

ARE LAWYERS UNSUNG DISASTER HEROES?: THE IMPORTANCE OF WELL-PREPARED DOMESTIC LEGAL AND REGULATORY FRAMEWORKS FOR EFFECTIVE DISASTER RESPONSE

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INTRODUCTION

The aftermath of a natural disaster unquestionably calls for action amid chaos. No matter its character—a sudden-onset earthquake, seasonal hurricane, or flooding—a natural disaster’s immediate-term impact is similar: families and communities confronting loss of life and property and struggling to meet their basic needs. The affected population may be displaced from their homes, supply chains of essential items such as food and fuel may be cut off, and social services may be interrupted. When these basic needs outstretch local capacities, the complexity of the response operation mounts.

Fittingly then, the images we most readily associate with disaster response are of the arrival and distribution of relief goods by all means of transportation—planes, helicopters, and truck convoys—all directed by so many “disaster cowboys.” Less often do we think of the legal and regulatory systems within which disaster operations are conducted. The lawyers and bureaucrats who design these systems are unlikely to be heralded as disaster heroes, but their role in facilitating and regulating an effective response can be just as crucial to ensuring that critical relief swiftly reaches those most in need.

This Article highlights the importance of well-prepared domestic regulatory frameworks for effective disaster response. Reviewing several key historic and current international and regional initiatives, it offers insight into future directions in the field of international disaster response law.

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I. THE DISASTER CONTEXT

One cannot begin to contemplate the challenge—or the critical importance—of regulating for international disaster response without first appreciating the impossibly complex backdrop of the disaster context.

Most readers will recall clearly the images of devastation caused by the 2004 Indian Ocean tsunami. Seven years later, these images—and those of the overwhelming international response they motivated—are still the classic, go-to images of a large-scale disaster response. For good reason: in many ways, the 2004 Indian Ocean tsunami marked a turning point in international disaster response.

The Author's own experience in the tsunami response was as a legal officer for a large humanitarian organization in Sri Lanka and the Maldives—addressing legal issues, including the release of relief and recovery items from customs, the entry of the international staff, and the web of laws, regulations, policies, and contractual relationships through which the organization would implement our multi-year response operation.

In Sri Lanka, the tsunami caused severe destruction and damage along approximately two-thirds of the island's coastline.¹ In total, it claimed 35,322 lives, displaced 853,025 people, and destroyed the livelihoods of untold numbers across the island.² The economic value of the disaster's destruction in Sri Lanka alone is estimated at \$1.454 billion.³

The generous outpouring of support from around the world that the disaster prompted was overwhelming, but it was apparent within weeks that the sheer volume of support could also overwhelm the legal framework in place in Sri Lanka to receive international assistance.

A. *Twin Upward Trends*

The unfortunate reality today is that the number of disasters and their humanitarian impacts are increasing. Though reliable figures do not exist

¹ INT'L FED'N OF RED CROSS & RED CRESCENT SOC'YS, LEGAL ISSUES FROM THE INTERNATIONAL RESPONSE TO THE TSUNAMI IN SRI LANKA 4 (2006), available at <http://www.ifrc.org/Global/Publications/IDRL/country%20studies/report-srilanka.pdf>.

² *Id.*

³ TSUNAMI EVALUATION COAL., JOINT EVALUATION OF THE INTERNATIONAL RESPONSE TO THE INDIAN OCEAN TSUNAMI 8 (2007), available at ochanet.unocha.org/p/Documents/Syn_Report_Summary_Final_Version_Jan_2007.pdf.

before the 1950s, the incidences of disasters can be traced from a total of just over 1,200 reported in the 1970s, rising steadily to an average of over 380 *per year* during the last decade.⁴ While the causes may be debated, the trend is undeniable.

Against this backdrop, the number and diversity of responders are also increasing. The 300 international nongovernmental organizations (“NGOs”) that sent staff to Indonesia to deliver assistance more than tripled the number that responded to the large-scale earthquake in Gujarat, India just four years earlier.⁵ Compare this to the more than 1,000 international NGOs that arrived in Haiti in the weeks and months following last January’s earthquake.⁶ Then multiply these numbers to take into consideration the many other categories of actors, including state actors (foreign civil defense and military), United Nations (“UN”) actors, the Red Cross and Red Crescent, corporate actors, religious groups, well-meaning individuals, and so on.

B. Common Regulatory Problems in International Disaster Response

The interplay of an uncertain international framework with an undeveloped national disaster response and coordination mechanism results in a number of common regulatory issues. Perhaps the most comprehensive analysis of the regulatory problems arising in the aftermath of a major natural disaster was carried out by the International Federation of Red Cross and Red Crescent Societies (“IFRC”). Some of the most common problems that IFRC’s extensive research and consultations revealed can be divided into three categories: barriers to entry; legal facilities for operation; and, partially resulting from these, quality and accountability issues.⁷

⁴ SuperAdminEMDAT, *Natural Disasters Trend*, CENTRE FOR RES. ON EPIDEMIOLOGY DISASTERS, <http://www.emdat.be/natural-disasters-trends> (last visited Oct. 1, 2011). Disaster is defined for the purpose of these statistics to include events in which any of the following criteria are met: ten or more people killed, 100 or more people affected, declaration of a state of emergency, or a call for international assistance.

⁵ BILL CANNY, A REVIEW OF NGO COORDINATION IN ACEH POST EARTHQUAKE/Tsunami 2 (2005), available at <http://reliefweb.int/sites/reliefweb.int/files/resources/FEA7B9C91F77119949257021001CFEC0-icva-idn-8apr.pdf>; DISASTERS EMERGENCY COMM., THE EARTHQUAKE IN GUJARAT, INDIA paras. 12, 15 (2001), available at <http://www.alnap.org/pool/files/erd-3045-full.pdf>.

⁶ FRANÇOIS GRÜNEWALD ET AL., INTER-AGENCY REAL-TIME EVALUATION IN HAITI: 3 MONTHS AFTER THE EARTHQUAKE 7 (2010), available at http://ochanet.unocha.org/p/Documents/Haiti_IA_RTE_1_final_report_en.pdf [hereinafter INTER-AGENCY HAITI REPORT].

⁷ The body of IFRC’s research can be found on its program website, including a database of more than 500 international legal instruments, dozens of regional and national case studies, and numerous academic articles and reports compiled from exhaustive consultation and surveys among governments, UN agencies, national societies, NGOs, and other humanitarian actors and stakeholders. See INT’L FED’N OF RED CROSS & RED CRESCENT Soc’YS, *Disaster Law*, IFRC.ORG, www.ifrc.org/idrl (last visited Oct. 1, 2011).

Notably, each of these categories of issues is relevant for assisting and transit states as much as for affected states;⁸ they are relevant for developed states, developing states, and for humanitarian actors of all types. Further, each of these problems is related—and their consequences include reduced humanitarian access, higher costs for delivering aid, and ultimately poorer quality assistance to communities in need.

1. Barriers to Entry

The most immediate challenges confronting international responders are barriers to entry. But this issue is far more nuanced than basic access to the disaster-affected territory.

It is a well-established principle that international humanitarian assistance is conditional upon acceptance by the state affected by the disaster. This follows directly from the principles of sovereignty and non-intervention, as reflected in the guiding principles for the strengthening of the coordination of emergency humanitarian assistance of the UN system, adopted by the UN General Assembly by its landmark Resolution 46/182:

The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.⁹

However, in practice, this principle seems to apply to only bilateral, state-to-state assistance and assistance by intergovernmental organizations. Other responders, including NGOs, religious groups, individuals, and others, more typically simply “turn up” at airports and other ports of entry. They enter the country as tourists or under another visa category and proceed to direct disaster assistance to the affected population. In the first days following a major disaster, these extra resources may be appreciated or just tolerated as attention is focused on meeting the immediate needs of the affected population.

⁸ See INT'L FED'N OF RED CROSS & RED CRESCENT SOC'YS, INTRODUCTION TO THE GUIDELINES FOR THE DOMESTIC FACILITATION AND REGULATION OF INTERNATIONAL DISASTER RELIEF AND INITIAL RECOVERY ASSISTANCE 6–11 (2011) [hereinafter *Introduction to the Guidelines*], available at [http://www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20\(2\).pdf](http://www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20(2).pdf).

⁹ G.A. Res. 46/182, Annex ¶ 3, U.N. GAOR, 46th Sess., Supp. No. 49, (Vol. I), U.N. Doc. A/46/49 (Vol. I), at 49 (Dec. 19, 1991).

But in the ensuing weeks when the situation stabilizes, governments will want to normalize the presence of international actors—requiring appropriate visas and work permits for aid workers. Too often, this process entails considerable bureaucracy and cost. For example, international relief personnel in Banda Aceh following the 2004 tsunami were required to leave the country every sixty days to renew their visas¹⁰—diverting considerable human and financial resources from relief operations. Similar anecdotes are beginning to emerge from the response to the historic floods in Pakistan during the summer of 2010. According to a general survey conducted by IFRC, forty-eight percent of respondents (including fifty-five percent of governments reporting such problems for civilian personnel and fifty-four percent of international humanitarian organizations) reported having encountered at least some difficulties in this area.¹¹

To illustrate how the issue relates to the entry and clearance of relief goods, return to the story of Sri Lanka following the 2004 Indian Ocean tsunami. Though the government did provide a number of duty and other exemptions and established a special unit to coordinate and expedite clearance of relief goods, four full months after the tsunami only 2,864 of the 4,018 container loads of aid materials received had been cleared.¹² As this makes clear, even when measures are taken by the affected state to facilitate entry, the sheer volume of goods can still be overwhelming. As a result, critical relief items are all too frequently caught in a backlog—and by the time the items can be cleared, they may no longer be useful or even safe. Tents and hygiene kits are not needed beyond the emergency phase, food spoils, and medicines expire.

2. *Legal Facilities for Operation*

As challenging as the arrival and clearance of relief goods and personnel may be, the legal issues associated with operating in a foreign country are frequently even more problematic.

¹⁰ INT'L FED'N OF RED CROSS & RED CRESCENT SOC'YS, LEGAL ISSUES FROM THE INTERNATIONAL RESPONSE TO THE TSUNAMI IN INDONESIA 15–16 (2006), available at <http://www.ifrc.org/Global/Publications/IDRL/country%20studies/indonesia-cs.pdf>.

¹¹ INT'L FED'N OF RED CROSS & RED CRESCENT SOC'YS, LAW AND LEGAL ISSUES IN INTERNATIONAL DISASTER RESPONSE: A DESK STUDY 199 (2007) [hereinafter IFRC, DESK STUDY], available at <http://www.ifrc.org/PageFiles/41194/113600-idrl-deskstudy-en.pdf>.

¹² S.C. MAYADUNNE, INTERIM REPORT OF THE AUDITOR GENERAL ON THE REHABILITATION OF THE LOSSES AND DAMAGES CAUSED TO SRI LANKA BY THE TSUNAMI DISASTER ON 26 DECEMBER 2004, CARRIED OUT UP TO 30 JUNE 2005, at 5 (2005), http://www.auditorgeneral.lk/reports/English/Tsunami_Eng_.pdf (reporting deficiencies in the clearance of relief goods).

The legal personality of international organizations is generally recognized by international instruments,¹³ and many other organizations including IFRC and some international NGOs regularly conclude status agreements or memoranda of understanding with governments which set out their legal personality in country. But for all other organizations, one of the first issues they encounter when arriving in a foreign country is how to establish a domestic legal personality. Failure to register a local office of a foreign organization or to obtain other similar recognition from government authorities is de facto illegal—and generally subject to civil, and in some cases criminal, penalties.

But registration requirements can be unclear, onerous, or simply impractical. As one example, Uganda has taken steps to ensure registration requirements are explicitly clear.¹⁴ The sixteen items required to register a foreign NGO include letters of recommendation from the home government or embassy, the Ugandan Embassy, or Ministry of Foreign Affairs, as well as numerous certificates of good conduct.¹⁵ In its study of legal issues in Thailand following the 2004 Indian Ocean tsunami, IFRC found at least five different official and quasi-official registration options.¹⁶ Given the complexity, it is not surprising that some organizations choose to simply operate “under the radar.” A number of organizations interviewed in Thailand even reported having been discouraged from registering by government officials.¹⁷

Operating without legal recognition, however, creates numerous follow-up risks—both in country and at home vis-à-vis boards, donors, and the general public. In country, the most common issues arise in relation to opening bank accounts, taxation, and local hiring. Problems can arise in these areas in any case, but these problems become significantly compounded by the absence of recognized legal status.

¹³ *E.g.*, Convention on the Privileges and Immunities of the Specialized Agencies of 1947, *approved* Nov. 21, 1947, 33 U.N.T.S. 261.

¹⁴ *See, e.g.*, UGANDA NAT'L NGO FORUM, THE NGO ACT REGULATIONS AND POLICY IN UGANDA 5 (2009), *available at* <http://africancso.org/documents/10136/0/Uganda+NGO+Law+Analysis>.

¹⁵ Uganda Ministry of Internal Affairs, *Requirements for Registration of Foreign NGO*, MINISTRY OF INTERNAL AFF., http://www.mia.go.ug/page.php?1=reg_foreign&&2=Foreign%20NGO%20Registration (last visited Oct. 24, 2011); Uganda Nat'l NGO Forum, *Guidelines and Requirements for Registering an NGO in Uganda*, UGANDA NAT'L NGO FORUM, http://ngoforum.or.ug/index.php?option=com_docman&task=doc_details&gid=63&Itemid=29 (last visited Oct. 24, 2010).

¹⁶ INT'L FED'N OF RED CROSS & RED CRESCENT SOC'YS, LEGAL ISSUES FROM THE INTERNATIONAL RESPONSE TO THE TSUNAMI IN THAILAND 12, 13 (2006), *available at* <http://www.ifrc.org/Global/Publications/IDRL/country%20studies/report-thailand.pdf>.

¹⁷ *See id.* at 14, 17.

For example, most banks will require certificates of registration to open corporate or institutional accounts. The alternative of operating from personal accounts in the names of staff is untenable—putting both the organization and the individuals at risk both financially and legally. With regard to taxation, unregistered organizations will generally be ineligible for claiming various tax and duty exemptions normally granted for disaster relief activities—an already challenging process. Worse, they may face substantial tax liability and penalties. Local hiring is complex in any foreign environment. Unfamiliar labor laws, provisions for social benefits, tax withholding requirements, and employment claim liability are just a few of the major hazards. Fully eighty-five percent of international humanitarian organization headquarters that responded to IFRC’s survey reported problems hiring local staff.¹⁸

3. *Quality and Accountability*

Closely related to the entry and operation issues outlined above are issues arising in relation to the quality of assistance provided and accountability of international actors and the affected government—to the affected population, to their respective donors, and to one another.

While international responders complain of the bureaucracy hampering their ability to operate, governments of affected states may also be burdened by an influx of international actors resistant to regulation and oversight by domestic authorities. As reported in *The Washington Post* more than one year after the massive earthquake that struck Haiti in January 2010, “Haitian officials speak of being ‘overrun’ by ‘an invasion’ of NGOs.”¹⁹ Then-Prime Minister Jean-Max Bellerive was quoted as saying that “foreign NGOs operate in Haiti with little regard to government planning and that their presence, while necessary, can actually undermine long-term recovery efforts. . . . NGOs condemn the country to a cycle of dependence.”²⁰

While the majority of humanitarian assistance is well-intentioned, not all of it is helpful—in fact, some can do tremendous harm. Regulation is crucial to ensure that the affected population does not suffer further at the hands of aid providers.

¹⁸ IFRC, DESK STUDY, *supra* note 11, at 120.

¹⁹ William Booth, *International Charities Fall Short in Haiti*, WASH. POST, Feb. 2, 2011, at A6.

²⁰ *Id.*

Returning to the example of customs clearance, delays are exacerbated by the volumes of inappropriate or unneeded items sent by the well-meaning but uninformed. Many readers will have read stories of used winter coats sent to tropical regions, risqué clothing sent to conservative communities, or of expired food and medicines. Such items not only add volume to the processing load at ports—delaying critically needed aid—but must also be disposed of by the receiving government at significant cost.

Similarly, humanitarian personnel and individuals who arrive in a disaster area without supplies for their own food and shelter place an additional burden on local resources. Worse yet is the harm done by medical and other professionally qualified individuals who offer their services without either checking existing records or leaving records of the work they performed.

Turning to coordination and the relationship between domestic and international actors, much has been written about how international assistance can undermine local capacity and create dependency.²¹ A basic tenet of humanitarian disaster response is that international assistance should reinforce, not replace, domestic capacity. Yet for all the experience garnered in international operations over so many decades, this is a persistent issue. “The limited collaboration between international actors and national institutions at both national and decentralized levels” was listed as a key finding of the interagency real-time evaluation of the Haiti earthquake response.²² Lessons drawn from the Haiti experience included the importance of assessing existing local capacities and aligning additional resources to complement these, as well as building a cluster coordination system that is compatible with local structures.²³ Despite its strong government and recent experience with international assistance, similar issues were reported in the response to the 2010 floods in Pakistan.²⁴

This broad overview does not begin to cover the full range of regulatory issues encountered by affected states and international actors in managing

²¹ See, e.g., SUE LAUTZE & JOHN HAMMOCK, COPING WITH CRISIS; COPING WITH AID CAPACITY BUILDING, COPING MECHANISMS AND DEPENDENCY, LINKING RELIEF AND DEVELOPMENT (1996), available at <http://reliefweb.int/sites/reliefweb.int/files/resources/AE75547C3F158795C1256C4D005209F0-iasc-coping-dec96.pdf>.

²² INTER-AGENCY HAITI REPORT, *supra* note 6, at 8.

²³ *Id.* at 8, 9.

²⁴ RICCARDO POLASTRO ET AL., INTER-AGENCY REAL TIME EVALUATION OF THE HUMANITARIAN RESPONSE TO PAKISTAN'S 2010 FLOOD CRISIS 46 (2011), available at <http://daraint.org/wp-content/uploads/2011/03/Final-Report-RTE-Pakistan-2011.pdf>.

international disaster relief. However, it provides a sketch of the myriad complex issues that must be addressed by any legal framework regulating international disaster assistance.

II. LEGAL FRAMEWORKS FOR INTERNATIONAL DISASTER RESPONSE

The first point to recognize about the international legal framework for international disaster response is that, in fact, there is no comprehensive or unified legal framework. Unlike other bodies of law, such as the law of armed conflict, there is not a flagship international treaty despite previous efforts. Instead, what we see is a complex web of potentially relevant laws and rules—often overlapping, sometimes conflicting, and leaving many gaps.

This includes relevant provisions of international treaties in other areas of law, such as human rights law, international humanitarian law (even if generally limited to situations of armed conflict), and refugee and internally displaced person laws. It includes sector-specific instruments in areas such as health, telecommunications, civil aviation, and marine transport. It includes bilateral agreements between states and regional agreements among groups of states. And often more important in practice, it includes nonbinding resolutions, declarations, guidelines, and codes.

The large number of diverse legal instruments regulating the provision of international disaster relief can impede an otherwise well-coordinated response. Beyond the notable gaps and overlaps, there is often also a lack of awareness of the existing instruments and their application to a specific disaster context.

Over the past several decades, a number of global initiatives have been launched to provide a comprehensive international framework for international disaster response.²⁵ Two of the most notable past initiatives faltered early, while two newer initiatives are showing more promise.

²⁵ Regional and subregional organizations have made important strides, including the entry into force of the Association of Southeast Asian Nations (“ASEAN”) Agreement on Disaster Management and Emergency Response in 2009, and the development of a regional legal compendium of regulatory instruments in Latin America for the management of international humanitarian assistance in emergencies. ASEAN Secretariat, *Regional Disaster Management Agreement Enters into Force*, ASEANWEB (Dec. 24, 2009), <http://www.asean.org/24136.htm>; IFRC, *Latin American and Caribbean Governments Commit to Examining Their Disaster Laws at Regional Conference*, IFRC.ORG (June 24, 2011), <http://www.ifrc.org/en/what-we-do/idrl/latest-news/idrl-newsletter-june-2011/latin-american-and-caribbean-governments-commit-to-examining-their-disaster-laws-at-regional-conference>. Though this Article does not address such regional developments, their contribution to the overall enhancement of legal preparedness for disaster response should

A. *International Relief Union*

Among the earliest initiatives was the creation of the International Relief Union (“Union”) by the League of Nations in 1927.²⁶ The idea to establish an international organization ensuring assistance to populations affected by disasters originated with Italian Senator and then-President of the Italian Red Cross, Giovanni Ciraiolo, who was inspired by the 1908 earthquake in Messina, Italy.²⁷

The convention establishing the new organization was unique in its exclusive focus on disaster relief as distinct from conflict situations.²⁸ The thirty-one founding member states set out in the convention a dual mandate for the Union:

1. In the event of any disaster due to *force majeure*, the exceptional gravity of which exceeds the limits of the powers and resources of the stricken people, to furnish to the suffering population first aid and to assemble for this purpose funds, resources and assistance of all kinds;
2. In the event of any public disaster, to co-ordinate as occasion offers the efforts made by relief organisations, and, in a general way, to encourage the study of preventive measures against disasters and to induce all peoples to render mutual international assistance.²⁹

However, despite these grand ambitions and a life-span of nearly forty years, the Union achieved little. Lack of financial resources and the dissolution of the League of Nations contributed to its eventual dismantling. In 1968, the research and advocacy functions of the Union were transferred to the UN Educational, Scientific and Cultural Organization.³⁰

not be underestimated. Press Release, ASEAN Disaster Management Agreement to Enter into Force by End of 2009, ASEAN SECRETARIAT (Sept. 16, 2009), <http://www.asean.org/PR-AADMER-EIF-End-2009.pdf>; see also INT’L FED’N OF RED CROSS & RED CRESCENT SOC’YS, MID-YEAR REPORT 9 (2011), available at <http://www.ifrc.org/PageFiles/53419/MAA0000411myr.pdf>.

²⁶ See Peter Macalister-Smith, *The International Relief Union of 1932*, 5 DISASTERS 147, 147–48 (1981).

²⁷ *Id.* at 147.

²⁸ *Id.*

²⁹ Convention Establishing an International Relief Union art. 2, July 12, 1927, 135 L.N.T.S. 249 (entered into force Dec. 27, 1932).

³⁰ See Agreement on the Transfer to the United Nations Educational, Scientific and Cultural Organization of Certain Responsibilities and of the Assets of the International Relief Union, Dec. 18–24, 1968, 656 U.N.T.S. 345.

B. *Draft Convention on Expediting the Delivery of Emergency Assistance*

The next major development at the international level was the proposal by the UN Disaster Relief Coordinator (“UNDRO”)—the predecessor to the present UN Office for the Coordination of Humanitarian Affairs—for a convention directed to smooth technical barriers to international disaster assistance.³¹

Following a joint study by UNDRO and then-League of Red Cross Societies,³² UNDRO prepared and submitted a draft “Convention on Expediting the Delivery of Emergency Relief” to the UN Economic and Social Council.³³ Though the draft was referred to the Second Committee of the UN General Assembly and despite support from a number of UN member states, no action was taken and the convention effectively died in committee.³⁴

C. *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*

A global initiative, but focused on national-level implementation, the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (“IDRL Guidelines”) are the foremost achievement of IFRC’s extensive work in the field of international disaster response law.³⁵

IFRC had been engaged in the practice and study of disaster response since its founding at the beginning of the last century, but turned its attention to legal aspects only in 2001 following a new mandate from one of its governing bodies to “advocate for the development and, where applicable, the improvement and faithful application of International Disaster Response Law.”³⁶

³¹ See IFRC, DESK STUDY, *supra* note 11, at 27.

³² *Id.*

³³ UNDRO Secretary-General, *Proposed Draft Convention on Expediting the Delivery of Emergency Assistance*, U.N. Doc. A/39/267/Add.2 (June 18, 1984).

³⁴ See IFRC, DESK STUDY, *supra* note 11, at 28 (“The Draft Convention did not go far. [The UN Economic and Social Council] referred the text to the UN’s 2nd Committee, which, despite expressions of support from several states, never took official action on it.”).

³⁵ See IFRC, DESK STUDY, *supra* note 11, at 9; INTRODUCTION TO THE GUIDELINES, *supra* note 8, at 5.

³⁶ *Council of Delegates of the International Red Cross and Red Crescent Movement*, in INTERNATIONAL REVIEW OF THE RED CROSS 263, 276–77 (2002), available at http://www.icrc.org/eng/assets/files/other/263-288_resolutions.pdf.

IFRC was well placed to take up this task. The organization's unique role and expertise in disaster response had consistently been recognized by states and humanitarian partners alike, including through resolutions of the International Conference of the Red Cross and Red Crescent, resolutions of the UN General Assembly, and resolutions of the UN Economic and Social Council.³⁷ It had also collaborated in the development of several normative instruments in the area, including the Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations,³⁸ the Measures to Expedite International Relief,³⁹ the Code of Conduct for the Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief,⁴⁰ and numerous other operational guidelines through its participation in the Inter-Agency Standing Committee ("IASC").⁴¹ Further, IFRC's global network of National Red Cross and Red Crescent Societies, in their capacities as auxiliaries to the public authorities, gave it unique access.⁴²

³⁷ See, e.g., E.S.C. Res. 2006/5, U.N. Doc. E/RES/2006/5 (July 18, 2006); G.A. Res. 46/182, *supra* note 9, Annex, ¶ 38; PROTECTING HUMAN DIGNITY: 28TH INT'L CONFERENCE OF THE RED CROSS AND RED CRESCENT, GENEVA, 2–6 DECEMBER 2003, at 4–6 (2003), available at http://www.icrc.org/eng/assets/files/other/icrc_002_1103.pdf.

³⁸ Int'l Conf. of the Red Cross, *Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations*, Res. No. 26 (Sept. 1969), available at <http://www.ifrc.org/Docs/idrl/I49EN.pdf>.

³⁹ Adopted by the International Conference of the Red Cross and the UN Economic and Social Council. See UN Secretary-General, *Measures To Expedite International Relief: Rep. of the Secretary-General*, ¶ 3, U.N. Doc. A/32/61 (May 12, 1977).

⁴⁰ Developed by IFRC together with the members of the Steering Committee for Humanitarian Response and the International Committee of the Red Cross in 1994, and welcomed by the 26th International Conference of the Red Cross and Red Crescent in 1995. See 26TH INT'L CONFERENCE OF THE RED CROSS & RED CRESCENT, *The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief*, Annex VI (1995), available at <http://www.ifrc.org/Docs/idrl/1259EN.pdf>; see also *Law and Legal Issues in International Disaster Response*, *supra* note 30, at 19 ("The [International Red Cross and Red Crescent] Movement has . . . been a leading actor in developing . . . the Code of Conduct for the Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief.").

⁴¹ Established in 1992, the IASC is the primary mechanism for interagency coordination of humanitarian assistance. It is a unique forum involving the key UN and non-UN humanitarian partners. See *About the Inter-agency Standing Committee*, INTER-AGENCY STANDING COMMITTEE, <http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-about-default>; cf. IFRC, DESK STUDY, *supra* note 11, at 61 ("IASC was created by UN General Assembly Resolution 46/182 . . . Its role as the 'primary mechanism for inter-agency coordination' was affirmed by General Assembly Resolution 48/57 of 1993.").

⁴² The auxiliary role of national societies constitutes one of the defining characteristics that distinguishes them from other humanitarian actors. For an elaboration of the auxiliary role of Red Cross and Red Crescent national societies, see TOGETHER FOR HUMANITY: 30TH INT'L CONFERENCE OF THE RED CROSS AND RED CRESCENT, GENEVA, 26–30 NOVEMBER 2007, at 12–13, available at http://www.icrc.org/eng/assets/files/other/icrc_002_1108.pdf.

After more than six years of intensive study and broad consultations, the IDRL Guidelines were adopted by consensus at the 30th International Conference of the Red Cross and Red Crescent in November 2007⁴³—a conference which “brings together all the components of the [International Red Cross and Red Crescent] Movement and the States Parties to the Geneva Conventions.”⁴⁴ The IDRL Guidelines are nonbinding—in effect, recommendations to governments on how to address the most common regulatory issues arising in international disaster response and to enhance their legal preparedness.⁴⁵ They draw on existing international norms and operational experiences and are based on key principles that should be familiar to readers:

- the affected state has the primary role to address the humanitarian needs caused by the disaster;⁴⁶
- other domestic actors have a supporting role, which should not be replaced by international actors;⁴⁷
- international actors should be held to minimum humanitarian standards, including adherence to key humanitarian principles (humanity, neutrality, and impartiality).⁴⁸

While not legally binding, the IDRL Guidelines are comprehensive. They are global in geographic scope, are relevant for all sectors of response and for all types of natural disasters, address both state and non-state actors, and have broad international support.⁴⁹

The practical impact of the IDRL Guidelines can be gauged by their degree of implementation. Nearly four years have passed since they were adopted, several countries have already adopted new regulations or administrative rules

⁴³ *Id.*

⁴⁴ *What Is the International Conference?*, 31ST INT’L CONF. RED CROSS & RED CRESCENT, <http://rcrcconference.org/en/what-is-the-rcrc-conference.html> (last visited Sept. 26, 2011).

⁴⁵ See Introduction to the Guidelines, *supra* note 8, at 11.

⁴⁶ *Id.* at 9.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Since their adoption, the IDRL Guidelines have been recognized in no fewer than seven resolutions of the UN General Assembly, each time calling upon UN member states and regional organizations to take account of the IDRL Guidelines in strengthening their operational and legal frameworks for international disaster relief. See G.A. Res. 65/264, ¶ 7, U.N. Doc. A/RES/65/264 (June 21, 2011); G.A. Res. 65/133, ¶ 11, U.N. Doc. A/RES/65/133 (Mar. 3, 2011); G.A. Res. 64/251, ¶ 7, U.N. Doc. A/RES/64/251 (Apr. 30, 2010); G.A. Res. 64/76, ¶ 10, U.N. Doc. A/RES/64/76 (Feb. 2, 2010); G.A. Res. 63/141, ¶ 5, U.N. Doc. A/RES/63/141 (Mar. 10, 2009); G.A. Res. 63/139, ¶ 8, U.N. Doc. A/RES/63/139 (Mar. 5, 2009); G.A. Res. 63/137, ¶ 6, U.N. Doc. A/RES/63/137 (Mar. 3, 2009).

drawing on or inspired by the IDRL Guidelines, and a number of others are in the process.⁵⁰

D. International Law Commission

The development with perhaps the best potential for leading to a legally binding framework at the global level is the advancing work of the International Law Commission (“Commission”), an expert body of the UN charged with codifying customary international law.⁵¹ In 2007, the Commission added to its program of work the topic “Protection of Persons in the Event of Disasters.”⁵² The Special Rapporteur appointed for the topic, Eduardo Valencia-Ospina, has since delivered four background reports to the Commission and presented twelve draft articles for inclusion in an eventual legal instrument.⁵³

The Commission has adopted and presented to the Sixth Committee of the UN General Assembly a total of eleven draft articles of the eventual legal instrument on the protection of persons in the event of disasters.⁵⁴ However, it

⁵⁰ See INT’L FED’N OF RED CROSS & RED CRESCENT SOC’YS, THE RIGHT AID AT THE RIGHT TIME: PROGRESS REPORT ON THE GUIDELINES FOR THE DOMESTIC FACILITATION AND REGULATION OF INTERNATIONAL DISASTER RELIEF AND INITIAL RECOVERY ASSISTANCE 3–6 (2009), available at http://www.ifrc.org/PagesFiles/41203/IDRL-Progress-Report_en.pdf. An updated progress report will likely be published after the conclusion of the 31st International Conference of the Red Cross and Red Crescent, in December 2011. *Id.* at 1.

⁵¹ See G.A. Res. 174(II), at 105, U.N. Doc. A/519 (Nov. 21, 1947) (“The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.”).

⁵² Rep. of the Int’l Law Comm’n, 59th Sess., May 7–June 5, July 9–Aug. 10, 2007, ¶ 375, U.N. Doc. A/62/10; GAOR, 62d Sess., Supp. No. 10 (2007).

⁵³ See Special Rapporteur on the Protection of Persons in the Event of Disasters, *Fourth Rep. on the Protection of Persons in the Event of Disasters*, Int’l Law Comm’n, U.N. Doc. A/CN.4/643 (May 11, 2011) (by Eduardo Valencia-Ospina); Special Rapporteur on the Protection of Persons in the Event of Disasters, *Third Rep. on the Protection of Persons in the Event of Disasters*, Int’l Law Comm’n, U.N. Doc. A/CN.4/629 (Mar. 31, 2010) (by Eduardo Valencia-Ospina); Special Rapporteur on the Protection of Persons in the Event of Disasters, *Second Rep. on the Protection of Persons in the Event of Disasters*, Int’l Law Comm’n, U.N. Doc. A/CN.4/615 (May 7, 2009) (by Eduardo Valencia-Ospina); Special Rapporteur on the Protection of Persons in the Event of Disasters, *Preliminary Rep. on the Protection of Persons in the Event of Disasters*, Int’l Law Comm’n, U.N. Doc. A/CN.4/598 (May 5, 2008) (by Eduardo Valencia-Ospina) [hereinafter *Preliminary Rep.*].

⁵⁴ For the text of the draft articles provisionally adopted so far by the Commission, see Rep. of the Int’l Law Comm’n, 62d Sess., May 3–June 4, July 5–Aug. 6, 2010, ¶¶ 330–31, U.N. Doc. A/65/10; GAOR 65th Sess., Supp. No. 10 (2010); Rep. of the Int’l Law Comm’n, 63d Sess., Apr. 26–June 3, July 4–Aug. 12, 2011, U.N. Doc. A/CN.4/L.794; GAOR 66th Sess., Supp. No. 10 (2010) (drafting committee provisionally adopting the text and titles of draft articles 10 and 11).

is still unclear what form such a legal instrument will eventually take—specifically, whether it will be proposed as a binding international treaty.

IFRC and the Commission maintain close engagement in areas where their work is related. The Commission has drawn on the IDRL Guidelines and research products by IFRC in its own study of the issues.⁵⁵ IFRC also regularly participates in debates of the Sixth Committee of the UN General Assembly in its capacity as permanent observer;⁵⁶ and in these debates, UN member states have repeatedly recalled the relevance of the IDRL Guidelines to the Commission's work and the importance of drawing on the prior work of IFRC.⁵⁷ In this way, the potential for these two initiatives to be mutually reinforcing is supported.

CONCLUSION

An examination of the complexity of international disaster response operations, and the countless regulatory issues posed to affected states and international actors alike, presents a seemingly insurmountable challenge for regulators and policymakers. In this context, the limited success of prior initiatives, such as the International Relief Union and the stalled convention on expediting the delivery of emergency assistance, is all the more discouraging.

But current initiatives at the international level seem well placed to bring real advances in the field of international disaster response law. The IDRL Guidelines, for their part, benefit not only from broad international support, but also from their dual approach, at once global and national. The current project of the International Law Commission on the protection of persons in the event of disasters is firmly global. Yet with the institutional weight of the Commission behind it and a long-term horizon, the project has the potential to deliver the first comprehensive international framework for disaster response.

Retuning then to the question posed in the title of this Article: are lawyers unsung disaster heroes? Don't expect a parade in your honor anytime soon, but

⁵⁵ See, e.g., Secretariat, *Memorandum on the Protection of Persons in the Event of Disasters*, Int'l Law Comm'n, U.N. Doc. A/CN.4/590 (Dec. 11, 2007) (discussing numerous IFRC studies and citing the IDRL Guidelines frequently); see also *Preliminary Rep.*, *supra* note 53, at 7, 8, 15.

⁵⁶ G.A. Res. 49/2, ¶ 1, U.N. Doc. A/RES/49/2 (Oct. 27, 1994).

⁵⁷ See U.N. GAOR, 65th Sess., 25th mtg. at 8, U.N. Doc. A/C.6/65/SR.25 (Dec. 1, 2010); cf. U.N. GAOR, 65th Sess., 22d mtg., U.N. Doc. A/C.6/SR.22 (Dec. 1, 2010) (discussing the Commission's work on the protection of persons in the event of disasters, which was itself influenced by the IDRL Guidelines and the IFRC's work in general).

the question may be premature. Current initiatives have incredible potential to advance legal preparedness for international disaster response—addressing the regulatory issues outlined above and improving the efficiency, effectiveness, and quality of response. If these aims can be reached in the years ahead, lawyers will take credit for some of the most significant progress in humanitarian response in our time.