁴ and all regional human rights treaties, i.e. Art. 2 (1) (I) ECHR,, Art. 4 (1) (II) American Convention of Human Rights (ACHR)⁴⁵, Art. 5 (2) (I) Arab Charter of Human Rights⁴⁶ and Art. 4 Banjul-Charter⁴⁷ and also recognized as customary international law.⁴⁸ The Human Rights Committee (HRC), the sole interpretative body of the ICCPR, adopts a very wide interpretation of the right to life. States do not only have to respect the right to life, but must take positive safeguard measures to implement the right and thereby guarantee the protection of the right holders. The HRC has explicitly referred to measures against malnutrition and protection against epidemics.⁴⁹ Taking a teleological approach and looking at the object and purpose of the right to life in accordance with Art. 31 (1) of the Vienna Convention on the Law of Treaties (VCLT)⁵⁰, one could argue further that active measures of disaster relief, i.e. disaster preparedness and instant disaster assistance, are encompassed as well. Disasters often cause many deaths through their mere onset alone, e.g. in case of earthquakes and tsunamis. It would seem paradox and undermine the right to life entirely was the affected State not obliged to adopt measures of preventing such irreversible casualties before they occurred. Furthermore, in the immediate aftermath of disasters, the existence of those rights holders not already killed by the disaster is often substantively endangered, e.g. due to plagues, lack of medical treatment. It stems from the core of the right to life to adopt measures to protect the right holders in those situations.

⁴⁴ December 16, 1966, 999 UNTS 171 (1966), entered into force March 23, 1976.

⁴⁵ November 22, 1969, available at

<http://www.refworld.org/docid/3ae6b36510.html>, entered into force July 18, 1978.

⁴⁶ Arab Charter on Human Rights, May 22, 2004, printed in 12 INT'L HUM. RTS. REP. 893 (2005), entered into force March 15, 2008.

⁴⁷ African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, entered into force October 21, 1986.

⁴⁸ PETERSEN, Life, Right to, International Protection, Max Planck Encyclopedia on Public International Law (2012), para. 1.

⁴⁹ HRC, General Comment No. 6 – The right to life (Art. 6) (April 30, 1982) U.N. Doc. HRI\GEN\1\Rev.1, p. 6, para. 5.

⁵⁰ April 18, 1961, 500 UNTS 95.

The obligation to respect the right to life is bypassed by the right to health, which is protected under Art. 12 International Covenant on Civil, Economic and Social Rights (ICESCR)⁵¹, Art. 16 Banjul-Charter, Art. 39 (1) Arab Charter and Art. 10 of the Additional Protocol to the IACHR⁵². It is further enshrined in Art. 5 lit. e (iv) International Convention on the Elimination of All Forms of Racial Discrimination⁵³, Art. 12 Convention on the Elimination of All Forms of Discrimination against Women⁵⁴, Art. 24 Convention on the Rights of the Child⁵⁵ and Art. 11 of the European Social Charter. According to the preamble of the WHO Constitution, health is defined as a „state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.“⁵⁶ The right to health is often referred to in conjunction with the guarantee of certain minimum standards regarding food, water, housing as well as sanitary and medical care. All these factors accumulate in the right to health and can also be described as being parts of the right to health.⁵⁷

With regard to the scope and effectivity of the right to health, Art. 12 ICESCR gives the most complete guarantee. It encompasses the three-fold dimension to respect, protect and fulfill the right.⁵⁸ The Committee on Economic, Social and Cultural Rights has repeatedly emphasized that these obligations can include the avoidance of food scarcity during disasters.⁵⁹ Furthermore, Art. 12 (2) lit. c ICESCR explicitly requires States to take measures for the cure of diseases. This includes the establishment of medical emergency systems during accidents and epidemics as well as the delivery of

⁵¹ December 16, 1966, 999 UNTS 3 (1966), entered into force January 17, 1976.

⁵² Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, November 17, 1988, 28 ILM 156 (1989), entered into force November 16, 1999.

⁵³ March 7, 1966, 660 UNTS 195, entered into force January 4, 1969.

⁵⁴ December 18, 1978, 1249 UNTS 14, entered into force September 3, 1981.

⁵⁵ November 20, 1989, 1577 UNTS 3, entered into force September 2, 1990.

⁵⁶ Constitution of the World Health Organization, July 22, 1946, 14 UNTS 185, entered into force April 7, 1948, Preamble.

⁵⁷ UNHCR/WHO The right to Health - Fact Sheet No. 31 available at http://www.who.int/hhr/activities/Right_to_Health_factsheet31.pdf, 3.

⁵⁸ CESCR, General Comment No. 14: The right to the highest attainable standard of health (article 12) (August 11, 2000) UN Doc. HRI/GEN/1/Rev.9 (Vol. I), p. 78-96, para. 33.

⁵⁹ CESCR, General Comment No. 12: The right to adequate food (art. 11) (May 12, 1999) UN Doc. E/C.12/1999/5, para. 6.

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disaster relief and humanitarian assistance in case of emergencies.⁶⁰ ICESCR-rights oblige the member States to work towards the full and effective realization of the guarantees and programmatic goals enshrined in the Covenant.⁶¹ Every State party is given discretion in the development of feasible strategies towards achieving this goal.⁶² In any event, minimum core obligations must be provided, such as the provision of non-discriminatory access to health institutions, food, shelter, sanitary institutions and water.⁶³ The minimum standards of all rights enshrined in the ICESCR are today considered fully enforceable human rights, which is illustrated by the fact that violations can be claimed through an individual complaint mechanism since May 2013.⁶⁴ The right to health is recognized as part of customary international law, insofar as it is included in the right to life.⁶⁵

Specific human rights obligations in case of disasters are also enshrined in specific treaty instruments such as the Convention on the Rights of Disabled People⁶⁶ and the African Charter on Children Rights.⁶⁷ Both treaties oblige the treaty parties to take all necessary measures to guarantee the full effectiveness of their provisions. Treaty parties have to create a

⁶⁰ CESCR, General Comment No. 14 (August 11, 2000) UN Doc. HRI/GEN/1/Rev.9 (Vol. I), p. 78-96, para. 16.

⁶¹ STEIN/VON BUTTLAR, *Völkerrecht* (Carl Heymanns Verlag 12th ed. 2009) para. 214; BROWNLIE, *Principles of Public International Law* (OUP 7th ed. 2008) para. 566; MECHLEM, 'Food, Right to, International Protection' (MPEPIL), (2008) OUP para. 14; CESCR, General Comment No. 14 (August 11, 2000) UN Doc. HRI/GEN/1/Rev.9 (Vol. I), p. 78-96, para. 30.

⁶² CESCR, General Comment No. 14 (August 11, 2000) UN Doc. HRI/GEN/1/Rev.9 (Vol. I), p. 78-96, para. 53.

⁶³ CESCR, General Comment No. 14 (August 11, 2000) UN Doc. HRI/GEN/1/Rev.9 (Vol. I), p. 78-96, para. 43.

⁶⁴ December 12, 2008, UN Doc. A/RES/63/117 (entry into force May 5, 2013). Cf. VÖNEKY, Globalisierung und soziale Menschenrechte – Grenzen von Unternehmensaktivitäten insbesondere am Beispiel der Arzneimittelforschung in Schwellen- und Entwicklungsländern, *Freiburger Informationspapiere zum Völkerrecht und Öffentlichem Recht* (10/2013), available at http://www.jura.uni-freiburg.de/institute/ioeffr2/online-papers/FIP_10_2013_Menschenrechte_Unternehmen.pdf, p. 6.

⁶⁵ ECHR, *L.C.B. v. United Kingdom* (App no 23413/94) (June 9, 1998) (1998) EHHR 27, 212 [1998], para. 36-41; MALINVERNI, *The Protection of Social Rights in the Case Law of the European Court on Human Rights*, in *Hanschel/Graf von Kielmansegg/Kischel/Lorz (eds.)*, *PRAXIS DES INTERNATIONALEN MENSCHENRECHTSSCHUTZES - ENTWICKLUNG UND PERSPEKTIVEN* (2008), 23 (24).

⁶⁶ December 13, 2006, 2515 UNTS 3, entered into force May 3, 2008, e.g. Art. 11.

⁶⁷ July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force November 29, 1999, e.g. Art. 23, 25.

humanitarian regulatory framework, but are not obliged to immediately respect the rights vis-à-vis individual rights holders.⁶⁸

3. Specific legal obligations of the Ebola-affected States

The implication of the aforementioned legal duties during disaster relief has only been partially achieved in the Ebola affected States. In addition to a lack of sufficient legal frameworks, all States *de facto* struggled with the delivery of assistance.

a) Sierra Leone

As regards disaster relief in international law, Sierra Leone is bound to respect the right to life and right to health, as it is a party to the WHO International Health Regulations (IHR)⁶⁹, the ICCPR, ICESCR, CRC, CEDAW and Banjul-Charter. The concept of the primary role of the affected State during disaster relief must be applied on a customary law basis in Sierra Leone. There are no national laws governing the procedure in case of a disaster. In 2002, Sierra Leone established a National Security and Central Intelligence Council which is practically the primary responsible unit to handle disasters.⁷⁰ But to date Sierra Leone neither has national disaster management laws and regulations nor Standard Operating Procedures in terms of OCHA requirements.⁷¹ There are plans of developing a set of rules on disaster response.⁷² One draft is entitled the National Disaster

⁶⁸ ILC, 'Preliminary report on the protection of persons in the event of disasters by Mr. Eduardo Valencia-Ospina, Special Rapporteur' (May 5, 2008) UN Doc. A/CN.4/598, p. 10 para. 26.

⁶⁹ May 23, 2005, 2nd ed., available at http://whqlibdoc.who.int/publications/2008/9789241580410_eng.pdf. The IHR aim at strengthening national outbreak-response and surveillance capacities and gives guidance on public health measures especially with regard to exit and entry of affected areas, but they do not give operational guidelines with regard to disease control.

⁷⁰ ACT Supplement to the Sierra Leone Gazette Vol. CXXXI, No. 41, July 4, 2002, available at <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/SierraLeone.pdf>.

⁷¹ International Federation of Red Cross and Red Crescent Societies, International Disaster Response Laws (IDRL) in Sierra Leone: Legal preparedness study for strengthening the legal and policy framework for foreign disaster response, available at <https://www.ifrc.org/PageFiles/41164/1213700-IDRL-Sierra%20Leone-EN-LR.pdf>, pp. 18, 33.

⁷² Sierra Leone was the 43rd state to sign the Constitutive Act of the African Union (AU) adopted by the thirty-sixth ordinary session of the Assembly of Heads of State and Governments on the 11th of July, 2000 in Lome, Togo. It is worth noting that one of the objectives of the AU is to work with relevant international partners for the eradication of preventable diseases and the promotion of good health on the continent. Of utmost

Preparedness and Response Plan⁷³ and the Draft National Disaster Management Policy.⁷⁴ According to the IFRC, the Draft National Disaster Management Policy gives strategic directives to the government on steps to be taken before, during and after disasters. It contains a procedure for the declaration of a state of emergency and the responsibilities for disaster management at different levels.⁷⁵ Under Sect. 3.1, it states that the “government of Sierra Leone shall [sic] have the prerogative to define the occurrence of disaster and define the boundaries of the disaster affected site. This shall be followed by a disaster declaration by the National Security Coordinator. The declaration shall be made in consultation with the National Security Council Coordinating Group (NSCCG) on disasters.”⁷⁶ Furthermore, the government of Sierra Leone has joined ECOWAS in developing a Disaster Risk Reduction Platform.

b) Guinea

Guinea is bound by the same international and regional human rights treaties as Sierra Leone. In addition, it has a set of national rules on disaster relief which aid the implementation of some of its customary legal duties with regard to civil protection during disaster relief. Guinea’s disaster management regulation is entitled “Plan national de gestion des catastrophes”.⁷⁷ Art. 3 emphasizes the primary role of the affected State and its authorities in disaster relief. The management regulation basically sets out the general concept of the national strategy for disaster prevention, the support measures for the plan, and the resources to be used in all disaster management activities. Furthermore, it entails a comprehensive evaluation of the country’s disaster risks and natural hazards, such as tornado, flood,

importance is Art. 13, which states that the Executive Council shall coordinate and take decisions on policies in areas of common interest to the Member States, including environmental protection, humanitarian action and disaster response and relief.

⁷³ Vol. I, available at <http://www.ifrc.org/docs/idrl/672EN.pdf>.

⁷⁴ Sierra Leone Disaster Management Policy, Final Draft, June 2006, available at <http://www.ifrc.org/docs/idrl/671EN.pdf>.

⁷⁵ IFRC, International Disaster Response Laws (IDRL) in Sierra Leone: Legal preparedness study for strengthening the legal and policy framework for foreign disaster response, <<https://www.ifrc.org/PageFiles/41164/1213700-IDRL-Sierra%20Leone-EN-LR.pdf>>, p. 18.

⁷⁶ Sierra Leone Disaster Management Policy, Final Draft, June 2006, available at <http://www.ifrc.org/docs/idrl/671EN.pdf>, p.11.

⁷⁷ Available at http://www.preventionweb.net/files/30443_guineepnationalgestioncatastroph.pdf.

drought, earthquake, landslide and wildfire. Descriptions for institutional framework at all levels are provided.

c) Liberia

Like Sierra Leone and Guinea, Liberia is a party to the WHO IHR, the ICCPR, ICESCR, CRC, CEDAW and Banjul-Charter. The Liberian National Disaster Management Policy entered into force in 2012.⁷⁸ The policy aims at the enhancement of national and local capacities to minimise vulnerability and disaster risks, prevent, mitigate and prepare for adverse impacts of hazards within the context of sustainable development. It provides the necessary steps to create a foundation for the development of an effective and functional legal, operational and institutional framework and good governance for disaster risk management. Chapter 6 lays down the implementation of the framework and includes provisions for the declaration of a state of emergency cooperation of various authorities during an emergency. One important aspect is also the strengthening of disaster preparedness for effective emergency and recovery response.

d) Is there a duty to request international assistance?

All three affected States were bound to respect the right to life and right to health according to international treaty law. Whilst Sierra Leone lacks national legal regulations, Guinea and Liberia at least have set up regulations, although they mainly provide guidance for institutional frameworks to implement their international law obligations through effective disaster response. However, so far they have failed to lay down specific procedures for disaster relief. All three States and their disaster response capacities were thus factually overwhelmed with the Ebola response. Sierra Leone and Guinea were especially ill-prepared to the epidemic because they lacked national legislative and administrative disaster relief frameworks. Measures such as quarantine could not properly be enforced in Sierra Leone

⁷⁸ National Disaster Management Agency Republic of Liberia, available at <http://www.mia.gov.lr/doc/Web%201%20National%20Disaster%20Risk%20Management%20Policy-clean-12102012.pdf>.

Hübler – Ebola: International Disaster Response to a Global Health Emergency and Guinea.⁷⁹ Aid workers were attacked in Guinea.⁸⁰ This leads to the question whether affected States are obliged under international law to request foreign disaster assistance if their national disaster management capacities are exceeded. This question must be answered in the negative under the current state of customary international law, but in the affirmative with regard to an extensive interpretation of the right to life contained in the ICCPR.

The lack of an independent customary norm to approach other States for aid can be derived from a lack of State practice, as both international treaties and domestic disaster laws, leave it to the discretion of the affected State to ask for international aid. The few multilateral treaties dealing with international disaster relief merely allow the affected State to ask for international assistance. Art. 4 (I) Tampere-Convention⁸¹ states that the affected treaty party “may request” international assistance. Art. 12 of the Convention on Transboundary Effects of Industrial Accidents gives affected States the option to request assistance (“may ask for assistance”). The factual behaviour of States is also very inconsistent in this regard. This concerns the conditions, scope and number of cases where affected States actually do ask for international assistance. This lack of consistency does not (yet) meet the threshold of “virtually uniform” State practice as postulated by the ICJ.⁸²

There are, of course, cases where the affected State did ask for international assistance in the immediate aftermath or shortly after a disaster occurred.

⁷⁹ Sierra Leone Dispatches Troops to Enforce Ebola Quarantine, Time, (August 6, 2014), available at <http://time.com/3086145/sierra-leone-troops-ebola/>.

⁸⁰ Ebola crisis: Red Cross says Guinea aid workers face attacks, BBC News (February 12, 2015), available at <http://www.bbc.com/news/world-africa-31444059>.

⁸¹ Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, June 18, 1998, 2296 UNTS 5, entered into force January 8, 2005.

⁸² ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)* (February 20, 1969) ICJ Reports 1969, 3, 43 para. 74. The World Risk Report, developed inter alia by the United Nations, shows which States are especially prone to disasters, 'World Risk Report 2012 (in cooperation with United Nations University Institute for Environment and Human Security und The Nature Conservancy)', Works) (2012), available at <http://www.ehs.unu.edu/file/get/10487.pdf>.

Recent cases include Haiti 2010⁸³, Laos⁸⁴, Cambodia⁸⁵, South Sudan⁸⁶, Japan (with regard to civil protection and search and rescue projects) in 2011⁸⁷, the Philippines in 2013⁸⁸ and Nepal in 2015.⁸⁹ Nevertheless, there are also a lot of cases where the affected States only requested international aid at a very late stage or not at all.⁹⁰ This concerns for instance the Fiji-islands and Turkey after the earthquake in 1999⁹¹. It is also true that Japan's prime minister Shinzo Abe only requested experts for international aid 2.5 years after Fukushima in order to control radioactive cooling water in the abandoned nuclear power plant.⁹² Further examples concern the USA after Hurricane Katrina⁹³, Thailand and India after the tsunami 2004⁹⁴, Burma after a cyclone in 2008⁹⁵ and Mexico 2012 after hurricanes had devastated

⁸³ IFRC, 'IDRL in Haiti: A study on the legal framework for the facilitation and regulation of international disaster response', (January 2012), available at http://www.ifrc.org/PageFiles/80197/1213600-IDRL_Haiti-EN-LR%20final.pdf, 29.

⁸⁴ IFRC/ADB, 'Legal Preparedness for Responding to Disasters and Communicable Disease Emergencies in Lao PDR', (2009), available at http://www.ifrc.org/PageFiles/80197/IDRL_Red-Cross-Report-Laos_v27-ENG.pdf, 70 f.

⁸⁵ IFRC/ADB, 'Legal Preparedness for Responding to Disasters and Communicable Disease Emergencies in Cambodia', (2009), available at http://www.ifrc.org/PageFiles/80197/IDRL_Report-Cambodia_v17-ENG.pdf, 49.

⁸⁶ OCHA, 'Sudan: Flash Update (issue # 2)', (August 7, 2013) available at <https://sudan.humanitarianresponse.info/system/files/documents/files/OCHA%20flash%20update%232.pdf>; OCHA, 'Sudan: Flash Update (issue # 8)', (September 3, 2013), available at <http://reliefweb.int/sites/reliefweb.int/files/resources/OCHA%20flash%20update%238.pdf>.

⁸⁷ Reuters, *Japan requests foreign rescue teams, U.N. says*, (March 11, 2011), available at <http://www.reuters.com/article/2011/03/11/us-japan-quake-aid-refile-idUSTRE72A71320110311>.

⁸⁸ 'IOM Responds to Request for Life-Saving Aid as Floods Leave Half of Manila Underwater', (August 20, 2013), available at <http://reliefweb.int/report/philippines/iom-responds-request-life-saving-aid-floods-leave-half-manila-underwater>; 'Philippines: Typhoon Usagi (local name Odette) - OCHA Flash Update', (September 23, 2013), available at <http://reliefweb.int/report/philippines/philippines-typhoon-usagi-local-name-odette-ocha-flash-update-23-september-2013>.

⁸⁹ For references see HÜBLER, op cit, Chapter 5, pp. 5-7.

⁹⁰ International Federation of Red Cross and Red Crescent Societies, 'Law and legal issues in international disaster response: a desk study', (2007) available at <http://www.ifrc.org/PageFiles/41194/113600-idrl-deskstudy-en.pdf>, p. 89; BANNON, *International Disaster Response Law and the Commonwealth: Answering the Call to Action*, 34 COMMONWEALTH LAW BULLETIN (2008), 843 (850).

⁹¹ IFRC, 'Law and legal issues in international disaster response: a desk study', (2007) 89 with further references in Fn. 669.

⁹² 'Havarierte Atomreaktoren: Japan bittet Ausland um Hilfe in Fukushima' FAZ (October 6, 2013), available at <http://www.faz.net/-gqg-7i72r>.

⁹³ 'Annan ruft zu Hilfe für Hurrikan-Opfer', *Handelsblatt* (September 2, 2005), available at <http://www.handelsblatt.com/panorama/aus-aller-welt/schwerer-schicksalsschlag-annan-ruft-zu-hilfe-fuer-hurrikan-opfer/2546684.html>.

⁹⁴ Tsunami Evaluation Coalition, 'Funding the tsunami response: A synthesis of findings', (2006) 22.

⁹⁵ 'Burma (Myanmar): An unbending junta still blocks aid', *The Christian Science Monitor* (May 12, 2008), available at <http://www.csmonitor.com/World/Asia-South-Central/2008/0512/p01s02-wosc.html>.

large parts of the country.⁹⁶ These examples show that States generally make use of their discretion when asking for international disaster assistance. This approach is also taken in many national disaster laws and regulations. No duty to ask for international assistance is enshrined, but it is merely stated which State authorities would be competent to issue a request for aid of the government decided to ask for foreign assistance.⁹⁷ There is also no extensive *opinio juris* which would yet support a customary obligation to request international assistance. Whilst 18 governments promoted the existence of such a duty during the discussions of the ILC Draft Articles on the Protection of Persons in the Event of Disasters in the UN General Assembly,⁹⁸ the same number of States, among them those which deliver the world's largest amount of international disaster relief, explicitly negated such a duty and stated that no such duty has yet been established *de lege lata*.⁹⁹

Although customary international law does not render a duty to ask for international disaster relief *lex lata*, one can argue that it is already included in the universal and regional human rights treaties advocating the protection of the right to life. This hypothesis applies at least in cases where the failure to request international assistance would entirely jeopardize the right to life

⁹⁶ Pan American Health Organization, 'Heavy Rains Produce Floods and Landslides in the Region', (September 18, 2013) (2013), available at <http://reliefweb.int/report/mexico/heavy-rains-produce-floods-and-landslides-region>.

⁹⁷ E.g. in Indonesia, Art. 7 (2) lit. d Law of the Republic of Indonesia Concerning Disaster Management, President of the Republic of Indonesia, 24 (2007), available at http://www.ifrc.org/PageFiles/100077/Indonesia_2007_Law%20concerning%20disaster%20management.pdf ("*The authority of the government over disaster management shall encompass: (...) d. policy option for cooperation with other countries, agencies, or other international parties in disaster management;*"); also Haiti, see International Federation of Red Cross and Red Crescent Societies, 'IDRL in Haiti: A study on the legal framework for the facilitation and regulation of international disaster response', (January 2012), available at http://www.ifrc.org/PageFiles/80197/1213600-IDRL_Haiti-EN-LR%20final.pdf, p. 29.

⁹⁸ Albania, Algeria, Bosnia-Herzegovina, Chile, Colombia, Croatia, Czech Republic, El Salvador, India, Israel, Italy, Macedonia, Moldova, Montenegro, Romania, Singapore, Slovenia, South Korea. See UNGA Sixth Committee, 'Summary record of the 20th meeting', (November 23, 2011) UN Doc. A/C.6/66/SR.20; UNGA Sixth Committee, 'Summary record of the 21st meeting', (December 2, 2011) UN Doc. A/C.6/66/SR.21; UNGA Sixth Committee, 'Summary record of the 23rd meeting', (November 14, 2011) UN Doc. A/C.6/66/SR.23. For further references HÜBLER, op cit, Chapter 5 pp. 9-11.

⁹⁹ Austria, China, Cuba, Denmark, Finland, France, Iceland, Indonesia, Iran, Ireland, Japan, Malaysia, Norway, Russia, Sri Lanka, Sweden, United Kingdom, United States of America, See e.g. UNGA Sixth Committee, 'Summary record of the 21st meeting', (December 2, 2011) UN Doc. A/C.6/66/SR.21 paras. 58, 60; UNGA Sixth Committee, 'Summary record of the 23rd meeting', (November 14, 2011) UN Doc. A/C.6/66/SR.23 paras. 38, 45; UNGA Sixth Committee, 'Summary record of the 24th meeting', (December 1, 2010) UN Doc. A/C.6/65/SR.24, paras. 36, 37, 50, 70.

or minimum core obligations of other human rights. The member States of the ICCPR are obliged to use the maximum of their resources to protect the lives of their population. If their own capacities are exceeded and the core of the right to life is endangered, i.e. if people would die if international aid did not pour in, the affected State has to mobilize other, foreign sources of aid. *Asking*¹⁰⁰ other States for aid thus is an integral part of the duty to take all available measures to protect the right to life.¹⁰¹ *Asking* for aid is a reasonable option which is open to any government, even if national capacities are exceeded, unless there is a case of a failed State or the government has been completely eliminated or disintegrated due to extreme disasters.

However, it must be duly noted that a more restrictive approach must be taken in less extreme cases, i.e. where only components of the right to life are affected, such as the right of access to medical, but not life-saving, supplies. If the duty to ask for assistance would also be derived from the right to life in these cases, this would reduce the current vivid and comprehensive debate among States, the ILC and the IFRC as to whether a customary duty to ask for assistance exists, to absurdity. The existence of such debate also shows that the international community does not accept such a far-reaching interpretation of the right to life yet.

To conclude, it is worth noting that the Ebola epidemic was actually the first case in international disaster relief where the core element of the right to life was immediately and extremely endangered. During other disasters, such as the Tsunami in Southeast Asia 2004 or the Tsunami and Earthquake in Japan in 2011, most people had already died immediately due to the disaster. Ebola, by contrast, is a continuing disaster situation where the right to life continues to be a legally protectable good. Ebola can therefore be considered the first case where the affected States actually had a duty to ask for international assistance. This obligation was abided by all affected States as

¹⁰⁰ Another question is whether States actually have to accept international aid. As this was not an issue in the Ebola epidemic, because all affected States welcomed international aid, it will not be discussed in this paper. See HÜBLER, *op cit*, Chapter 5, pp. 25-50.

¹⁰¹ Cf. for technical co-operation RIEDEL, International Covenant on Economic, Social and Cultural Rights (1966), MPEPIL (2011) para. 8.

they all issued requests for humanitarian aid at a very early stage of the EVD outbreak.

IV. Legal obligations of the international community

1. International organizations

International organizations, especially the WHO and the United Nations, responded only slowly to the Ebola epidemic. Ebola was declared a Public Health Emergency only in August 2014, although it had been declared a health emergency in West Africa since March 2014.¹⁰² Other international organizations which responded to Ebola were the African Development Bank, the African Union, the Economic Community of West African States (ECOWAS), the European Union and the World Bank.¹⁰³ The lack of aid by other international organizations can be explained by the fact that they cannot be obliged to deliver international disaster assistance unless such duty is enshrined in their statutes and constitutions.

With regard to Ebola, the WHO was the first and foremost competent international organization – in accordance with its leading role for the world-wide protection of health as enshrined within Art 1 of its constitution – to deal with the disease. OCHA was thus not principally responsible. The United Nations set up the UN Mission for Ebola Emergency Response (UNMEER) on September 19, 2014 after the unanimous adoption of General Assembly resolution 69/1 and the adoption of Security Council resolution 2177 (2014) on the Ebola outbreak.¹⁰⁴ UNMEER was set up as a temporary measure to meet immediate needs related to the unprecedented fight against Ebola.¹⁰⁵ WHO and UNMEER have been active in the affected States since September 2014 and worked towards achieving the so-called “70-70-

¹⁰² Ebola: the failures of the international outbreak response, Médecins Sans Frontières (August 29, 2014), available at <http://www.msf.org/article/ebola-failures-international-outbreak-response>.

¹⁰³ The World Bank, Transcript of Remarks at the Event: Impact of the Ebola Crisis: A Perspective from the Countries (October 9, 2014), available at <http://www.worldbank.org/en/news/speech/2014/10/09/transcript-event-impact-ebola-crisis-perspective-countries>.

¹⁰⁴ United Nations, UN Mission for Ebola Emergency Response (UNMEER), available at <https://ebolaresponse.un.org/un-mission-ebola-emergency-response-unmeer>.

¹⁰⁵ Ibid.

60 goal". According to the WHO, "the goals aim to get 70% of the cases isolated and treated, 70% of the deceased safely buried within 60 days starting from 01 October to 01 December."¹⁰⁶ The WHO has been "providing curricula for multiple partners on trainings in the field on case management, contact tracing, safe and dignified burials and social mobilization; providing trainings on contact tracing; working with partners (the Governments of France, United Kingdom, USA) to train thousands in the classroom and in simulation." To date, 75 doctors have been trained in Guinea, 100 doctors in Liberia, additionally 1000 treatment unit personnel have been trained for cold case management, 4115 health-care workers, hygienists and trainers were trained in basic personal protective equipment, infection prevention and control, and site layout in Sierra Leone (together with the UK government) as well as 5 experienced clinicians.¹⁰⁷

In addition to UNMEER, the United Nations responded to the Ebola epidemic by a milestone-declaration from the Security Council. In Res 2177 (2014), the Security Council determined "that the unprecedented extent of the Ebola outbreak in Africa constitutes a threat to international peace and security".¹⁰⁸ It was argued that the epidemic could trigger unrest and tensions and endanger political stability in Western Africa.¹⁰⁹ The resolution is especially notable as it marked the first time in history that the Security Council classified a disease as a threat to peace and security and only the second time – after HIV/AIDS – that the Council dealt with a disease at all.¹¹⁰ It was also a very rare occasion that the resolution was adopted unanimously by all Security Council members and supported by the record number of 134 States.¹¹¹ Resolution 2177 (2014) was passed under Chapter VI of the UN Charter, since no coercive measures were ordered and no reference to Chapter VII was contained as is usually the case with Chapter VII

¹⁰⁶ World Health Organization, WHO's contribution to the Ebola response, December 2014, available at <http://www.who.int/features/2014/who-ebola-response/en/>.

¹⁰⁷ Ibid.

¹⁰⁸ UN Security Council, Res 2177 (2014) (Peace and security in Africa) (September 18, 2014) UN Doc. S/RES/2177 (2014) Preambular-Clause 5.

¹⁰⁹ UN Security Council, Res 2177 (2014) (Peace and security in Africa) (September 18, 2014) UN Doc.S/RES/2177 (2014) Preambular-Clause 4.

¹¹⁰ BURCI/QUIRIN, *Ebola, WHO, and the United Nations: Convergence of Global Public Health and International Peace and Security* (ASIL Insights Vol. 18, Issue 25, 2014).

¹¹¹ *Global Ebola Response*, United Nations, (2014), available at <http://www.un.org/ebolareponse/response.shtml>.

resolutions.¹¹² Resolutions under Chapter VI of the Charter are binding upon all UN member States even if no coercive measures are ordered.¹¹³ The Security Council ordered the specially affected States Sierra Leone, Guinea and Liberia to set up and accelerate national mechanisms for disaster relief, to improve cooperation between all involved actors and to strive for a solution to the political, security, socio-economic and humanitarian effects of the Ebola outbreak. All UN member States as well as multilateral organizations such as the European Union, African Union and ECOWAS were ordered to make resources and assistance available. Very specific suggestions were made as to which kind of aid and technical assistance would be suitable. In addition, all UN member States were asked to implement the guidance of how to deal with diseases provided in the International Health Regulations of 2005.

2. Legal duties of non-affected States

In the first months after the Ebola outbreak only 41 countries had offered humanitarian assistance to the affected States.¹¹⁴ Mainly neighbouring States sent aid, such as Cabo Verde, Cote d'Ivoire, Ghana, Mali and Senegal.¹¹⁵ Western States did not respond in a satisfying or efficient way, especially in the crucial days of the beginning of the Ebola outbreak. Ebola did not seem to be of 'Western' concern as effective exit border controls in the affected countries seemed to prevent the spread of the disease to other continents. Governments were reluctant to send aid personnel as they feared the high

¹¹² E.g. UN Security Council, Res 1840/2008 (Haiti) (October 14, 2008) UN Doc. S/RES/1840 (2008); UN Security Council, Res 1270/1999 (Sierra Leone) (October 22, 1999) UN Doc. S/RES/1270 (1999); UN Security Council, Res 2178 (2014) (Threats to international peace and security caused by terrorist acts) (September 24, 2014) UN Doc. S/RES/2178 (2014).

¹¹³ ICJ, *Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (June 21, 1971) (1971) ICJ Reports 1971, 16, 40 seq., para. 113; ICJ, *Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (July 9, 2004) (2004) ICJ Reports 2004, 136, 192, para. 134.

¹¹⁴ Andorra, Australia, Austria, Brasil, Canada, Chile, China, Columbia, Cuba, Czech Republic, Denmark, East Timor, Estonia, Finland, France, Germany, India, Ireland, Israel, Italy, Ivory Coast, Japan, Kenia, Kuwait, Luxemburg, Malaysia, New Zealand, Netherlands, Nigeria, Norway, Romania, Senegal, Sweden, Switzerland, Slovakia, Slovenia, Spain, South Korea, Qatar, United Kingdom, USA. List compiled by using *Ebola Virus Outbreak - West Africa - April 2014. Table A: List of all commitments/contributions and pledges compiled by OCHA on the basis of information provided by donors and appealing organizations (Table ref: R10)*, Financial Tracking Service, available at http://fts.unocha.org/reports/daily/ocha_R10_E16506_asof__1410161726.pdf.

¹¹⁵ UN Security Council, Res 2177 (2014) (Peace and security in Africa) (September 18, 2014) UN Doc. S/RES/2177 (2014) Preambular-Clause 10.

infectiousness of Ebola and thus mostly sent financial aid. For instance, Germany donated 102 million Euros in October 2014 after the initial sum of 17 million Euros, pledged in September 2014 had been publicly criticized as insufficient.¹¹⁶ The World Bank and African Development Bank agreed to give loans of 260 million US dollars.¹¹⁷ The European Union offered 2 million Euro.¹¹⁸ The problem with financial assistance is that it cannot be used efficiently in countries with no or little infrastructure. The affected States were in desperate need of technical equipment such as ambulances and well-experienced doctors and medical aid personnel.

The question arises whether non-affected States like Germany were under a legal obligation to render suitable disaster assistance to the affected countries. This question must be answered in the negative. There is no virtually uniform, extensive and representative State practice which would support a duty to help.¹¹⁹ Although State practice must not be exercised by all States, at least the majority of relevant States must be involved.¹²⁰ The practicing States must resemble a well-balanced *mélange* of all legal, economic and political systems and all geographic regions must be equally represented.¹²¹

State practice of the past has shown that virtually uniform humanitarian assistance, *i.e.* assistance from two thirds of all States, is only rendered in sudden-onset disasters with five-figure casualties and multi-billion US dollars economic damage. This is exemplified by the cases of Hurricane Katrina in the USA 2005, the earthquake in Haiti 2010 and Japan 2011. In these cases,

¹¹⁶ Germany Steps Up Ebola Aid Amid Criticism of Slow Response Germany Increases Funding Sixfold to €102 Million, *The Wall Street Journal* (October 16, 2014), available at <http://www.wsj.com/articles/germany-steps-up-ebola-aid-amid-criticism-of-slow-response-1413481370>.

¹¹⁷ 'Kampf gegen Ebola: Weltbank gewährt 200 Millionen Dollar', *FAZ* (August 5, 2014), available at <http://www.faz.net/aktuell/gesellschaft/gesundheit/kampf-gegen-ebola-weltbank-gewaehrt-200-millionen-dollar-13081888.html>.

¹¹⁸ 'Katastrophe Ebola: Notstand in Westafrika - über 720 Tote', *ÄrzteZeitung Online* (July 31, 2014), available at <http://www.aerztezeitung.de/medizin/krankheiten/infektionskrankheiten/article/866067/ebola-notstand-westafrika-720-tote.html>.

¹¹⁹ Cf. „*extensive and virtually uniform*“, ICJ, *North Sea Continental Shelf*, ICJ Reports 1969, 3, 43, para. 74.

¹²⁰ ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands): Dissenting Opinion of Judge Manfred Lachs* (February 20, 1969) ICJ Reports 1969, 3, 219, 229.

¹²¹ ICJ, *North Sea Continental Shelf*, ICJ Reports 1969, 3, 219, 227; TREVES, 'Customary International Law' (MPEPIL), (2006) OUP para. 35.

even developing States with little budget for international assistance from all continents sent aid.¹²² Disasters with four-figure casualties and little economic damage did not trigger uniform or expansive humanitarian assistance from foreign States in the past. Humanitarian aid was then only provided by 30 to 50 – mostly neighboring – States, as shown during the Ebola outbreak.

The vast majority of States does also not believe in a legal obligation to render humanitarian assistance. Respective *opinio juris* was expressed by the majority of States in response to an ILC-survey and in the discussions of the UN General Assembly's Sixth Committee with the result that no obligation to offer and deliver assistance exists.¹²³ Only Sri Lanka¹²⁴ und Thailand¹²⁵ have explicitly expressed their belief that such a duty is part of the *lex lata*. Furthermore, even progressive *soft law* documents such as the Hyogo Framework for Action¹²⁶, the Oslo Guidelines¹²⁷, resolutions of the UN General Assembly and the International Conferences of the Red Cross do not contain any evidence towards a duty to offer humanitarian assistance.

The concept of Responsibility to Protect does also not serve as a basis for a duty to offer humanitarian assistance. Although its application to disasters had been initially stipulated by the International Commission on State Sovereignty¹²⁸, such wide application is not supported by the vast majority of the international community as evidenced by statements of States at the UNGA, the UN Secretary General and the majority of ILC members including the Special Rapporteur on the Draft Articles on the Protection of Persons in

¹²² HÜBLER, *op cit*, Chapter 5.

¹²³ ILC, Statement of the Chairman of the Drafting Committee (64th session 2012, Protection of Persons in the Event of Disasters) (July 30, 2012), available at [http://legal.un.org/ilc/sessions/64/ProtectionOfPersonsDCstatement\(2012\).pdf](http://legal.un.org/ilc/sessions/64/ProtectionOfPersonsDCstatement(2012).pdf) p. 3.

¹²⁴ UNGA Sixth Committee, 'Summary record of the 27th meeting', (December 8, 2011) (2011) UN Doc. A/C.6/66/SR.27, para. 20.

¹²⁵ UNGA Sixth Committee, 'Summary record of the 24th meeting', (December 1, 2011) (2011) UN Doc. A/C.6/66/SR.24, para. 92.

¹²⁶ United Nations World Conference on Disaster Reduction, 'Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters', (March 16, 2005) Resolution 2, UN Doc. A/CONF.206/6.

¹²⁷ OCHA, Guidelines on The Use of Foreign Military and Civil Defence Assets In Disaster Relief (Oslo Guidelines) [2007], available at [https://docs.unocha.org/sites/dms/Documents/Oslo%20Guidelines%20ENGLISH%20\(November%202007\).pdf](https://docs.unocha.org/sites/dms/Documents/Oslo%20Guidelines%20ENGLISH%20(November%202007).pdf).

¹²⁸ WELLENS, Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections (2010) 14.

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the Event of Disasters.¹²⁹ The Responsibility to Protect can only be considered for application during disasters if one of its four cases is fulfilled, i.e. genocide, crimes against humanity, war crimes or ethnic cleansing.¹³⁰

In conclusion, the unanimous expressions of States in the legal committee of the United Nations as well as *soft law* instruments lead to the conclusion that there is no *opinio juris* supporting a duty of non-affected to offer or deliver humanitarian assistance during disasters.

V. Summary and Outlook

1. Summary

Ebola-affected States are not only the primary actors in disaster relief, but also left with the sole responsibility of caring for their population, striving towards the full respect of the right to life of all those under their jurisdiction and educating them as to how to prevent further outbreaks of EVD. Liberia, Sierra Leone and Guinea did all they could to fight the epidemic. When they found their national response capacity overwhelmed, they called for international assistance and thus fulfilled their duty to ask for international aid under human rights law. Their call for aid remained ill-responded for a long period of time. Non-affected States are not obliged under international law to offer or deliver humanitarian assistance. Those States who did send aid for the Ebola-affected States out of courtesy mostly focused on financial aid, which was less useful than material donations would have been.

International organizations do only have to respond to disasters within the limits of their statutes and constitutions. Whilst regional organizations and financial organizations like ECOWAS and the World Bank responded

¹²⁹ ILC, 'Report of the International Law Commission on the work of its sixty-third session (2011): Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat', (January 20, 2012) UN Doc. A/CN.4/650 para. 38; ILC, 'Report of the International Law Commission on the work of its Sixtieth session - Chapter IX: Protection of persons in the event of disasters', (May 5 - June 7, July 7 - August 8, 2008) UN Doc. A/63/10 paras. 247-249; ILC, 'Report of the International Law Commission on the work of its Sixty-first session - Chapter IX: Protection of persons in the event of disasters', (May 5 - June 5, July 6 - August 7, 2009) UN Doc. A/64/10 para. 156.

¹³⁰ See HÜBLER, op cit, Chapter 6, sect. III.

sufficiently, especially the WHO failed, especially with regard to initial disaster response.

The main reason for the late response is a lacuna in competencies within the UN system. The WHO is not a first responder agency, as has been reaffirmed by its Director General, Dr. Margaret Chan in September 2014.¹³¹ According to Art. 2 lit. d of its Constitution, the WHO is only obliged “to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments.” The term ‘technical assistance’ is interpreted in a narrow manner and does not automatically include immediate action, but rather the provision of analysis and data.¹³² This can be deduced *e contrario* from Art. 29 WHO Constitution, which lays down the competencies of the Executive Board. According to Art. 29 lit. e, the Board shall “take emergency measures within the functions and financial resources of the Organization to deal with events requiring immediate action. In particular it may authorize the Director-General to take the necessary steps to combat epidemics, to participate in the organization of health relief to victims of a calamity and to undertake studies and research the urgency of which has been drawn to the attention of the Board by any Member or by the Director-General.” Another reason for the late response were budget cuts and staff shortages at the WHO.¹³³ The WHO relies on private donations with regard to 75% of its budget.¹³⁴ In turn, OCHA was not in a position to cover for the ineffective WHO-response as the WHO remained – at least formally – the primarily responsible institution within the UN system.

To conclude, the affected States have no means of claiming compensation against States who did not send (enough) aid or the WHO and the United Nations. The international community acted within the limits of current international law and did not violate any obligations.

¹³¹ W.H.O. Leader Describes the Agency’s Ebola Operations, New York Times (September 4, 2014), available at http://www.nytimes.com/2014/09/04/world/africa/who-leader-describes-the-agencys-ebola-operations.html?_r=0.

¹³² Vox Media, Global health agencies were too slow in responding to the Ebola crisis (May 14, 2015), available at <http://www.vox.com/cards/ebola-facts-you-need-to-know/the-botched-global-response-to-this-crisis-caused-a-containable>.

¹³³ Ibid.

¹³⁴ Vox Media, The most predictable disaster in the history of the human race (May 27, 2015), available at <http://www.vox.com/2015/5/27/8660249/gates-flu-pandemic>.

2. Outlook

"There is a section of population here who simply don't believe Ebola is real, they think it is witchcraft and so they don't come to the treatment centres. Sometimes, even those who turn up at clinics with symptoms of the disease will be resistant to the idea that they have it. They will say 'yes, people in my family have died already, but this is witchcraft rather than Ebola.'"¹³⁵

This quote by a volunteer in Sierre Leone during the recent virus outbreak in Western Africa sums up the dilemma in fighting Ebola. The main challenge for affected States and those delivering assistance is to help prevent future infections. Community engagement and education, especially about the dangers of eating the meat of wild animals, is one key to successfully preventing and eventually controlling outbreaks. According to the WHO, "good outbreak control relies on applying a package of interventions, namely case management, surveillance and contact tracing, a good laboratory service, safe burials and social mobilisation. Early supportive care with rehydration [...] and symptomatic treatment improves survival." Western States only slowly start to realize the dangers (also for their own health systems) of not assisting during disasters, especially in far-away, poor countries with poor infrastructure.¹³⁶ Germany even suggested to establish a pool of doctors and medical staff (white helmets), to be mobilised swiftly and deployed in areas suffering health emergencies.¹³⁷ Furthermore, research efforts on Ebola are being intensified.¹³⁸ Ebola vaccines have been developed by Canada and the United Kingdom, which is one step in helping to prevent future outbreaks.

¹³⁵ Quote by Dr. Benjamin Black cited in Ebola virus outbreak, As it happened, The Telegraph, July 30, 2014, available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/11002186/Ebola-virus-outbreak-as-it-happened.html>.

¹³⁶ Vox Media, The most predictable disaster in the history of the human race (May 27, 2015), available at <http://www.vox.com/2015/5/27/8660249/gates-flu-pandemic>.

¹³⁷ Chancellor's proposals for crisis management: White helmets against Ebola (January 27, 2015), available at http://www.bundesregierung.de/Content/EN/Artikel/2015/01_en/2015-01-27-gavi-sechs-punkte_en.html?nn=393164.

¹³⁸ E.g. Germany, see Ebola: Mehr Geld aus Deutschland für die Forschung, ÄrzteZeitung (October 23, 2014), available at <http://www.aerztezeitung.de/medizin/krankheiten/infektionskrankheiten/haemorrhagische-fieber/article/871734/ebola-geld-deutschland-forschung.html>.

To avoid future disease disasters like the EVD outbreak, however, public health experts and medical personnel from the private sector will have to increase their efforts in public health cooperation by technology and knowledge transfer. Fostering a change in behaviour in the population as regards the handling of affected relatives, wild animals and hygiene as well as making an impact on the improvement of public health systems and basic infrastructure are even more important than conducting research.¹³⁹ International actors and aid workers will have to foster community education about the danger of Ebola and raise the awareness of how to prevent the disease, e.g. by way of vaccination. This is a task which cannot be accomplished by governments or the WHO alone, but requires a coordinated, predictable response from all international and national actors.

¹³⁹ Quote by Thomas Frieden, Director of the US Centres for Disease Control and Prevention, cited in Vox Media, The most predictable disaster in the history of the human race (May 27, 2015), available at <http://www.vox.com/2015/5/27/8660249/gates-flu-pandemic>.