

Domestic regulation of international humanitarian relief in disasters and armed conflict: a comparative analysis

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Abstract

In both disasters and armed conflicts, domestic regulatory control over the entry and operation of international humanitarian relief operations can significantly affect their ability to address the critical needs of affected persons. The types of regulatory problems that arise, such as customs barriers, visa issues and taxation of aid, are often similar, but both the underlying dynamics and the applicable international law can be quite different. This article analyses these similarities and differences and suggests distinct steps that might be taken to move forward in the two contexts.

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In the wake of a major disaster or an armed conflict,¹ the lives and dignity of affected persons may depend on international humanitarian relief. In both contexts, the regulatory approach taken by domestic authorities can enhance the ability of international humanitarian actors to provide this relief in a timely and effective manner. Too often, however, it has just the opposite effect.

* The views and opinions expressed in this article are the author's and do not necessarily represent those of the International Federation or its member societies. Elements of this article were drawn from a larger study of IDRL currently being prepared by the International Federation.

This paper will take a comparative look at the common regulatory problems and the applicable international law for relief in armed conflicts and non-conflict disasters. It will argue that many of the problems are similar. These include both regulatory barriers, such as bureaucratic delays in the entry of personnel, goods and equipment, as well as regulatory gaps, for instance, with regard to mechanisms speedily to provide domestic legal recognition of international relief organizations. In both disasters and conflicts, the ability and willingness of domestic authorities to address these problems are impacted by factors including the distraction and reduced administrative capacity stemming from their own efforts to respond to the emergency, the unique need for speed inherent in humanitarian operations and, in particularly high-visibility emergencies, the increasingly large and diverse community of international actors who seek to intervene.

Yet there are also substantial differences. In armed conflicts, security is an overwhelming concern from several points of view. Armed parties who worry that international relief will favour their enemies. Humanitarian actors who fear for the safety of their staff and material. Meanwhile affected persons, who must be as concerned about being attacked as meeting their basic needs. Also, particularly in internal armed conflicts (currently the predominant form of warfare), there is frequently more than one *de facto* authority exercising regulatory power over international humanitarian relief efforts. These factors lead to more deliberate barriers than are commonly found in disaster settings. On the other hand, in disasters there is an expectation (sometimes unfulfilled) that domestic authorities will take the primary role in humanitarian aid efforts and not only facilitate the access of international humanitarian aid where needed, but also co-ordinate it and monitor its effectiveness. In armed conflict the expectations are quite different, due to the status of the domestic authorities as parties to the conflict.

There are also important differences in the character and content of the applicable international law. For disasters, the relevant norms are scattered among instruments from different sectors with varying degrees of specificity and geographic reach, providing at best incomplete guidance. In contrast, in armed conflict international humanitarian law has much broader acceptance and scope and provides for some very specific rights and obligations. However, even in international humanitarian law, there are ambiguities about the extent of the obligations of domestic actors to consent to and facilitate international relief, particularly in internal armed conflicts. What is clear is that there are substantially fewer conditions that may legitimately be imposed on international humanitarian organizations before allowing them access in conflict settings than in disasters.

This paper will suggest that progress ought to be possible across the board on solving the common regulatory problems in both disasters and conflicts. However, there are also strong reasons to take distinct steps toward this goal in the

1 For the purposes of this article the term “disaster” will be considered not to include armed conflicts.

two contexts, because of both their differing dynamics and the specific requirements of international humanitarian law.

General obligations to allow and facilitate international humanitarian relief

Before turning to the individual regulatory issues, it is helpful briefly to recall what international law provides in general concerning the obligations of domestic authorities to allow and facilitate humanitarian assistance. The relevant norms can be found in the domains of human rights (applicable to both conflicts and disasters), international humanitarian law (applicable only to conflicts), refugee and internally displaced person (IDP) law (which may or may not be applicable in a particular conflict or disaster setting), and an “other” category, increasingly known as “international disaster response laws, rules and principles” (IDRL) (with primary application to disasters).

Human rights law

With a few notable exceptions,² the major human rights instruments do not directly refer to international humanitarian relief. Some scholars have asserted, therefore, that there is no general right to receive such relief.³ However, existing human rights instruments do set out a great many related rights, such as the rights to life,⁴ food,⁵ housing,⁶ clothing,⁷ health,⁸ and livelihood.⁹ These rights have been

- 2 See the discussion below concerning references to refugee and displaced children in the Convention on the Rights of the Children and the African Charter on the Rights and Welfare of the Child. There are also a number of references to international relief in expert-produced “soft-law” documents. See, e.g., Council of the International Institute of Humanitarian Law, *Guiding Principles on the Right to Humanitarian Assistance* (April 1993); Institute of International Law, *Resolution of the Institute of International Law on Humanitarian Assistance* (Bruges Session 2003), Article II(2); *Resolution of the Institute of International Law on the Protection of Human Right and the Principle of Non-Intervention in Internal Affairs of States* (Santiago de Compostela Session 1989), Article 5, as well as the *Guiding Principles on Internal Displacement*, also discussed below.
- 3 See, e.g., Yoram Dinstein, “The right to humanitarian assistance in peacetime”, *Naval War College Review*, Vol. 53 (Autumn 2000), p. 77 (stating that “[i]t is impossible to assert, at the present point, that a general right of humanitarian assistance has actually crystallized in positive international law.”); Peter MacAlister-Smith, “The right to humanitarian assistance in international law”, *Revue de Droit International de Sciences Diplomatiques et Politiques*, Vol. 66 (1988), pp. 224–5 (asserting that “[a] legal right to humanitarian assistance already exists in certain restricted circumstances... [h]owever, extending the right to humanitarian assistance to the situations of greatest need is a difficult task which remains to be achieved”).
- 4 See, e.g., Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (1948) (hereinafter UDHR), Article 3; International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (hereinafter CCPR), Article 6(1); Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 (hereinafter CRC), Article 6(1); American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, Article 4(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 222 (hereinafter ECHR), Article 2(1); and African Charter on Human and Peoples’ Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) (hereinafter AFCHPR), Article 4.

read to imply certain obligations with regard to international humanitarian assistance.

The human rights treaty bodies¹⁰ consider that states have three levels of obligation with respect to each human right: the duty to respect (i.e. refraining from itself violating them), protect (i.e. protecting rights-holders from violations by third parties) and fulfil (i.e. undertaking affirmative actions to strengthen access to the right). Thus, for example, the UN Human Rights Committee has asserted that it is not a sufficient observance of the right to life for a state to avoid arbitrarily executing its own citizens, or to protect citizens against private violence; it must also take positive steps to reduce mortality, such as measures to “eliminate malnutrition and epidemics”.¹¹ This would therefore imply an obligation to allow access to international humanitarian relief when it is required to avoid loss of life.¹²

The Committee on Economic, Cultural and Social Rights (the equivalent of the Human Rights Committee for the International Covenant on Economic, Social and Cultural Rights) has made this more explicit in the context of economic and social rights. For example, in General Comment No. 12, the Committee determined that the right to food includes a core right to be free of hunger, which is violated if hunger exists on a state’s territory and it cannot show that it has made “every effort” to address it immediately, including by seeking international assistance.¹³ Likewise, “the prevention of access to humanitarian food aid in

5 See UDHR, above note 4, Article 25, International Covenant on Economic Social and Cultural Rights, 16 December 1966, 999 UNTS 3 (hereinafter CESCR), Article 11(1); CRC, above note 4, Articles 24(2)(c) and 27(1). Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 513 (hereinafter CEDAW), Articles 12(2) and 14(2); Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, 17 November 1988, O.A.S. Treaty Series No. 69 (1988), repr. in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1, p. 67 (1992) (hereinafter Protocol of San Salvador), Article 12.

6 See UDHR, above note 4, Article 25; CESCR, above note 5, Article 11(1).

7 See UDHR, above note 4, Article 25; CESCR, above note 5, Article 11(1). See also CRC, above note 4, Article 27(3).

8 See UDHR, above note 4, Article 25; CESCR, above note 5, Article 12. See also CRC, above note 4, Article 24(1); AfCHPR above note 4, Article 16(1), Protocol of San Salvador above note 5, Article 10.

9 See UDHR, above note 4, Article 25; CESCR, above note 5, Article 6.

10 The treaty bodies are expert committees created by many of the major human rights treaties with authority to comment on both general and specific issues of state compliance. See generally Office of the High Commissioner for Human Rights, Fact Sheet No. 30: The United Nations Human Rights Treaty System, available at <http://www.ohchr.org> (last visited 3 July 2007). Among them are the “Human Rights Committee”, the treaty body for the International Covenant on Civil and Political Rights, and the “Committee of Economic Social and Cultural Rights”, the treaty body for the International Covenant on Economic, Social and Cultural Rights.

11 See Human Rights Committee General Comment No. 6, The right to life (Article 6), 1982, para. 6, republished in UN Doc. HRI/GEN/1/Rev.6, p.131 (2003).

12 Notably, moreover, the right to life is non-derogable, even in situations of national emergency. See CCPR, above note 4, Article 4(2). It is therefore one of the civil and political rights that is always applicable in situations of disaster and armed conflict.

13 Committee on Social, Economic and Cultural Rights, General Comment No. 12, The right to adequate food, UN Doc. No. E/C.12/1999/5 (1999), paras. 6 and 17.

internal conflicts or other emergency situations” is a violation of the right to food.¹⁴ Thus, even though economic and social rights such as the rights to food, housing and health are generally considered subject to “progressive realization” over time,¹⁵ it would be inappropriate for a state simply to throw up its hands in the face of a crisis when international assistance would be available.¹⁶

It is therefore arguable that existing human rights instruments imply a right to assistance in situations of crisis and a certain obligation on states to seek international support if their own means are insufficient to address humanitarian needs. However, they provide no specificity as to the means that should be employed for the request and facilitation of international relief or who should provide it.

International humanitarian law

International humanitarian law provides both obligations for armed parties to accept international humanitarian relief when it is needed and some level of detail of the kinds of legal facilities providers should receive. The scope of these duties varies in the text of the Geneva Conventions and their first two Additional Protocols, depending on whether recipients are in occupied territories in an international conflict, in a state party’s own territory during an international conflict, or in a state experiencing an internal conflict. However, arguments have been made that customary law is beginning to bridge these differences.

Pursuant to Article 59 of the Fourth Geneva Convention, if “the whole or part of the population of an occupied territory is inadequately supplied”, an occupying power “shall agree” to relief schemes provided by states or “impartial humanitarian organizations”, conditioned only on the right to search their consignments, regulate their timing and routes and receive assurance that their assistance will only be used for the needy population.¹⁷ Likewise, under Article 62 civilians in occupied territories are guaranteed the right to receive individual assistance “subject to imperative reasons of security”.

14 Ibid., para. 19.

15 See CESCR, above note 5, Article 2.

16 But compare the more permissive language of paragraph 16.6 of the FAO Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security, reprinted in the Report of the Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, Rome, September 23, 2004, FAO Doc. No. CL 127/10-Sup.1, annex 2 (providing that states “should provide food assistance to those in need, may request international assistance if their own resources do not suffice, and should facilitate safe and unimpeded access for international assistance in accordance with international law and universally recognized humanitarian principles, bearing in mind local circumstances, dietary traditions and cultures”).

17 Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (hereinafter Fourth Geneva Convention). As noted below, these requirements apply to all contracting parties, and the last condition refers to guarding against misuse “by the Occupying Power”. However, it is reasonable to assume, as the ICRC’s Commentary on this section does, that the point is to guard against misuse by all belligerents. See Jean S. Pictet (ed.), *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, 1958 (hereinafter ICRC GC IV Commentary), pp. 322–3.

In contrast, both Article 70 of the First Additional Protocol (applicable to a state's own territory in interstate conflicts) and Article 18 of the Second Additional Protocol (applicable to internal conflict) state that relief actions "shall be undertaken, subject to the consent" of the parties concerned.¹⁸ The ICRC commentary to these sections and many scholars insist that consent to humanitarian relief may not be arbitrarily withheld without running afoul of the prohibition of using starvation as a method of warfare.¹⁹ Moreover, a comprehensive study of customary international humanitarian law completed by the ICRC in 2005 found sufficient state practice consistent with this position to assert it as a rule of customary law.²⁰ In addition to practice in the field, the study notes the large number of UN Security Council, General Assembly and Commission on Human Rights resolutions that support the thesis that humanitarian access is not considered optional in any type of armed conflict.²¹ However, there is still debate on this point.²²

The Fourth Geneva Convention also specifically calls for free passage of "medical and hospital stores and objects necessary for religious worship", as well as food and other items if the latter are specifically destined for children, expectant mothers and "maternity cases", subject again to search and to assurances against diversion and misuse. This obligation applies not only in all territory of the parties to an international conflict but also to other states through which the consignments might transit.²³ Moreover, under Article 30, persons in need are guaranteed the right to solicit assistance from international humanitarian actors.²⁴

18 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3 (hereinafter First Additional Protocol).

19 See Yves Sandoz et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, 1987 (hereinafter ICRC AP Commentary), pp. 820 and 1479; Michel Bothe, "Relief actions: the position of the recipient state", in *Encyclopaedia of Public International Law*, Vol. 4, Max Planck Institute for Comparative Public Law and International Law, 1982, pp. 92–3; Ruth Stoffels, "Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps", *International Review of the Red Cross*, vol. 86 (September 2004), p. 522; Joakim Dungal, "A right to humanitarian assistance in internal armed conflicts respecting sovereignty, neutrality and legitimacy: practical proposals to practical problems", *Journal of Humanitarian Assistance*, May 2004, s. 2.3.1.1.

20 See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, International Committee of the Red Cross, 2005 (hereinafter ICRC Customary Law Study), pp. 193, 196–7.

21 *Ibid.*, p. 198; see also Stoffels, above note 19, pp. 521–2 and n.16. A representative example is Security Council Resolution 1460, UN Doc. S/RES/1460 (2005) on children in armed conflict, which "underlin[ed] the importance of the full, safe and unhindered access of humanitarian personnel and goods and the delivery of humanitarian assistance to all children affected by armed conflict".

22 See, e.g., David Forsythe, "Human rights and humanitarian operations: theoretical observations", in Eric Belgrad and Nitza Nachmas (eds.), *The Politics of International Humanitarian Aid Operations*, Praeger, 1997, p. 45.

23 See ICRC GC IV Commentary, above note 17, p.181 (explaining that this provision "applies to all such consignments, when they are intended for the civilian population of another contracting party, whether that party is an enemy, allied, associated or neutral State").

24 See Fourth Geneva Convention, Articles 30 and 62. See also Fourth Geneva Convention arts 62 (on individual relief) and 142 (on relief to detain individuals).

Beyond merely granting access, the Fourth Geneva Convention and First Additional Protocol also impose affirmative duties to promote it. Occupying powers must “facilitate [relief schemes] by all means at their disposal”.²⁵ State parties in international conflicts must grant the ICRC, the other components of the International Red Cross and Red Crescent Movement and “to the extent possible” other humanitarian organizations, “all facilities within their power”,²⁶ and “facilitate [their humanitarian work] in every way possible”.²⁷ In other words, as noted by the ICRC Commentary, parties should, as much as possible, “cut[] out red tape”.²⁸ Again, these duties apply not only to the belligerents themselves, but to all states parties, including states of transit.²⁹

No similar language on facilitation is applied to internal conflicts in the Second Additional Protocol.³⁰ Still, the ICRC Commentary to Article 18 argues that its provision that relief actions “shall be undertaken” implies that, “[o]nce relief actions are accepted in principle, the authorities are under an obligation to co-operate, in particular by facilitating the rapid transit of relief consignments and by ensuring the safety of convoys”.³¹ Moreover, the ICRC’s customary law study concluded that customary law rules have formed in both international and internal conflicts requiring parties to “allow and facilitate rapid and unimpeded passage” of relief, and “ensure freedom of movement of authorized humanitarian relief personnel”.³² Again, the ICRC study was able to rely on a number of resolutions of the UN Security Council in addition to other sources for the notion that “full, safe and unhindered access” is required.³³

International law on refugees and displaced persons

Armed conflicts and disasters often result in population displacement. Armed conflicts are also frequent backdrops to the kinds of persecution required for refugee protection by the Convention Relating to the Status of Refugees of 1951,³⁴ and persons fleeing the generalized effects of conflict are recognized as refugees by the Convention Governing the Specific Aspects of Refugee Problems in Africa of

25 See *ibid.*, Article 59.

26 See First Additional Protocol, Article 81(1).

27 See *ibid.*, Article 81(3).

28 See ICRC GC IV Commentary, above note 17, p. 328.

29 See, e.g., Fourth Geneva Convention, Article 23; First Additional Protocol, Articles 70(2), 81(2)–(4); ICRC Customary Law Study, above note 20, pp. 198–9.

30 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 UNTS 609 (hereinafter Second Additional Protocol).

31 See ICRC AP Commentary, above note 19, p. 1480.

32 See ICRC Customary Law Study, above note 20, pp. 193 and 200.

33 See, e.g., UN Security Council Resolution 1261, UN Doc. No. S/RES/1261, para. 11 (1999); see also ICRC Customary Law Study, above note 20, pp. 195–6 and nn.70–3 (citing over two dozen other such resolutions).

34 Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150 (hereinafter 1951 Refugee Convention), Article 1.

1969³⁵ and the Cartagena Declaration on Refugees of 1984.³⁶ Persons displaced by disasters are not normally considered refugees under the definitions of any of these instruments, but refugee law may nevertheless be relevant in a disaster setting where refugees happen (*i.e. persons displaced due to persecution or conflict*) to be present.

While not entering into great detail on international relief, global and regional refugee law instruments do call on states to co-operate with the UN High Commissioner for Refugees (UNHCR) in the exercise of its mandate,³⁷ which includes providing protection and assistance to refugees. Moreover, both the United Nations General Assembly³⁸ and UNHCR's Executive Committee³⁹ have made it clear that access to refugees should be guaranteed to both UNHCR and other "approved" humanitarian organizations.

Likewise, both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child provide that refugee (and, in the latter case, also internally displaced) children should be provided "appropriate protection and humanitarian assistance", and that states should "co-operate" with international actors in their efforts to "protect and assist" such children.⁴⁰

Persons fleeing both armed conflict and disasters can be considered IDPs pursuant to the most prominent international instrument in this area, the Guiding Principles on Internal Displacement.⁴¹ The Guiding Principles has express provisions on the duty of states to allow humanitarian access to international humanitarian actors for persons displaced by conflicts and disasters (among other causes).⁴²

35 Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45 (hereinafter African Refugee Convention'), Article 1.

36 Cartagena Declaration on Refugees, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10 (1984-5) (hereinafter Cartagena Declaration'), rev. 1, at 190-3.

37 See Convention Relating to the Status of Refugees, July 28, 1951, Article 8, 189 UNTS 150; Cartagena Declaration on Refugees, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10 (1984-5), rev. 1, pp. 190-3, para. (e).

38 See, e.g., UN General Assembly Resolutions 51/75, UN Doc. A/RES/51/75 (1996), para. 6 ("[e]mphasiz[ing] the importance of ensuring access by the Office of the High Commissioner to asylum-seekers, refugees and other persons of concern in order to enable it to carry out its protection functions"); 47/105, UN Doc. A/RES/47/105 (1992), para. 20 (calling on states to "ensure the safe and timely access for humanitarian assistance").

39 See, e.g., UNHCR Executive Committee Conclusions 79 (XLVII), para. (p) (47th Sess. 1996) ("stress[ing] the importance of UNHCR's being granted access to asylum applicants and refugees in order to enable the Office to carry out its protection functions in an effective manner"); 72 (XLIV), para. (b) (44th Sess. 1993) (calling on states to "afford UNHCR and, as appropriate, other organizations approved by the Governments concerned prompt unhindered access' to refugees"); 73 (XLIV), para. (b)(iii) (44th Sess. 1993) (calling on states to make "arrangements facilitating prompt and unhindered access to all asylum-seekers, refugees and returnees for UNHCR and, as appropriate, other organizations approved by the Governments concerned"); 48 (XXXVIII), para. (d) (38th Sess. 1987) (asserting that "States have a duty to cooperate with the High Commissioner in the performance of his humanitarian protection and assistance functions, which can only be effectively accomplished if he has access to camps and settlements of his concern").

40 See CRC, above note 4, Article 22; African Charter on the Rights and Welfare of the Child, 11 July 1990, OAU Doc. No. CAB/LEG/24.9/49 (1990), Article 23. The CRC limits this obligation somewhat by stating that states should co-operate "as they consider appropriate", however, it also refers expressly to both UN and non-governmental actors.

41 See Guiding Principles on Internal Displacement, UN Doc. No. E/CN.4/1998/53/Add.2 (1998).

42 See *ibid.*, at Principles 3 and 25.

Recently, eleven states in the Great Lakes region of Africa adopted a “Protocol on the Protection and Assistance of Internally Displaced Persons”, which requires member states to adhere to the Guiding Principles.⁴³ Discussions are also underway for a development of an African Union Treaty on IDPs.

Other international law applicable to disasters (IDRL)

In addition to the well-known canons of international law described above, there is another category of instruments and norms relevant to disaster assistance, known as IDRL.⁴⁴ In contrast to the centralization of international humanitarian law, IDRL is a rather scattered and heterogeneous collection of instruments.⁴⁵

These include multilateral treaties on customs,⁴⁶ industrial accidents,⁴⁷ nuclear emergencies,⁴⁸ health emergencies,⁴⁹ civil defence,⁵⁰ food aid,⁵¹ sea or air transport,⁵² telecommunications,⁵³ satellite imaging⁵⁴ and telecommunications,⁵⁵

43 See Protocol on the Protection and Assistance of Internally Displaced Persons (version of 30 November 2006), available at http://www3.brookings.edu/fp/projects/idp/GreatLakes_IDPprotocol_final.pdf (last visited 3 July 2007), Articles 3(6) and (7) and 4(1)(f).

44 Many of these instruments define the term “disaster” so broadly as to also include situations of armed conflict, although it is relatively plain from their text and drafting history that non-conflict disasters are at least their primary focus. See, e.g., Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, December 4, 1998, United Nations depositary notification C.N.608.1998.TREATIES-8, available at <http://www.ifrc.org/what/disasters/idrl/publication> (last visited 3 July 2007) (hereinafter, Tampere Convention), Article 1(6) (defining “disaster” as “a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex long-term processes”).

45 See generally Victoria Bannon, “Strengthening disaster response laws, rules and principles: overview of the current system and a new way forward”, in C. Raj Kumar and D. K. Srivastava (eds.), *Tsunami and Disaster Management: Law and Governance*, 2006.

46 See International Convention on the Simplification and Harmonization of Customs Procedures, May 18, 1973, T.I.A.S. 6633 (1973), and its 1999 Protocol of Amendment, available at <http://www.ifrc.org/what/disasters/idrl/publication.asp> (last visited 3 July 2007), annex J.5.

47 See, e.g., Convention on the Transboundary Effects of Industrial Accidents, 17 March 1992, 2105 UNTS 460.

48 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, September 26, 1986, 1457 UNTS 134 (hereinafter Nuclear Assistance Convention).

49 See Revised International Health Regulations, 58th World Health Assembly, Doc. No. WHA58.3 (2005), Agenda Item 13.1.

50 See Framework Convention on Civil Defense Assistance, 22 May 2000, available at <http://www.ifrc.org/what/disasters/idrl/publication.asp> (last visited 3 July 2007).

51 See Food Aid Convention, 13 April 1999, available at <http://untreaty.un.org/english/notpubl/notpubl.asp> (last visited 3 July 2007).

52 See, e.g., Convention on Facilitation of International Maritime Traffic, April 9, 1965, 591 UNTS 265, annex 1, ss. 5.11–5.12; Annex 9 to the Convention on International Civil Aviation, December 7, 1944, s. 8.8, repr. in *International Civil Aviation Organization, International Standards and Recommended Practices: Facilitation – Annex 9 to the Convention on International Civil Aviation* (12th edn, 2005).

53 See Tampere Convention, above note 44.

54 See, e.g., Charter On Co-operation to Achieve the Coordinated Use of Space Facilities in the Event of Natural or Technological Disasters (2000), available at http://www.disasterscharter.org/charter_e.html (last visited 3 July 2007).

55 See Tampere Convention, above note 44.

several regional mutual assistance treaties in the Americas, Asia and Europe,⁵⁶ and a great many bilateral treaties and agreements, most of which are between European states.⁵⁷

Many of these treaties are limited either in thematic scope or geographic reach and very few address themselves to any international actors other than states or UN agencies. Thus, in general, the instruments with the widest reach in this field are non-binding resolutions, guidelines and codes, such as UN General Assembly Resolutions 46/182 of 1991 and 57/150 of 2002, the Measures to Expedite Emergency Relief adopted by both the International Conference of the Red Cross and the UN General Assembly in 1977, and the Code of Conduct of the International Red Cross and Red Crescent Movement and Non-governmental Organizations in Disaster Relief.

While it is difficult to generalize across this eclectic collection of instruments, many set out procedures for requesting and accepting international assistance and specific types of legal and administrative facilitation at the national level with regard to the entry and operations of international actors. The emphasis of most of them is on providing assistance to the government of the affected state in its efforts to address a disaster, rather than on the rights and needs of affected persons. There is thus a corresponding emphasis on the primary role of the affected state and the importance of its consent to international assistance, as articulated, for example, by the ASEAN Agreement on Disaster Management and Emergency Response:

The sovereignty, territorial integrity and national unity of the Parties shall be respected, in accordance with the Charter of the United Nations and the Treaty of Amity and Cooperation in Southeast Asia, in the implementation of this Agreement. In this context, each affected Party shall have the primary responsibility to respond to disasters occurring within its territory and external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party.⁵⁸

The situation is thus something of the inverse of the human rights instruments discussed above. These instruments impose no duty on affected states to accept international assistance in the first instance, but once they have

56 See, e.g., Inter-American Convention to Facilitate Assistance in Cases of Disaster, 7 June 1991 (hereinafter Inter-American Convention), available at <http://www.oas.org/legal/intro.htm> (last visited 3 July 2007) (in force, but with only three state parties and never used); ASEAN Agreement on Disaster Management and Emergency Response, 26 July 2005 (not yet in force) (hereinafter ASEAN Agreement), available at <http://www.aseansec.org> (last visited 3 July 2007); Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation (BSEC) on Collaboration in Emergency Assistance and Emergency Response to Natural and Man-Made Disasters, 15 April 1998, available at <http://www.bsec-organization.org/> (last visited 3 July 2007).

57 See Horst Fischer, "International disaster response law treaties: trends, patters and lacunae", in Victoria Bannon (ed.), *International Disaster Response Laws, Principles and Practice: Reflections, Prospects and Challenges*, International Federation of Red Cross and Red Crescent Societies, 2003, p. 29. The International Federation of Red Cross and Red Crescent Societies has produced an online database of several hundred of these instruments, available at <http://www.ifrc.org/idrl> (last visited 3 July 2007).

58 See ASEAN Agreement, above note 55, Article 3(1).

consented, they are called upon to accord a specific set of legal facilities to the providers, such as expedited visas and customs clearance and exemptions from taxation among others. Another difference is that many of the instruments have very few state parties or apply only to a certain type of disaster or relief sector.

Summary

International law thus provides that, in certain situations, affected states are obligated to allow for international relief. The rules in this respect are strongest and clearest in situations of international armed conflict as laid out by international humanitarian law. States also have certain obligations to facilitate international relief operations, including through regulatory means. However, particularly outside the context of armed conflict, the applicable rules lack uniformity. Moreover, as discussed below, there is sometimes a lack of precision as to state obligations with regard to some of the most common regulatory issues.

Problems in the initiation and entry of international humanitarian relief

To some extent, the scope and intensity of common domestic regulatory problems for international relief in conflicts and non-conflict disasters mirror the divergences in the applicable international law. However, in the light of the fact that both share most of the same mechanical aspects (e.g. moving personnel, goods, equipment and operations across borders), there are inevitable similarities.

Initiation

In both disasters and armed conflicts, the relevant domestic authorities sometimes refuse to call for or allow international relief. In conflict settings, this is always a serious issue, at least as a matter of principle, and the general provisions of international humanitarian law described above go directly to this point.⁵⁹

In contrast, for many disasters such refusal is not necessarily problematic. The vast majority of disasters are customarily handled entirely by domestic actors,⁶⁰ and in some cases where international actors offer to assist their help is

59 See generally, Stoffels and Dungal, above note 19.

60 For example, in 2005 there were 473 reported natural disasters but only 47 appeals reported by the United Nations and 29 by the International Federation of Red Cross and Red Crescent Societies. See EM-DAT Emergencies Disasters Database of the Centre for Research on the Epidemiology of Disasters (CRED), Université Catholique de Louvain, at <http://www.em-dat.net/index.htm> (last visited 3 July 2007). OCHA Financial Tracking Service, Natural Disasters in 2005, available at <http://www.reliefweb.org> (last visited 15 June 2007); International Federation of Red Cross and Red Crescent Societies, Statistics, http://www.ifrc.org/where/statisti.asp?navid=05_12 (last visited 3 July 2007).

not really required.⁶¹ In cases of major disaster, outright refusal is relatively rare and the more common problem is delay in the issuance of a formal request for international assistance or in the response to international offers. This is frequently due to weaknesses in national procedures and regulations for needs assessment and decision-making.⁶²

A number of existing instruments encourage affected states to speed the process of requesting and accepting offers of assistance from other states in disasters in addition to clarifying processes for offer and request.⁶³ However, very few of them address the mechanics of initiation of assistance by non-state actors.⁶⁴

Personnel, goods and equipment

Even in the absence of explicit refusals to allow humanitarian relief, problems with visas and particularly internal travel regulations are common in conflict settings, due to heightened government sensibility to the presence of international actors. For example, in Sudan, notwithstanding several formal agreements between the United Nations and the government to streamline procedures regarding relief to Darfur, humanitarian officials have reported that the time, paperwork and expense required to obtain and renew visas as well as internal travel permits have become onerous.⁶⁵ In Israel entry visas have reportedly been denied to humanitarian personnel and their contractors of Arab origin or nationalities, posing a particular

61 See, e.g., Henri Astier, “Can aid do more harm than good?”, *BBC News*, 1 February 2006, available at <http://news.bbc.co.uk/2/hi/africa/4185550.stm> (last visited 3 July 2007). On the other hand, there are many disasters where international assistance is greatly needed and urgently requested but little help has been forthcoming. See generally, International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2006: Focus on neglected crises*, 2006.

62 See, e.g. International Federation of Red Cross and Red Crescent Societies, *Fiji: Laws, Policies Planning and Practices on International Disaster Response*, 2005, p. 30 (“It was noted that foreign organizations providing disaster assistance in Fiji had experienced delays in obtaining entry permission and visas for relief personnel. The systems were considered to be ad hoc and inconsistent. The length of time taken to request external assistance by the Fiji Government also resulted in delays for sending relief personnel into the country and to the affected area”); Turkish Red Crescent Society, *International Disaster Response Law: 1999 Marmara Earthquake Case Study*, 2006, p. 38 (hereinafter *Turkish Red Crescent Study*) (“Turkey did not make any appeals during the acute stage (which should be made through the Ministry of Foreign Affairs with the Decree of the Cabinet) (the appeal was made 2–3 days later). During this period, international relief was unable to be provided”).

63 See, e.g., Framework Convention, above note 49, Article 3(e) (providing that “[o]ffers of, or requests for, assistance shall be examined and responded to by recipient States within the shortest possible time”); Oslo Guidelines on the Use of Civil and Military Assets in Disaster Relief (as revised in 2006), para. 38, available at <http://www.ifrc.org/idrl> (last visited 3 July 2007) (“If international assistance is necessary, it should be requested or consented to by the Affected State as soon as possible upon the onset of the disaster to maximize its effectiveness”).

64 One exception is the ASEAN Agreement, above note 55, Article 11.

65 See Lydia Polgreen, “Red tape imperils humanitarian efforts in Darfur”, *International Herald Tribune*, 27 March 2007; Opheera McDoom, “UN warns Darfur’s aid operation may collapse”, *Reuters*, 17 January 2007. A 2006 “fact sheet” on this issue by the Office for the Co-ordination of Humanitarian Affairs (OCHA) found that “[t]he visas regime for NGOs operating in Sudan is unclear, complicated and lengthy”, noting that the government had required multiple renewals of stay visas at a cost of US\$240 per person. OCHA, *Fact Sheet on Access Restrictions in Darfur and Other Areas of Sudan* (20 April 2006), available at <http://ochaonline.un.org/GetBin.asp?DocID=4494> (last visited 3 July 2007).

challenge to operations requiring staff fluent in Arabic.⁶⁶ Travel restrictions on humanitarian personnel are also imposed by insurgent groups, sometimes with a level of formality similar to governmental procedures.⁶⁷

Likewise, in some disaster settings initial entry visas for international relief personnel are refused or substantially delayed. More often, however, disaster personnel are initially allowed to enter freely on tourist or other temporary visas, and problems only arise some time later with regard to renewing those documents and/or obtaining work permits. In both Indonesia and Thailand, for example, international relief personnel responding to the 2004 tsunami were required to exit and re-enter the country repeatedly in the midst of their operations in order to renew visas, at substantial loss of time and expense.⁶⁸

Restrictions, delays and charges related to the importation of relief goods and equipment are another major impediment in disaster and conflict operations. For example, after the 2004 tsunami, customs clearance for relief consignments in both Sri Lanka and Indonesia was delayed for months, while food and medications perished.⁶⁹ One non-governmental organization (NGO) responding in Sri Lanka was required to pay \$1 million in customs duties on the vehicles it imported for its operations.⁷⁰ In Eritrea, hundreds of tonnes of UN food aid for drought-affected persons were delayed for over a month in 2005 due to government demands for taxes,⁷¹ and after the 1999 earthquake in Turkey a legal storage deadline was exceeded for some relief consignments awaiting customs clearance, and as a result they were nationalized rather than cleared for distribution.⁷²

The story is similar in conflict settings. For example, during the war in the Balkans in the 1990s there were reports of significant customs delays on humanitarian relief in Yugoslavia⁷³ and in neighbouring countries hosting refugees.⁷⁴ In 2002, 8,500 metric tonnes of World Food Programme (WFP) emergency aid was blocked in Angolan ports over a dispute as to payment of customs and processing charges. Two years later the same dispute arose again,

66 See Mission Report of Catherine Bertini, Personal Humanitarian Envoy of the Secretary-General, 11–19 August 2002, para. 76, available at <http://www.reliefweb.int/library/documents/2002/un-opt-19aug.pdf> (last visited 3 July 2007).

67 During the north–south war in Sudan, the Sudan People’s Liberation Army developed a formal system of travel permits which could be applied for at a “consular” office in Nairobi.

68 See International Federation of Red Cross and Red Crescent Societies, *Legal Issues in the International Response to the Tsunami in Thailand*, 2006, available at <http://www.ifrc.org/idrl> (last visited 3 July 2007) (hereinafter *IFRC Thailand Report*), pp. 15–16; International Federation of Red Cross and Red Crescent Societies, *Legal Issues in the International Response to the Tsunami in Indonesia* (publication pending) (hereinafter *IFRC Indonesia Report*), p. 15.

69 See International Federation of Red Cross and Red Crescent Societies, *Legal issues in the international response to the tsunami in Sri Lanka*, 2006 (hereinafter *IFRC Sri Lanka Report*), p. 17; *IFRC Indonesia Report*, above note 67, pp. 21–22.

70 See *IFRC Sri Lanka Report*, above note 68, p. 24.

71 See “Food aid held for taxes to be released, says gov’t official”, *IRIN* (16 August 2005).

72 See *Turkish Red Crescent Study*, above note 61, p. 34.

73 See Refugees International, “Kosovo: Shortfalls and difficulties in food aid delivery”, 9 December 1998.

74 See Médecins sans Frontières press release, “Doctors without borders calls for immediate and unconditional access to Kosovar refugees in no man’s land on Macedonian border”, April 5 1999.

blocking food aid for three months.⁷⁵ In Sudan the United Nations has reported months-long delays in the clearance of food, telecommunications equipment and other items for use in Darfur.⁷⁶

It should be recognized that some of the difficulties in entry are traceable to the rising number of international relief providers. Recent years have seen more governments, UN agencies, Red Cross and Red Crescent Societies, private entities and individuals becoming involved in international relief operations.⁷⁷ The numbers of international NGOs has risen most dramatically.⁷⁸ This has heightened risks of competitiveness among providers as well as of poor quality of work, as discussed below. These factors plainly complicate the task of affected states in facilitating speedy entry, as it is difficult for them to know whom to trust.

Existing international law addresses these issues at differing levels of precision. The Fourth Geneva Convention calls for the “free passage”⁷⁹ and “rapid distribution”⁸⁰ of relief consignments, which should also be “exempt ... from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory”.⁸¹ The First Additional Protocol expands these requirements to the “rapid and unimpeded passage of all relief consignments, equipment and personnel”.⁸² As noted above, the ICRC customary law study found this same rule to be applicable as a matter of customary law to all types of armed conflict.⁸³

Most of the treaties and soft-law instruments on disaster assistance make specific reference to facilitating the speedy entry of relief goods and personnel (mainly for assisting states).⁸⁴ Moreover, many of them call for the waiver of customs duties on relief items. Intergovernmental organizations are additionally entitled to such facilities as elements of their privileges and immunities.⁸⁵ There are several customs instruments that are applicable to all providers of relief and that call on member states to take a number of steps to speed customs clearance and

75 See “Angolan food aid ‘sits untouched,’” *BBC News*, 4 March 2004; “Angola: government bureaucracy delays WFP food aid”, *IRIN*, 4 March 2004.

76 Report of the Secretary-General to the Security Council on the Sudan, UN Doc. S/2006/728 (2006), para 28.

77 See Arjun Katoch, “The responders’ cauldron: the uniqueness of international disaster response”, *Journal of International Affairs*, Vol. 59 (Spring/Summer 2006), pp. 157–8 (2006); John Telford and John Cosgrave, *Joint Evaluation of the International Response to the Indian Ocean Tsunami: Synthesis Report*, Tsunami Evaluation Coalition, 2006 (hereinafter TEC Synthesis Report), pp. 55–60.

78 See Feinstein International Famine Center, “Ambiguity and change: humanitarian NGOs prepare for the future”, 2004, pp. 70–1.

79 See Fourth Geneva Convention, Articles 23 and 59.

80 *Ibid.*, Article 61.

81 *Ibid.*, Article 61. The ICRC Commentary, argues for a restrictive reading of the limitation clause concerning the “interests of the economy”, asserting that “belligerents should endeavour to regard it as absolutely exceptional, since to grant absolute exemption from all charges is really the only way of acting in the true spirit of relief actions and, in the great majority of cases, is in the real interests of the countries to which relief is sent”. ICRC GC IV Commentary, above note 17, p. 327.

82 First Additional Protocol, Article 70(2).

83 See note 32 above.

84 See Fischer, above note 56, p. 36.

85 See, e.g., Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15.

recommend that restrictions and duties be lifted in disaster situations.⁸⁶ However, their coverage is either geographically or thematically limited.⁸⁷

Relief operations

In order for humanitarian relief providers to carry out effective operations, more than mere permission to be present is required. There are many regulatory issues affecting these operations, only a few of which are summarized here.

Providing security

As noted above, security for relief personnel and/or their beneficiaries is one of the chief obstacles to humanitarian access in conflict settings, and this is equally true in mixed situations of conflict and disaster.⁸⁸ Security can be a domestic regulatory issue not only with regard to permission to enter affected areas, but also when authorities require armed escorts against the wishes of humanitarian actors seeking to ensure the acceptance of their neutrality. Issues also arise when on the contrary, interpose obstacles to providing requested security support. In Indonesia, for example, the army reportedly imposed military escorts on some humanitarian actors immediately after the 2004 tsunami.⁸⁹ Likewise, in Myanmar, among the numerous restrictions on humanitarian organizations are requirements that all their in-country travel be approved by several ministries and accompanied by a government official.⁹⁰ Conversely, in Uganda the government has required humanitarian actors requesting armed escort for humanitarian relief convoys to internally displaced persons camps to pay substantial fees, which some NGOs are unable to afford.⁹¹

86 See Revised Convention on the Harmonization and Simplification of Customs Procedures, 26 June 1999 (hereinafter Kyoto Convention), Specific Annex J.5; Convention on Temporary Admission, 26 June 1990, Annex B.9; Recommendation of the Customs Co-operation Council to expedite the forwarding of relief consignments in the event of disasters, Doc. No. T2-423 (1970) (hereinafter CCC Recommendation), all available at <http://www.ifrc.org/what/disasters/idrl/publication.asp> (last visited 3 July 2007).

87 For example, Specific J.5 of the Kyoto Convention currently has only seven parties, and annex B.9 of the Istanbul Convention refers only to equipment intended for re-exportation after use in disaster relief.

88 For example, in Somalia severe floods and droughts have coincided with renewed outbreaks of conflict over the last several years. See International Committee of the Red Cross, *Annual Report 2006*, May 2007, p. 128. In the ongoing environment of lawlessness, banditry and piracy have greatly hampered efforts to bring food and other relief to affected persons. See, e.g., World Food Programme press release, "New pirate attack on aid ship: WFP urges high-level international action against Somali piracy", 21 May 2007; "Food shortages worsen as piracy slows aid delivery", *IRIN*, 6 December 2005.

89 See Jim Gomez, "Indonesia requires aid escorts", *Deseret News*, 13 January 2005; Human Rights Watch, "Open letter to President Susilo Bambang Yudhoyono", 6 January 2005.

90 See International Crisis Group, "Myanmar: new threats to humanitarian aid", 8 December 2006, p. 9.

91 See Office for the Co-ordination of Humanitarian Affairs, "UN system response to the IDP situation in Uganda and recommendations for enhanced support to the national and local authorities, a mission report of the Internal Displacement Unit", August 2003, p. 3; Internal Displacement Monitoring Centre, "NGOs that access some of the camps without escort place themselves at considerable risk", August 2003, available at www.internal-displacement.org (last visited 3 July 2007).

In “pure” disaster relief settings, security is nowhere near as pressing a concern. However, it is also not entirely absent, as international relief goods and personnel are frequently targeted by criminals as sources of wealth. Thus, for example, after Tropical Storm Stan in Guatemala, relief workers reported armed assaults on trucks delivering food assistance.⁹² A 2003 survey of relief and development workers in thirty-nine countries found that even among those working in overall environments of little or no violence, over 15 per cent reported obstacles to their operational access to beneficiaries due to concerns about small arms.⁹³

In situations of international armed conflict, the Fourth Geneva Convention and First Additional Protocol require parties to “guarantee the[] protection” of relief consignments,⁹⁴ and “protect[] and respect[]” humanitarian personnel.⁹⁵ These rules have reportedly attained the status of customary law in both international and internal armed conflicts.⁹⁶ The Convention on the Safety of United Nations and Associated Personnel of 1994 (hereinafter UN Safety Convention) likewise requires parties to ensure the safety of personnel, prevent crimes against them and criminalize attacks against them in international peace and security missions; however, it is limited to personnel of the United Nations and NGOs acting under agreement with the UN.⁹⁷

The Optional Protocol to the UN Safety Convention⁹⁸ broadened the reach of these protections to “emergency humanitarian assistance” missions more generally,⁹⁹ although parties are allowed to “opt out” of applying the convention to particular natural disaster operations.¹⁰⁰ However, it is not yet in force and currently has only ten parties.¹⁰¹ A number of other treaties concerned with

92 See International Federation of Red Cross and Red Crescent Societies, *Legal Issues from the International Response to Tropical Storm Stan in Guatemala*, 2007, p. 35.

93 Ryan Beasley et al., *In the Line of Fire: Surveying the Perceptions of Humanitarian and Development Personnel of the Impacts of Small Arms and Light Weapons*, Centre for Humanitarian Dialogue and Small Arms Survey, 2003, p. 52.

94 Fourth Geneva Convention, Article 59.

95 First Additional Protocol, Article 71.

96 See ICRC Customary Law Study, above note 20, pp. 105–11.

97 See Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, Articles 7, 9 and 11, 2051 UNTS 363. Likewise, under the Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90, Articles 8(2)(b)(iii) and 8(2)(e)(iii), attacks on humanitarian personnel and material are considered war crimes in both international and internal armed conflict. While state parties are not required by the treaty to criminalize these acts in their national law, many of them have done so in order to be able to comply with the rendition requirements.

98 Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, November 8, 2005, UN Doc. No. A/C.6/60/L.11 (2005).

99 It also includes “peace building” missions. *Ibid.*, Article 2(3).

100 *Ibid.*

101 As of the date of writing, the parties were Austria, Botswana, Kenya, Liechtenstein, Monaco, Netherlands, Norway, Slovakia, Spain and Sweden. Pursuant to Article 6, the Protocol can enter into force after it has received twenty-two ratifications.

disaster relief, at the global,¹⁰² regional¹⁰³ and bilateral level¹⁰⁴ also impose obligations on affected states to protect relief personnel, goods and equipment; however, with a few notable exceptions¹⁰⁵ they apply only to the personnel of foreign governments or UN agencies.

There is less direct language in existing instruments concerning the right of humanitarian actors to refuse unwanted armed escorts. However, the concept of neutrality is plainly integrated into international humanitarian law, and states have often emphasized the importance of respecting it. For example, UN General Assembly Resolution 46/182 of 1991 states that “[h]umanitarian assistance must be provided in accordance with the principles of humanity, impartiality and neutrality”.¹⁰⁶ Moreover, a mandatory escort requirement could easily be characterized as an impediment to the freedom of movement of humanitarian personnel, discussed above.

The international humanitarian community has adopted a number of its own guidelines in this area for conflict situations, uniformly calling for the most restricted and careful acceptance of armed escorts, and only as a last resort.¹⁰⁷ One of these, the 2003 Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies, also “encourages” “Member States and regional organizations engaged in relief or military operations in complex emergencies ... to use the principles and procedures provided herein”.¹⁰⁸

102 See Nuclear Assistance Convention, above note 47, Article 3(b); Framework Convention, above note 49, Article 4(a)(5); Tampere Convention, above note 44, Article 5(3).

103 See, e.g., Inter-American Convention, above note 55, Article 4(c); ASEAN Agreement, above note 55, Article 12(2); see also Council of the European Communities Resolution, “Improving mutual aid between Member States in the event of a natural or technological disaster”, OJ C 198, 27 July 1991, at 1, para. 4.

104 See, e.g., Abkommen zwischen der Republik Österreich und dem Fürstentum Liechtenstein über die Gegenseitige Hilfeleistung bei Katastrophen oder Schwere Unglücksfällen, 23 September 1994, Bundesgesetzblatt Nr. 758, 1995, at 254; Acuerdo entre el Gobierno del Reino de España y el Gobierno de la Federación de Rusia sobre Cooperación en el Ámbito de la Prevención de Catástrofes y Asistencia Mutua en la Mitigación de sus Consecuencias, 14 June 2000, Article 9(c), Boletín Oficial del Estado 153/2001, p. 22942.

105 See, e.g., Tampere Convention, above note 44; ASEAN Agreement, above note 55.

106 UN Doc. A/RES/46/182 (1991), annex, para. 2. The ICRC’s arguments in this regard would be particularly supported by the recognition of its special status in the Geneva Conventions. See, e.g., Fourth Geneva Convention Article 142 (calling on parties to “respect” the “special position of the International Committee of the Red Cross in this field”).

107 See, e.g., Inter-Agency Standing Committee, Use of Military or Armed Escorts for Humanitarian Convoys, 2001; Council of Delegates of the Red Cross and Red Crescent, Resolution 7, Guidance Document on Relations of Components of the Movement with Military Bodies, 2005.

108 Inter-Agency Standing Committee, Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies, 2003, para. 18. A set of guidelines for civil–military relations, known as the “Oslo Guidelines” has also been developed by states and humanitarian actors for disaster situations. See Guidelines on the Use of Military and Civil Defense Assets in Disaster Relief, as updated in 2004. However, the Oslo Guidelines are intended for regulating the direct use of international militaries in relief operations and do not address the issue of armed escorts. *Ibid.*, para. 43.

Recognition of domestic legal status

The recognition of a domestic legal status is another common problem for foreign relief providers in both conflict and disaster settings, particularly for NGOs and foreign Red Cross or Red Crescent societies. All states require some type of registration process for “legal persons” before granting them legal personality. In emergency settings, these processes are frequently too slow or difficult for international actors to negotiate. For example, after the 2004 tsunami in Thailand, foreign NGOs were mystified by domestic registration processes and were unsuccessful in finding information from governmental sources even months after the disaster struck.¹⁰⁹ Similarly, in 1998, it was reported that many humanitarian agencies in Kosovo had given up on seeking domestic registration because of the complexity and delays.¹¹⁰

This lack of formal legal status can have a variety of consequences. Unregistered organizations are particularly vulnerable to sudden expulsion by authorities for non-programmatic reasons. Fear of such expulsion can lead relief providers to restrict their programming and advocacy on behalf of affected persons.¹¹¹ Unregistered organizations also sometimes have difficulty opening bank accounts,¹¹² operating radio communication systems,¹¹³ hiring staff, entering into leases, purchasing vehicles and obtaining visas for their workers, and, as discussed further below, obtaining tax exemptions.¹¹⁴

To avoid such problems UN agencies and other international organizations can call upon the laws on privileges and immunities (such as the Convention on Privileges and Immunities of the United Nations of 1946¹¹⁵ and the Convention on Privileges and Immunities of the Specialized Agencies of 1947¹¹⁶), which require member states to recognize their legal personality. Other relief providers, including states, the international components of the Red Cross and Red Crescent movement, and some of the large NGOs, have addressed this issue through bilateral agreements. However, where there are no such agreements in advance of an emergency, there is little guidance on this issue at the international level beyond the general obligations to facilitate aid discussed above.

109 See International Federation of Red Cross and Red Crescent Societies, *Legal Issues in the International Response to the Tsunami in Thailand* (2006) (hereinafter *IFRC Thailand Report*), at pp. 13–14.

110 See *Refugees International*, above note 72.

111 See *IFRC Thailand Report*, above note 108, at 14; Human Rights Watch press release, “Sudan: continuing blockade of humanitarian aid”, 4 April 2006.

112 See *IFRC Thailand Report*, above note 108, at 19.

113 See *Refugees International*, above note 72.

114 See International Federation of Red Cross and Red Crescent Societies, *Report of the European Forum on International Disaster Response Laws, Rules and Principles*, Antalya, Turkey, 25–6 May 2006, p. 4.

115 Convention on the Privileges and Immunities of the United Nations, above note 84.

116 Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947, 33 UNTS 261.

Medical qualifications

Another type of registration problem is related to medical services. Doctors and other medical professionals are commonly required to be domestically licensed or to have their foreign licences formally recognized by domestic authorities before they can legally practice medicine. Again, the procedures for obtaining such recognition are generally lengthy, complex and therefore functionally unavailable to medical relief personnel in emergency response situations. In Thailand, for example, recognition of foreign medical qualifications normally takes two years, and requires applicants, among other things, to pass a Thai language exam.¹¹⁷

Yet, medical professionals frequently intercede in both disaster and conflict situations and are mainly tolerated by domestic authorities. This occurred, for example, in Thailand after the 2004 tsunami, when thirty-two foreign medical teams intervened¹¹⁸ and in the United States after Hurricane Katrina, when a Canadian urban search and rescue team was allowed to provide medical services in New Orleans.¹¹⁹ However, tolerance has its limits. For example, in Nepal a prominent international medical NGO responding during the armed conflict between the government and the Maoist insurgents was required to cease operations because of the lack of recognized licences of its staff.¹²⁰ Foreign medical personnel are also left in a precarious position for liability for civil penalties.¹²¹ Moreover, the absence of some interim method of monitoring foreign medical interventions exposes disaster-affected persons to the dangers of incompetent or inappropriate treatment. For instance, after the 2004 tsunami, teams of Scientologists responded in Sri Lanka, Indonesia and India to perform their modern version of faith healing on affected persons.¹²²

The Geneva Conventions and First Additional Protocol, as well as some of the older humanitarian law conventions, have a number of specific provisions concerning the access, protection and respect for medical personnel. However, these provisions refer only to medical personnel acting under the specific direction of a party to the conflict and to certain other domestic medical actors, including recognized national Red Cross and Red Crescent societies.¹²³ On the other hand, Article 71 of the First Additional Protocol pertains to international relief personnel

117 See IFRC Thailand Report, above note 108, p. 16.

118 Ibid.

119 See Anne Richard, "Role reversal: offers of help from other countries in response to Hurricane Katrina", Center for Transatlantic Relations, 2006, p. 20.

120 See International Federation of Red Cross and Red Crescent Societies, *IDRL Asia-Pacific Study–Nepal Laws, Policies Planning and Practices on International Disaster Response*, 2005, p. 28.

121 See Richard, above note 118, p. 20.

122 See, e.g., Peter Goodman, "For tsunami survivors, a touch of Scientology", *Washington Post*, 28 January 2005; International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2005: Focus on information in disasters*, 2005, p. 93.

123 See, e.g., First Geneva Convention, Articles 24–26; Fourth Geneva Convention, Articles 17, 56; First Additional Protocol, Articles 8(c) (specifically defining the term "medical personnel" in these terms) and 15; ICRC Customary Law Study, above note 20, pp. 81–3 (concerning the definition of medical personnel), and Vol. II, pp. 453–6 (compiling citations to the Geneva Conventions of 1864, 1906 and 1929).

in general and requires parties receiving relief to admit them “where necessary”, respect and protect them, and assist them in carrying out their missions. It further provides that “[o]nly in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted”. The ICRC Commentary to this section notes that “[p]articipation of medical or paramedical personnel is not explicitly mentioned, but it is not excluded, and it should certainly be viewed in a favourable light. Often experts in hygiene and nutrition, nurses, or even doctors, can provide useful – if not essential – additional aid depending on the relief facilities and personnel locally available”.¹²⁴ Inasmuch as a licensing requirement cannot be considered an “imperative military necessity”, Article 71 would arguably forbid its use to block the activities of medical relief personnel.

Beyond this provision, however, this remains another area with little specific international guidance. For example, existing treaties on the recognition of foreign qualifications refer only obliquely to medical qualifications and have no provisions concerning emergencies.¹²⁵

Taxation

There are similar gaps with regard to taxation of international humanitarian relief beyond the domain of customs duties. Value added taxes (VAT) are frequently imposed on relief providers in disaster settings (particularly, but not exclusively, on unregistered humanitarian organizations) and can sometimes amount to large sums, especially when relief goods and services are purchased locally rather than imported from abroad, an important means for supporting a recovering economy.¹²⁶

Fees and taxes are also imposed on humanitarian relief in conflict settings, sometimes at exorbitant rates and with dubious legality, even under domestic law.¹²⁷ “Taxes” by insurgent groups are common both on relief providers and their beneficiaries.¹²⁸ Thus a 1999 survey of NGOs by the Union of International Associations found that delays and payment demands at militarized checkpoints

124 See ICRC AP Commentary, above note 19, p. 833.

125 See, e.g., Regional Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and other Academic Qualifications in Higher Education in the African States, 5 December 1981; Council of Europe/UNESCO Convention on the Recognition of Qualifications concerning Higher Education in the European Region, 11 April 1997, both available at <http://www.unesco.org> (last visited 3 July 2007).

126 See, e.g., Tom Wright, “Tax snarls relief for Aceh”, *Wall Street Journal*, 19 January 2007.

127 See, e.g., Transparency International, “Mapping the Risks of Corruption in Humanitarian Action” (July 2006), pp. 22–3; “Aid blocked as the Taliban demand “tax””, *Daily Telegraph*, 12 October 2001.

128 During the war between the north and south of Sudan, the Sudan People’s Liberation Army reportedly imposed a tax called “tayeen” on the beneficiaries of humanitarian aid to support its soldiers. See Human Rights Watch, *Famine in Sudan: The Human Rights Causes* (1998); Humanitarian Policy Group, “The Agreement on Ground Rules in South Sudan”, Study 3 in *The Politics of Principle: The Principles of Humanitarian Action in Practice*, March 2000, p. 55.

(both “public” and “private”) were among the most common obstacles to humanitarian access.¹²⁹

For international organizations such as the United Nations, exemption from most taxation is included among their privileges and immunities, as discussed above.¹³⁰ For their part, most of the Geneva Conventions’ provisions relevant to taxation seem primarily to be aimed at customs duties and other importation-related fees.¹³¹ However, both the Fourth Geneva Convention and the First Additional Protocol provide that parties “shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended” except in “urgent necessity” in the interest of the concerned population.¹³²

Several multilateral and a number of bilateral treaties¹³³ related to disaster response also address taxation beyond customs duties. For example, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency provides that “[t]he requesting State shall afford to personnel of the assisting party or personnel acting on its behalf exemption from taxation, duties or other charges, except those which are normally incorporated in the price of goods or paid for services rendered”¹³⁴ and the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations provides that relief organizations and personnel are to be provided “exemption from taxation, duties or other charges, except for those which are normally incorporated in the price of goods or services, in respect of the performance of their assistance functions or on the equipment, materials and other property brought into or purchased in the territory of the request State Party for the purpose of providing telecommunication assistance”.¹³⁵ However, there is no general rule on this question in existing disaster law across all types of disasters and relief providers.

Regulation of co-ordination and quality

Co-ordination and quality are among the most cited problem areas in international disaster relief operations and are of concern in conflict situations

129 See Mario Bettati, “Protection for non-governmental organizations on hazardous duties: reports of the results of a UIA survey”, *Transnational Associations/Associations transnationales*, Vol. 3 (1999), pp. 118–32.

130 See, e.g., Convention on the Privileges and Immunities of the United Nations, above note 84, s. 7.

131 As noted above, Article 61 of the Fourth Geneva Convention calls for “all taxes, charges and duties” to be waived for relief, but the use of the term “consignments”, and the context of the clause would seem to indicate that relief being brought in from outside the affected country is primarily intended. Similarly, Article 23 of the Fourth Geneva Convention and Article 71 of the First Additional Protocol calls for the free passage of relief “consignments”.

132 See, e.g., Fourth Geneva Convention, Article 60, and First Additional Protocol, Article 70(3).

133 See, e.g., Agreement between the Government of the United States of America and the Government of the Republic of Belarus Regarding Cooperation to Facilitate the Provision of Assistance, June 18, 1996, Article 1, available at <http://www.ifrc.org/idrl> (last visited 3 July 2007).

134 Nuclear Assistance Convention, above note 47, Article 8.

135 Tampere Convention, above note 44, Article 5.

as well. These issues are linked with the growth in the size and diversity of the international relief community.

For example, in 1996 a joint evaluation by donors and humanitarian organizations of emergency assistance provided in Rwanda in 1994–5 noted that at least 7 UN agencies, 8 militaries, several components of the Red Cross/Red Crescent Movement, 250 NGOs and 20 donor organizations intervened significant co-ordination problems.¹³⁶ While the report did not give a clear grade for all of these actors, it noted that, while most NGOs performed impressively, “a number performed in an unprofessional and irresponsible manner that resulted not only in duplication and wasted resources but may also have contributed to an unnecessary loss of life”.¹³⁷ More recently, an even larger joint evaluation of the international response to the 2004 tsunami noted with alarm the proliferation of international actors, the resulting competition and duplication of efforts, and the enormous quantities of unwanted and inappropriate assistance sent to affected countries, including expired foods and medicines, used clothing and many other items which were a positive burden on local relief actors.¹³⁸

In disaster settings it is expected that affected states will play a leading role with regard to international relief. As stated by UN General Assembly Resolution 46/182, “the affected State has the primary role in the initiation, organization, co-ordination, and implementation of humanitarian assistance within its territory”. However, in some instances, affected states have adopted an “open door” and “hands-off” approach to international relief items and providers, which has allowed for uneven and unco-ordinated international efforts. For instance, after the 2003 earthquake in Bam, Iran, few government controls were exercised over the entry of the extremely large number of international NGOs that intervened, some of which imported poor quality goods, were unable to carry out promised activities and even required food and shelter themselves from the Iranian Red Crescent Society.¹³⁹

In conflict settings the expectations are different. International humanitarian law recognizes and seeks to counterbalance the strong temptation of armed parties, in the tense atmosphere of an armed conflict, to exercise excessive control over humanitarian assistance. As noted above, parties may condition access on several restricted factors related to their own security and safeguards against military appropriation of relief. Ensuring an optimal co-ordination and high quality of humanitarian relief is not among these factors. Article 71 of the First Additional Protocol also notes that particular relief personnel “shall be subject to the approval of the Party in whose territory they will carry out their duties” and are prohibited from “exceed[ing] the terms of their mission under this Protocol”, but no additional personal qualifications are specified. Both the

136 Overseas Development Institute, *Joint Evaluation of Emergency Assistance to Rwanda: Study III – Principal Findings and Recommendations*, June 1996, pp. 18–21.

137 *Ibid.*, p. 23.

138 See TEC Synthesis Report, above note 76, pp. 52–7.

139 See International Federation of Red Cross and Red Crescent Societies, *Operations Review of the Red Cross Red Crescent Movement Response to the Earthquake in Bam, Iran*, 2004, p. 34.

Fourth Geneva Convention and First Additional Protocol provide non-exhaustive lists of potential types of relief items,¹⁴⁰ and assert that, in general, relief actions must be of an “exclusively humanitarian and impartial nature and ... conducted without any adverse distinction”,¹⁴¹ but do not otherwise prescribe the quality of relief. While these provisions would likely not be interpreted to prohibit states from some very limited quality control (e.g. ensuring that imported medicines are not expired and thus dangerous to the public), they would be incompatible with any comprehensive efforts in this area.

In both disaster and conflict settings, the main international instruments relevant to the co-ordination and quality of assistance are non-binding guidelines.¹⁴² These include UN General Assembly Resolutions 46/182 of 1991 and 57/150 of 2002, the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief,¹⁴³ the Sphere Project Humanitarian Charter and Minimum Standards in Disaster Response,¹⁴⁴ the International Search and Rescue Advisory Group (INSARAG) Guidelines¹⁴⁵ and the Principles and Practice of Good Humanitarian Donorship of 2003.¹⁴⁶ These guidelines are mainly aimed at international relief actors themselves, rather than affected states.

Mixed situations of conflict and disaster

The same heightened tensions that lead to particularly difficult regulatory problems in armed conflict tend to expand barriers in situations where natural disasters overlap with an armed conflict or a situation of high military tension. For example, in Sri Lanka, whereas access for relief providers was relatively open in the immediate aftermath of the 2004 tsunami,¹⁴⁷ ongoing assistance programmes have undergone much greater restrictions since the renewed outbreak of fighting with the Liberation Tigers of Tamil Eelam (LTTE).¹⁴⁸

140 See, e.g., Fourth Geneva Convention, Article 23; First Additional Protocol, Article 69.

141 See Second Additional Protocol, Article 18(2); see also the similar language in First Additional Protocol, Article 70(1).

142 One exception is the Food Aid Convention of 1999, which places a number of binding obligations on food donating states as to the quality of both the food they provide and the way in which food aid programmes are carried out.

143 Available in the IDRL Database at <http://www.ifrc.org/idrl> (last visited 3 July 2007).

144 *Sphere Project Humanitarian Charter and Minimum Standards in Disaster Response*, 2004 edn, available at <http://www.sphereproject.org/> (last visited 3 July 2007).

145 The Guidelines are available at <http://www.reliefweb.int> (last visited 3 July 2007).

146 See Meeting Conclusions, International Meeting on Good Humanitarian Donorship, Stockholm 16–17 June 2003, available at <http://www.reliefweb.int/ghd> (last visited 3 July 2007).

147 See International Federation of Red Cross and Red Crescent Societies, *Legal Issues in the International Response to the Tsunami in Sri Lanka*, 2006.

148 See Anuj Chopra, “Aid workers in Sri Lanka face escalating risk and red tape”, *Christian Science Monitor*, 27 September 2006.

Admittedly, there are also counter-examples. For instance, after the October 2005 earthquake struck Pakistan, an historic agreement was reached between Pakistan and India to allow a limited flow of relief and movement of civilians across their heavily militarized border.¹⁴⁹ Even more dramatically, after the 2004 tsunami struck Aceh, Indonesia, a near total ban on humanitarian access was significantly relaxed.¹⁵⁰ Still, even in these cases, the effects of heightened conflict-related tension were plain. In Pakistan there were significant delays, angry protests and tight controls on the border crossing points that were “opened”.¹⁵¹ In the early days of the Aceh operation, humanitarian actors’ travel and activities were tightly controlled by the military, notwithstanding a unilateral ceasefire by the Free Aceh Movement (GAM).¹⁵²

In any event, it is fairly clear that these mixed situations are governed by international humanitarian law. This is because the trigger for the rules related to allowing and facilitating access to humanitarian relief in the setting of an armed conflict is the need of the civilian population due to a lack of “necessary supplies”.¹⁵³ No particular cause for this need is singled out in the operative texts.¹⁵⁴ Thus an interpretation of the ordinary meaning of these texts¹⁵⁵ would lead to the conclusion that the fact that the need for relief might be attributable to natural forces rather than ongoing fighting does not change the parties’ obligations concerning relief in a conflict setting. Similarly, Article 55 of the Fourth Geneva Convention concerning the occupying power’s own duty to provide food and other needed supplies makes no reference to any particular cause for their need, and Article 56 of the Fourth Geneva Convention obliges occupying powers to ensure and maintain hospitals and medical services, including “prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics” without reference to any war-related causes

149 See Pakistan, “India agrees to open disputed Kashmir border”, *International Herald Tribune*, 30 October 2005.

150 See International Federation of Red Cross and Red Crescent Societies, *Legal Issues in the International Response to the Tsunami in Indonesia* (publication pending) (hereinafter IFRC Indonesia Report), pp. 7–8.

151 See, e.g., Zeeshan Haider, “India delays border crossing as disease spreads”, Reuters, 10 November 2005; Nilofar Suhrawardy, “Angry survivors slam delay in opening Kashmir border”, *Arab News*, 26 October 2005.

152 See IFRC Indonesia Report, above note 149, pp. 7–8; International Crisis Group, *Aceh: A New Chance for Peace*, Asia Briefing No. 40, 15 August 2005, p. 4.

153 See Fourth Geneva Convention Article 59; First Additional Protocol, Article 70; Second Additional Protocol, Article 18; see also ICRC Customary Law Study, above note 20, p. 193. An examination of the *travaux préparatoires* for the above-cited provisions indicates that the issue of the causation of humanitarian need was not raised in negotiating the texts.

154 Note that Article 13 of the Geneva Convention states that the articles in Part II of that Convention are meant to “alleviate the sufferings caused by war”. However, of the relief-related provisions in the Fourth Geneva Convention discussed here, only Article 23 falls within Part II, and that provision (in contrast to Article 59) does not refer to any condition precedent concerning a lack of supplies. Moreover, obstacles to obtaining relief from the effects of a disaster would very arguably qualify as “suffering caused by war” if they were imposed largely due to the dynamics of the armed conflict.

155 See Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 311, Article 31 (providing that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”).

for such diseases.¹⁵⁶ There is a pattern here of primary concern for the underlying need of civilians, which is quite consistent with the overall object and purpose of these treaties.¹⁵⁷

This plain-meaning reading also makes good sense as a matter of operability, inasmuch as it would often be very difficult to pinpoint when armed conflict could be said to be the proximate cause of a lack of supplies. For example, famine due to crop failure might be attributable in equal parts to drought and conflict-related insecurity interfering with work in the fields. Moreover, the temptations for armed parties to obstruct aid to civilians would not differ substantially according to the source of their distress; the same fears about potential advantage for the enemy would still be present.

Conclusion

Regulatory barriers often present themselves in the same form in disaster and conflict settings. Moreover, in both contexts they can amount to substantial obstacles to providing effective and speedy relief to people who need it the most.

International humanitarian law imposes rather strict and detailed rules on the access of humanitarian relief in international armed conflicts. There can be little doubt concerning domestic authorities' obligations concerning the initiation of relief, entry of personnel, customs clearance and duties, security and taxation of relief. Where there is no specific language, such as with regard to the registration of foreign relief organizations or certification of foreign medical personnel, the strong general duty to facilitate relief dictates that appropriate accommodation must be found.

There is not as much clarity on these questions in the context of internal armed conflict, in the light of the very sparse provisions of the Second Additional Protocol. However, it has been argued, both as a matter of interpretation of that text and an analysis of the development of customary law, that a similar overall duty to facilitate the access of international relief applies.

In contrast, other than a general duty that may be derived from human rights norms to ensure that the needs of affected persons are met (and some specific rules for access to refugees), the applicable international law for relief in

156 It is telling that the ICRC's background information to the 1947 Commission of Government Experts studying an early draft of the Geneva Conventions noted that wartime epidemics could arise for a variety of reasons. See Documentation Préliminaire Fournie par le Comité International de la Croix-Rouge, Commission d'Experts Gouvernementaux pour l'étude des Conventions protégeant les victimes de la guerre, Genève, du 14 au 26 avril 1947, p. 25 ("Au cours de la guerre de nombreux pays occupés ont souffert cruellement de la famine ou de la sous-alimentation. Des épidémies terribles ont ravagé des territoires entiers et cela en raison du manque de médicaments et d'hygiène, des conditions défavorables de vie, de la misère, du froid").

157 As noted in the ICRC commentary to Article 55 of the Fourth Geneva Convention (concerning an occupying power's duty to provide food and supplies to civilians), the article "represents a happy return to the traditional idea of the law of war, according to which belligerents sought to destroy the power of the enemy State, and not individuals". ICRC GC IV Commentary, above note 17, pp. 309–10.

disasters is fragmented. While there are a number of useful provisions in the various IDRL treaties, their reach is frequently limited by a lack of ratification or an orientation towards a single sector (e.g. telecommunications) or type of disaster (e.g. nuclear accidents). The most important soft law instruments, such as UN General Assembly Resolution 46/182, tend to provide only very general guidance with regard to the regulatory problems described above.

There are also important differences in the operating environments. The extremely high tensions surrounding relief operations in conflict settings (and in mixed situations of conflict and disaster) have long been recognized, in particular in the light of the incentives for armed parties to weaken civilian populations perceived as potentially supportive of (or instrumental for) their enemies. Accordingly, regulatory barriers in conflict settings are often seen as deliberate attempts to impede or manipulate relief. In this context, any impediment to the access of international relief must be viewed with substantial suspicion.

On the other hand, in disaster settings, consent for international relief is usually forthcoming when it is needed, and the overall atmosphere between international and domestic actors is much more likely to be one of mutual support. While regulatory barriers are occasionally deliberate, more often they are the inadvertent effects of otherwise neutral domestic laws and regulations. In this context, one might expect that negotiation between the relevant parties would suffice to resolve most problems. However, with the increasing size of the international disaster relief community, there is a rising recognition that such an ad hoc approach is not providing satisfactory solutions. Certainly, this has been one of the major lessons from the 2004 tsunami,¹⁵⁸ and states as diverse as the United States¹⁵⁹ and Pakistan¹⁶⁰ have recently acknowledged that the lack of national legislation on these subjects hindered their capacity to address international relief.

What is the way forward? For conflict settings there is additional work to be done in dissemination, education and advocacy on the provisions of international humanitarian law relevant to domestic regulatory barriers. NGOs, in particular, should make themselves more aware of the provisions of the Geneva Conventions and customary law that could be helpful to them in negotiating access to persons in need, given that they cannot claim the same privileges and

158 See TEC Synthesis Report, above note 76, p. 115; see also United Nations Secretary-General's Special Envoy for Tsunami Recovery, William J. Clinton, *Lessons Learned from Tsunami Recovery: Key Propositions for Building Back Better*, 2006, p. 8 ("Preparedness is not just about relief response, but also requires predetermined ways of working together with a range of stakeholders in rebuilding houses and schools, restoring income streams, training workers to participate in reconstruction, and activating procedures to allow materiel to clear ports and customs quickly... The development of legal frameworks at the national and international levels to facilitate preparedness and response is fundamental").

159 United States General Accountability Office, *Hurricane Katrina: Comprehensive Policies and Procedures are Needed to Ensure Appropriate Use and Accountability for International Assistance*, Doc. No. GAO-06-460 (2006).

160 See the remarks of Major-General Farooq Ahmed Khan, Chairman, Prime Minister's Inspection Commission in International Federation of Red Cross and Red Crescent Societies, Report of the Asia-Pacific IDRL Forum, December 12–14, 2006, Kuala Lumpur, Malaysia, p. 4.

immunities as international organizations. While the rules in internal armed conflict could be clearer, it is unlikely that putting the question to states to renegotiate would have any more expansive result today that it did in 1977 with Article 18 of the Second Additional Protocol.

With regard to issues of quality and co-ordination, states in conflict are generally not in a position to act as effective and impartial guarantors. As described above, this is due in part to their pre-existing duties to facilitate relief under international humanitarian law (which do not contemplate conditions on access beyond minimal controls) and in part to their interested position as parties to a conflict. The international community should therefore redouble its own efforts in this regard, including through dissemination and use of the RC/RC NGO Code of Conduct and the Sphere standards.

In contrast, disaster-affected states are neither legally constrained nor so potentially biased that they cannot play a constructive role in implementing international norms on the quality of international relief.¹⁶¹ In fact, a few have started to do so.¹⁶² Dissemination, education and advocacy about these norms, as well as existing international law pertinent to regulatory barriers, can thus also be of great use in the disaster setting. However, in the light of the dispersion of the relevant instruments, some means to bring together the relevant norms would be helpful. In the past, efforts have been made to achieve this through a comprehensive treaty on disaster relief, but they have not been successful and the political obstacles to such a path remain formidable.¹⁶³

With this in mind, the International Federation of Red Cross and Red Crescent Societies is currently consulting with states and humanitarian stakeholders to develop a set of non-binding “Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance” with a focus on the content of domestic law for disasters only. The guidelines would compile currently dispersed international norms pertinent to the common regulatory problems, in order to provide a resource to states in developing their own laws before disasters strike. They would recommend that states (i) lower potential bureaucratic obstacles to international relief providers when their help is accepted, (ii) conditioned on minimal guarantees of quality, co-ordination and complementarity with domestic efforts, (iii) with due regard to the independence, neutrality and impartiality of humanitarian actors. While there is

161 The Sphere standards expressly “invite other humanitarian actors, including states themselves, to adopt these standards as accepted norms”. See Sphere Project, above note 143, p. 19.

162 See, e.g., IFRC Sri Lanka Report, above note 68, pp. 32–3 (noting that Sri Lanka adopted Sphere standards for reconstruction after the tsunami).

163 See David Fidler, “Disaster relief and governance after the Indian Ocean tsunami: what role for international law?”, *Melbourne Journal of International Law*, Vol. 6 (May 2005), p. 458. It should be noted, however, that the International Law Commission has decided to take this issue into its programme of work and it is possible that this could lead to further development at the global level. See Report of the International Law Commission, 58th Sess. (1 May–9 June and 3 July–11 August 2006), UN Doc. No. A/61/10 (2006), p. 464. See also International Law Commission Daily Bulletin, 59th Session, United Nations Office at Geneva, 1 June 2007 (noting that “The Commission decided to appoint Mr Valencia Ospina as Special Rapporteur for the topic “Protection of persons in the event of disasters””).

the potential for some tension between these goals, they should not be irreconcilable in the disaster context, and success in this area would go a long way to reconciling the legitimate needs of both sides in the interest of affected persons.