SPECIAL REPORT

Regulating the Helping Hand: Improving Legal Preparedness for Cross-Border Disaster Medicine

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Keywords: disaster relief; international; International Disaster Response Laws, Rules and Principles Programme; International Federation of Red Cross and Red Crescent Societies; legal preparedness; liability; non-governmental organizations; regulation

Abbreviations:
IDRL = International Disaster Response Laws, Rules and Principles Programme
IFRC = International Federation of Red Cross and Red Crescent Societies
NGO = non-governmental organization
PAHO = Pan-American Health Organization

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Abstract

Medical care is a highly regulated field in nearly every country. Therefore, it is not surprising that legal issues regularly arise in cross-border disaster operations that have with the potential to profoundly impact the effectiveness of international assistance. Little attention has been paid to preparing for and addressing these kinds of issues. This paper will report on research by the International Federation of Red Cross and Red Crescent Societies (IFRC) on International Disaster Response Law, and discuss new developments in the international legal framework for addressing these issues.

For seven years, the IFRC has studied legal issues in cross-border disaster assistance. Its activities have included several dozen case studies, a global survey of governments and humanitarian stakeholders, and a series of meetings and high-level conferences.

The IFRC has found a consistent set of regulatory problems in major disaster relief operations related to the entry and regulation of international relief. These include some issues specific to the health field, such as the regulation of drug donations and the recognition of foreign medical qualifications. To address the gaps in domestic and international regulatory structures, the IFRC spearheaded the development of new international guidelines.

The legal risks for international health providers in disaster settings are real and should be better integrated into program planning. Governments must become more proactive in ensuring that legal frameworks are flexible enough to mitigate these problems.

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Introduction

When a major disaster caused by a natural hazard overwhelms domestic response capacities, everyday rules usually are changed so that international assistance—including medical assistance—can be rushed to affected communities. Most governments have specific powers to issue emergency orders to set aside certain laws and procedures that might hamper relief efforts. Most make arrangements to facilitate the arrival of the international relief they need.

However, these steps frequently are not as complete or as effective as might be expected. Few governments have comprehensive laws and procedures in place for facilitating international disaster assistance prior to the advent of a disaster. In the absence of this kind of forethought, regulatory problems are common, leading to excessive bureaucracy in some areas and insufficient oversight in others.

While not the only area of international relief affected, medical interventions can be particularly prone to both of these kinds of regulatory problems. Due to the extensive everyday regulation of medicine, the absence of specific planning can block the entry of medications, complicate the delivery of medical care, and/or leave providers legally vulnerable. On the other hand, the

absence of controls can lead to incompetent medical services and the arrival of inappropriate, even dangerous medications.

A new set of international guidelines, developed in 2007, suggested a compromise between the extremes of too much and too little regulation of international relief providers. Some progress is being made to implement these guidelines in the national law of a number of countries. International actors also might take steps to reduce legal uncertainties through bilateral agreements and by considering the development of international standards for international emergency medical care providers.

Methods

In 2001, the International Federation of Red Cross and Red Crescent Societies (IFRC) began its International Disaster Response Laws, Rules and Principles Programme (IDRL) to investigate law(s) and legal issues in international disaster relief. Under the aegis of the Programme, 21 case studies were carried out from 2001–2007 at the country or regional level in Africa, the Asia-Pacific, Latin America, and Europe.[1] These studies analyzed national law relevant to international relief and many evaluated operational experiences from recent disasters. The Programme also gathered and analyzed the many existing international instruments, ranging from treaties and resolutions to guidelines and codes.

In 2006, the IFRC conducted a written survey of governments, UN agencies, Red Cross and Red Crescent Societies, and non-governmental organizations (NGOs) about regulatory problems and the use of legal instruments in disaster operations. The survey generated 118 usable responses.[2] In 2006–2007, this was supplemented with a series of high-level, regional consultations with governments, humanitarian agencies, and other disaster response and legal experts.[3–7]

Results

Through research and consultations, the IFRC identified a number of common regulatory problems in international operations. These problems are of two categories, which generally are considered by the various stakeholders to be of equal importance: (1) bureaucratic barriers; and (2) lack of regulation.

Bureaucratic Barriers

There is a series of bureaucratic barriers to the entry and operation of international responses that render the aid slower, more expensive, and less effective. These include: (1) delays due to ambiguous domestic procedures for making an appeal for international relief; (2) delays or restrictions in providing visas or work permits to international relief personnel; (3) delays or restrictions in customs clearance; the imposition of prohibitive customs duties and other taxes on relief items; and (4) difficulties in legal registration for foreign humanitarian organizations leading to restrictions in opening bank accounts and hiring local staff.

Lack of Regulation

There also are problems of quality, coordination, and complementarity of international assistance occurring, in part, because of a lack of adequate regulation. These include the: (1) importation of unneeded or inappropriate relief items; (2) failures to coordinate with domestic authorities and civil society actors; (3) use of poorly trained staff; and (4) failures to consult with beneficiaries and culturally inappropriate behaviors.

While these general problems can impact equally on medical and non-medical responses to disasters, there also were some issues identified that are of particular interest to practitioners of disaster medicine: (1) professional qualifications and competence of medical staff; (2) professional liability and insurance; and (3) importation of medications and medical equipment.

Professional Qualifications and Competence of Medical Staff

All countries require some sort of domestic registration of doctors (and many other types of medical professionals) before they legally may provide services to the public. Most also have procedures by which foreign credentials can be recognized; however, they are notoriously slow and certainly not attuned to the exigencies of an emergency.[8] Even within the European Union, where member states are required to provide nearly automatic recognition of medical qualifications obtained from other EU states, a registration process that may take up to a month or more to complete, still is contemplated.[9]

In some instances, this has meant that foreign medical personnel have been turned away in the wake of a major disaster. For example, after Hurricane Katrina struck the United States in 2005, the US government declined offers from several governments to provide medical personnel (though the State of Louisiana subsequently adopted a temporary rule allowing such personnel to practice).[10] In other cases, governments have waived their domestic requirements, as in Bolivia after the flooding of 2007,[11] or simply "looked the other way", as in Thailand after the tsunami of 2004.[12]

On the other hand, an unregulated approach can carry significant dangers, as disasters do not only bring out the most competent. For example, after the 2004 tsunami, teams of foreign faith healers arrived in Sri Lanka, Indonesia, and India to provide "care" to affected persons.[13] Consultations by the IFRC also raised frequent complaints from affected states—particularly in Africa—of disaster settings being used as a "training ground" by humanitarian organizations for inexperienced medical personnel (Figure 1).

Currently, there are no specific international standards concerning the credentials or training that humanitarian medical personnel should possess, though the Pan-American Health Organization (PAHO) has suggested that an expert panel be called to examine the question.[14] Moreover, none of the international humanitarian organizations polled by the IFRC indicated that their existing bilateral disaster agreements with governments touch on this point.[1]

Professional Liability and Insurance

On a positive note, an overwhelming majority (96%) of international humanitarian organizations surveyed by the IFRC reported that liability concerns do not significantly

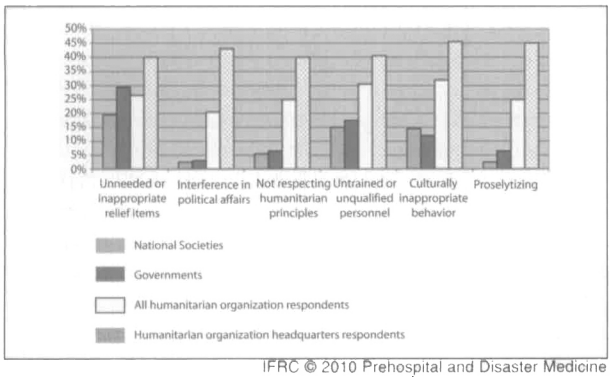

Figure 1—Problems with international disaster responders

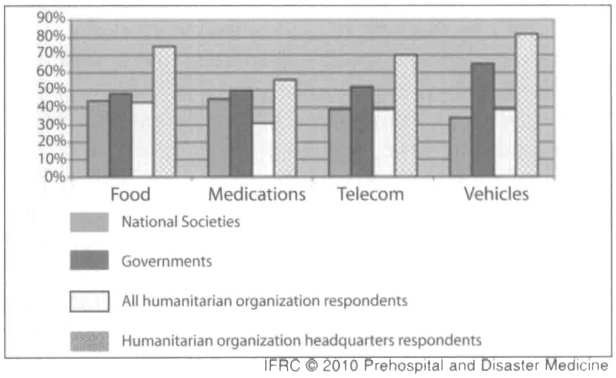

Figure 2—Problems with the entry of goods and equipment

impair their operations.[1] Nevertheless, 32% acknowledged that legal claims had been made against them.[12] Particularly in light of the difficulty that foreign medical personnel encounter in regularizing their right to practice in affected states as discussed above, consideration should be given to their individual exposure to professional liability. As noted by a recent study by the US military, "there is no overarching agreement or model in place to manage fiscal and liability issues" in international disaster relief operations and "[g]generally, there is no consistency across nations regarding the relief of foreign responders from liability."[15] Whereas some countries provide liability protections to disaster responders, many do not.[1] Under international law, diplomats, consular staff, and the staff of inter-governmental organizations generally enjoy certain immunities from domestic liability.[1] Some bilateral and multilateral treaties also provide for immunities for certain governmental disaster responders. However, many medical personnel in international operations fall outside of these categories.

In this respect, it is striking that many international NGOs (including 78% of those responding to the Federation's survey) report significant difficulties obtaining adequate insurance coverage for their personnel.[1] It has been reported that many NGOs have not devoted as much effort as might be desired in seeking such insurance.[16]

Importation of Medications and Medical Equipment

In addition to the difficulties facing medical staff, relief providers often encounter significant difficulties importing medications or medical equipment into disaster-affected countries. For example, after the 2007 earthquake in Peru, the PAHO sent for x-ray equipment to replace machines that had been destroyed. Release of this equipment was delayed for a full month pending receipt of permissions from the Ministry of Health and the Institute for Nuclear Energy. Similar delays were reported in importing medications after recent disasters in Mozambique, Ukraine, and Turkey.[1] During 2003–2004, the IFRC reported delays of up to nine months in customs clearance for medications imported for persons still suffering the effects of the Chernobyl accident in the Russian Federation.[1] Fifty-six percent of the international humanitarian organizations polled by the IFRC reported having experienced problems of this type (Figure 2).[1]

On the other hand, there also is a substantial problem with the importation of inappropriate medications during disasters. This certainly was the case after the earthquake in Peru, when the authorities received large quantities of medications for conditions having nothing to do with those likely to occur after an earthquake, in addition to expired medicines.[16] Likewise, after the tsunami struck Indonesia, authorities received 75 metric tons of expired medicines and food, as well as medicines labeled in languages not spoken in that country.[17] During a previous disaster, Eritrea received "seven truck loads of aspirin tablets that took six months to burn; a container full of unsolicited cardiovascular drugs with two months to expiry; and 30,000 bottles of expired amino acid infusion that could not be disposed of anywhere near a settlement because of the smell."[18]

Discussion

In light of the foregoing and similar problems, the IFRC spearheaded a two-year negotiation process with governments, humanitarian agencies, and other stakeholders in 2006–2007 to develop the "Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance" (also known as "the IDRL Guidelines"). The Guidelines are based on existing international instruments (where available) and are focused on the problem areas highlighted by the stakeholders in the IFRC's various consultations. They are meant to assist governments in strengthening their domestic legal arrangements for managing international disaster assistance. They are not legally binding on governments; however, as discussed below, they have a significant authority as a broadly-accepted consensus instrument.

The IDRL Guidelines recommend that governments provide certain legal facilities to international disaster responders to allow them to quickly and efficiently assist communities in need. These include facilities related to visas, customs, and taxes, among others. At the same time, they recommend that governments hold international actors to minimum humanitarian quality standards (derived from internationally-recognized guidelines such as the "Code of Conduct of the Red Cross and Red Crescent Movement and NGOs in Disaster Relief" of 1994 and the "Sphere Charter and Minimum Standards" of 2004). For humanitarian organizations, they further recommend that the legal facilities be made contingent on ongoing compliance with those quality standards. In other words, while governments should be ready to smooth out unnecessary bureaucratic

barriers, they are not well advised to throw open their doors without any control over the assistance that comes in.

With regard to professional qualifications, the IDRL Guidelines recommend that governments accept the "vouching" of approved humanitarian agencies and governments for the qualifications of the medical personnel they send. They further recommend that customs delays and charges for the entry of medical equipment and medications be reduced to a minimum. At the same time, international actors are called upon to monitor the quality of their medications, and to ensure that they are appropriate, properly labeled, properly shipped and stored, and not too close to expiration. Unfortunately, no consensus was reached on the contentious issue of liability, and therefore, the Guidelines leave this question open.

In 2007, the Guidelines were unanimously adopted by the state parties to the Geneva Conventions, and the components of the International Red Cross and Red Crescent Movement at the 30th International Conference of the Red Cross and Red Crescent. In 2008, three resolutions of the UN General Assembly (Resolutions 63/139, 63/141, and 63/137) called on member states to make use of the Guidelines to strengthen their legal preparedness for disaster cooperation.

Thus, the Guidelines enjoy a high level of support at the international level. The challenge now is to translate that support into concrete changes on the ground. This primarily should be achieved through the development of new domestic laws and administrative rules. As of the date of writing, three governments (Indonesia, New Zealand, and Panama) already have adopted new administrative rules based on the new Guidelines. With the support the IFRC and its member societies, 11 others (Austria, Bulgaria, Cambodia, France, Germany, Laos, Netherlands, Norway, Sierra Leone, UK, Vietnam), are undertaking formal evaluations of their domestic laws in light of the Guidelines. Preliminary steps have been taken to start such evaluations this year in eight more countries on four continents.

This is a good start, but there obviously is a long way to go before the IDRL Guidelines are in general use across the globe. The engagement of regional organizations could be a key means to expedite that process, because governments generally feel at greater ease discussing cross-border issues "among friends" in their regions. A number have already taken up the issue, including the Association of Southeast Asian Nations (ASEAN), the Andean Committee for Disaster Prevention and Assistance (CAPRADE), and the North Atlantic Treaty Organization (NATO), which have used the IDRL Guidelines to develop new standard operating procedures or guidance for their members. Others that have been examining the issue of legal preparedness for disaster cooperation include the Asia-Pacific Economic Cooperation (APEC), the Caribbean Disaster Emergency Response Agency (CDERA), the Commonwealth, and the Pacific Islands Applied Geoscience Commission (SOPAC).

Conclusions

Most of the common regulatory problems in international disaster assistance revolve around relatively non-controversial technical issues, such as visas, customs, professional qualifications, and the like. Although they are not very complicated, they have bedeviled operations for many years, in large part because of a lack of advance planning, or "legal preparedness". The key to solving them is to develop specific rules in advance of a disaster and to make sure that they are well and widely understood.

As noted, the new IDRL Guidelines hopefully will serve as a catalyst for governments to examine these issues in their own contexts, so as not to be in the situation of inventing new rules every time a disaster strikes. This will not happen by itself; the support and encouragement of disaster professionals, both at home and where they work abroad will be critical. Moreover, it must be non-lawyers—those who actually do the work of providing assistance—who drive the dialogue. The International Red Cross and Red Crescent Movement has committed to doing its part to promote that dialogue, but it cannot succeed alone. It already has had a warm reception from a number of other partners, including the United Nation's Office for the Coordination of Humanitarian Assistance (OCHA), but more are needed.

While the slow work of incubating national laws moves forward, international humanitarian actors also can act to address some of their own exposure to legal risks. An increasing number of NGOs and international organizations are entering into bilateral agreements with governments about the services they offer. Those agreements should take advantage of the consensus around the IDRL Guidelines to use them as the inspiration for provisions on issues such as the recognition of professional qualifications and facilities for the clearance of medical and other relief items through customs.

Relief providers also should ensure adequate attention to the liability exposure that they and their staff—particularly the medical personnel—bear in relief operations. Obtaining adequate insurance should be considered a basic building block of ensuring their success. Moreover, they should commit to making appropriate efforts to obtain and understand information about the legal requirements on them in the countries where they operate. This will help to protect them from surprises, but also to demonstrate their respect and support for the primary role of domestic authorities in meeting the needs of their own affected communities.

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