

# Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges

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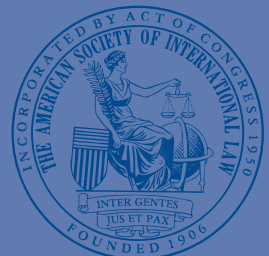
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## Chapter 3

### The Right to Humanitarian Assistance

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#### INTRODUCTION

It would seem a relatively straightforward matter for the *Guiding Principles on Internal Displacement*<sup>1</sup> (hereinafter the *Guiding Principles*) to assert that internally displaced persons (IDPs) have the right to request and receive humanitarian assistance and to point to duties of states and humanitarian actors to provide it. This issue is, however, more legally complex than it first appears, both with regard to the scope of the right to humanitarian assistance in international law and its implementation in national law.

“Humanitarian assistance” is not defined by any of the major humanitarian or human rights instruments, including the *Guiding Principles*. For purposes of this chapter, the term will apply to items essential to survival such as food, water, medical supplies, clothing, and related “non-food items” (e.g., water containers, cooking utensils, soap, etc.) or the means to immediately obtain any such items (e.g., cash assistance). It will also apply to essential services such as emergency medical care. Access to humanitarian assistance must also necessarily include not only access to relief goods, but also access to and for the personnel and equipment, such as vehicles and telecommunications or information technology items, needed to carry out humanitarian operations. This chapter will assume that humanitarian assistance arrives in the wake of some calamitous event such as an armed conflict or natural disaster. But it will also devote some brief attention to issues and standards related to providing for the survival needs of persons displaced by development projects.

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<sup>1</sup> U.N. Econ. & Soc. Council [ECOSOC], Comm’n. on Hum. Rts., *Guiding Principles on Internal Displacement*, U.N. Doc. No. E/CN.4/1998/53/Add.2 (1998) (prepared by Mr. Francis M. Deng) [hereinafter *Guiding Principles*].

At the international level, the existence of a general right to humanitarian assistance has been contested by some legal scholars. In fact, aside from the Geneva Conventions and their additional protocols, whose scope is limited to situations of armed conflict, the right is barely mentioned in existing treaty law. Moreover, even within the framework of the Geneva Conventions, the guarantees of the right to humanitarian assistance in internal conflict are expressed far less forcefully than those applicable in international conflict. Existing law concerning the rights and duties of international humanitarian actors is similarly patchy.

Nevertheless, the status of the right to humanitarian assistance articulated by the *Guiding Principles* is not as shaky as the foregoing might suggest. A number of human rights treaties guarantee the component rights to life, food, clothing, shelter, emergency medical care, and other necessities. The remaining gaps in law on the right to humanitarian assistance are being filled with a growing number of “soft law” instruments, of which the *Guiding Principles* is one important example, as well as with the consistent practices of states and humanitarian organizations. Strong arguments have been made about the development of customary law in this area. Moreover, there is an important number of international instruments on humanitarian assistance in the field of disasters known under the rubric of International Disaster Response Laws, Rules and Principles (IDRL), that do not express themselves in terms of rights but are aimed at ensuring speedy access to effective assistance when it is needed.<sup>2</sup> Finally, regional protocols are currently being developed in Africa to codify the *Guiding Principles* into binding law.

At the national level, it is rare to find states with comprehensive legal frameworks concerning humanitarian assistance for IDPs or anyone else. Whether this flows from a desire to maintain maximum flexibility or a simple failure to plan ahead, the result is uneven application of the rights articulated in the *Guiding Principles* as well as technical difficulties for the governments

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<sup>2</sup> The International Federation of the Red Cross and Red Crescent Societies (the Federation) established the IDRL Programme in 2001. On November 30, 2007, the Federation adopted the *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (the IDRL Guidelines), available at <http://www.ifrc.org/Docs/pubs/idrl/guidelines.pdf>.

themselves. Plainly, legislation cannot resolve all of the common barriers to humanitarian assistance. For instance, legal eligibility for aid from the national government would mean little to IDPs located in territory controlled by rebel forces. Similarly, if a state lacks the means to provide humanitarian assistance in massive situations of displacement, a dedicated law cannot manufacture the funds.

Yet, there are a number of legal steps that some states have been able to take to implement international norms on humanitarian assistance. These include laws related to eligibility, institutional frameworks, and budgetary mechanisms associated with humanitarian assistance from state resources; means to hold individuals accountable for criminal obstruction of humanitarian assistance; as well as rules designed to expedite, facilitate, and regulate humanitarian relief efforts.

This chapter will discuss issues at both the international and national levels. At the international level, it will survey the legal basis for the *Guiding Principles*' provisions on humanitarian assistance. In so doing, it will acknowledge the complexities of the current framework and, in particular, the different regimes operating in armed conflict and non-conflict situations. But the chapter will also conclude that the *Guiding Principles*' basic assertions about the right to humanitarian assistance are in line with the trends of international law and are therefore a good guide for the development of national law. This chapter will seek to identify the greatest barriers at the national level to implementing the rights and duties articulated by the *Guiding Principles* and provide ideas and examples as to how states might address them.

## **LEGAL FRAMEWORK**

### **Relevant Guiding Principles**

There are a number of provisions of the *Guiding Principles* that are directly relevant to humanitarian assistance and the associated issues examined here. These can be roughly divided into three categories: (1) those concerning the existence and scope of the right to humanitarian assistance; (2) those concerning specific measures of facilitation and regulation of humanitarian

assistance, and (3) those concerning assistance for particularly vulnerable groups.

### *The Existence and Scope of the Right to Humanitarian Assistance*

The *Guiding Principles* are emphatic that it is the primary duty and responsibility of governments to provide humanitarian assistance to IDPs, stating so in both Principles 3(1) and 25(1). Moreover, pursuant to Principle 7(2), any “authorities” (whether state or non-state actors) responsible for intentionally displacing persons should ensure “proper accommodation” to those affected, including satisfactory conditions of nutrition, health, and hygiene.

Principle 25(2) provides that humanitarian organizations and “other appropriate actors” have the right to offer their services to IDPs and such an initiative will not be regarded as an unfriendly or interfering act. Authorities are enjoined from arbitrarily withholding consent for such offers, particularly when they are themselves unable or unwilling to provide the aid needed.

However, humanitarian assistance is more than just a duty according to the *Guiding Principles*. Principle 3(2) asserts that IDPs have a right to humanitarian assistance and are entitled to request it without fear of reprisal or persecution. Some of the components of that right are identified in other provisions. Principle 10 sets out the right to life. Principle 18 sets out the right to an adequate standard of living, including essential food and potable water, basic shelter and housing, appropriate clothing and essential medical services, and sanitation. Principle 19 sets out the right to medical care, including psychological and social services and efforts to prevent contagious and infectious diseases. Pursuant to Principle 4(1), the right to humanitarian assistance is to be applied “...without discrimination of any kind, such as race, color, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria.”

### *Facilitation and Regulation of Humanitarian Assistance*

The *Guiding Principles* also address the facilitation and regulation of humanitarian assistance. Authorities are required to grant and facilitate free passage of humanitarian assistance, including associated personnel (Principle 25(2-3)), and not to divert it for non-humanitarian purposes (Principle 24(2)). They must also protect humanitarian personnel, transport and supplies, including from violence (Principle 26).

For their part, the providers of humanitarian assistance must ensure that their activities are carried out in accordance with the principles of humanity and impartiality (Principle 24(1)). They should also give “due regard” to the protection needs and human rights of IDPs, and respect “relevant international standards and codes of conduct” (Principle 27(1)).

### *Humanitarian Assistance for Particularly Vulnerable Groups*

Moreover, Principle 4 notes that certain IDPs, including unaccompanied children, expectant mothers, mothers with young children, female heads of household, persons with disability, and elderly persons, are entitled to “protection and assistance required by their condition and to treatment which takes into account their special needs.” This includes special attention to the health needs of women (Principle 19 (2)), and special efforts to ensure the full participation of women in the planning and distribution of relief or basic supplies (Principle 18(3)).

## **Legal Basis**

### *The Existence and Scope of the Right to Humanitarian Assistance*

Explicit reference to the right to humanitarian assistance appears very sparingly in existing treaties outside of the domain of international humanitarian Law. As a result, a number of legal scholars have reached pessimistic conclusions about the existence of a general right to humanitarian

assistance.<sup>3</sup> However, the *Guiding Principles* are nevertheless justified in asserting that there is such a right, both in war and peacetime disasters. Discussion here begins with sources of international law relevant to any situation and then turns to sources specifically relevant to situations of armed conflict, disasters, and development-induced displacement.

### *Sources Relevant to Any Situation*

There is only one human rights treaty currently in force that specifically refers to IDPs' right to receive humanitarian assistance. Article 23 of the African Charter on the Rights and Welfare of the Child of 1990 (hereinafter the African Children's Charter) provides that states shall take "all appropriate measures" to ensure that refugee children as well as internally displaced children "receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties."<sup>4</sup> It also specifically provides that states should "undertake to cooperate with existing international organizations ... in their efforts to protect and assist such a child."<sup>5</sup>

The African Children's Charter may soon be joined by two other regional instruments in Africa. In December 2006, eleven countries of the Great Lakes region of Africa adopted a binding Pact on Security, Stability and Development in the Great Lakes region with ten separate protocols, including

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<sup>3</sup> Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 NAVAL WAR C. REV. 77 (2000); Peter MacAllister-Smith, *The Right to Humanitarian Assistance in International Law*, 66 REVUE DE DROIT INTERNATIONAL DE SCIENCE DIPLOMATIQUES ET POLITIQUES 211, 224-25 (1998); Rohan Hardcastle & Adrian T. L. Chua, *Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters*, 325 INT'L REV. OF THE RED CROSS, 589-609 (1998).

<sup>4</sup> African Charter on the Rights and Welfare of the Child, July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49 (1990).

<sup>5</sup> This provision is similar to Article 22 of the Convention on the Rights of the Child, but the latter refers only to refugee children.

the Protocol on the Protection and Assistance to Internally Displaced Persons. The Protocol requires member states to adhere to the *Guiding Principles*, including by enacting them into local law.<sup>6</sup> It entered into force in 2008 after eight of the eleven signatories had ratified it. As of the date of writing of this chapter, the African Union was also considering the adoption of its own draft convention on the assistance and protection of internally displaced persons in Africa.<sup>7</sup>

Beyond these relief-specific provisions, however, there are a number of other human rights treaties and instruments that address what can be seen as component rights of the right to humanitarian assistance. Those component rights include the rights to life, food and water, housing, clothing, and medical care.

*The Rights to Food and Water*<sup>8</sup>

The right to food is articulated in Article 25 (1) of the Universal Declaration of Human Rights (UDHR)<sup>9</sup>, Article 11 (1) of the International Covenant on Economic Social and Cultural Rights (ICESCR)<sup>10</sup>, and Article 27 (1) of the

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<sup>6</sup> Protocol on the Protection and Assistance of Internally Displaced Persons, arts. 3(6), 3(7), 4(1)(f), available at [http://www.brookings.edu/projects/idp/Laws-and-Policies/~media/Files/Projects/IDP/Laws%20and%20Policies/Great%20Lakes/GreatLakes\\_ID\\_Pprotocol\\_2006.ashx](http://www.brookings.edu/projects/idp/Laws-and-Policies/~media/Files/Projects/IDP/Laws%20and%20Policies/Great%20Lakes/GreatLakes_ID_Pprotocol_2006.ashx).

<sup>7</sup> Draft Programme of Work of the AU Consultative Meeting on the Draft AU Convention of the Protection and Assistance of Internally Displaced Persons in Africa, Addis Ababa, May 10-11, 2007, available at <http://www.africa-union.org/root/au/Conferences/2007/May/PA/11/programme.doc>.

<sup>8</sup> See chapter 4 in this volume on the rights of IDPs to food and water.

<sup>9</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 67<sup>th</sup> plen. mtg., U.N. Doc. A/810 (1948) at 71 [hereinafter Universal Declaration].

<sup>10</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (1966), 6 I.L.M. 368 (1967).



Convention on the Rights of the Child (CRC)<sup>11</sup>, as an element of the right to an adequate standard of living.<sup>12</sup> ICESCR Article 11(2) goes on to specify the “fundamental right of everyone to be free from hunger,” and Article 24(2)(c) of the CRC requires states to combat child malnutrition, “through, inter alia, ...the provision of adequate nutritious foods and clean drinking-water.” With a more specific frame of reference, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979<sup>13</sup> provides that states must ensure “adequate nutrition during pregnancy and lactation” (Article 12(2)), and that women in rural areas must “enjoy adequate living conditions, particularly in relation to... water supply” (Article 14(2)). The right to food and/or water have also been repeatedly reaffirmed in the resolutions and declarations of international conferences<sup>14</sup> and United Nations bodies.<sup>15</sup>

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<sup>11</sup> Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989).

<sup>12</sup> Walter Kälin, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS 45 (2d ed. 2007) [hereinafter ANNOTATIONS].

<sup>13</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, G.A. Res. 34/180, U.N. GAOR Supp. No. 46 at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980).

<sup>14</sup> Universal Declaration on the Eradication of Hunger and Malnutrition, ¶ 1, U.N. Doc. E/CONF.65/20 (1974), U.N. Doc. ST/HR/Rev. (1974), endorsed by the General Assembly, G.A. Res. 3348 (XXIX), ¶ 3, U.N. Doc. A/RES/3348 (Dec. 17, 1974), available at <http://www.ohchr.org/english/law/malnutrition.htm>; United Nations World Water Conference, Mar del Plata Declaration, U.N. Doc. E/CONF.70/29 (1977); Vienna Declaration and Programme of Action, World Conference on Human Rights, June 25, 1993, ¶ 31, U.N. Doc. No. A/CONF.157/23 (1993), 32 I.L.M. 1661 (1993); Programme of Action of the International Conference on Population and Development, U.N. Doc. A/CONF.171/13/Rev.1 (1995); U.N. Report on the Forth World Conference on Women, Beijing Declaration and Platform for Action, ¶¶ 147(j) and 149(f), U.N. Doc. A/CONF.177/20 (1995); Rome Declaration on World Food Security, World Food Summit, ¶ 1 (1996); The Declaration of Marrakech, World Water Council, First World Water Forum (1997), available at

At the regional level, the right to food is expressly recognized by the Protocol of San Salvador to the American Convention on Human Rights of 1988 in Article 12, which provides that “[e]veryone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.”<sup>16</sup> The rights to both food and water are recognized by the African Children’s Charter as an element of the right to health in Article 14(2)(c).<sup>17</sup> Moreover, the European Charter on Water Resources adopted by the Council of Europe Committee of Ministers in 2001 acknowledges that “[e]veryone has the right to a sufficient quantity of water for his or her basic needs.”<sup>18</sup>

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[http://www.worldwatercouncil.org/fileadmin/wwc/Library/Official\\_Declarations/Marrakech\\_Declaration.pdf](http://www.worldwatercouncil.org/fileadmin/wwc/Library/Official_Declarations/Marrakech_Declaration.pdf); United Nations Millennium Declaration, ¶ 19, U.N. Doc. No. A/RES/55/2 (2000); *Food and Agriculture Organization of the United Nations [FAO], Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, reprinted in 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, Sept. 23, 2004, F.A.O. Doc. CL 127/10-Supp.1, annex 2.

<sup>15</sup> United Nations Commission on Human Rights Resolutions 1997/8, 1998/23, 1999/24, 2000/10, 2001/25, 2002/25, 2003/25, 2004/19, 2005/18; U.N. Doc. E/CN.4/RES/1997/8 (1997); E/CN.4/RES/1998/23 (1998); E/CN.4/RES/1999/24 (1999); E/CN.4/RES/2000/10 (2000); E/CN.4/RES/2001/25 (2001); E/CN.4/RES/2002/25 (2002); E/CN.4/RES/2003/25 (2003); E/CN.4/RES/2004/19 (2004); E/CN.4/RES/2005/18 (2005). United Nations Human Rights Council Resolution A/HCR/S-7/1 (2008).

<sup>16</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador, O.A.S.T.S. No. 69 (1988), *entered into force* Nov. 16, 1999, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992).

<sup>17</sup> African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (1990).

<sup>18</sup> Council of Europe Doc. No. CO-DBP 8 (2001), available at <http://www.coe.int>.

The Committee on Economic, Cultural and Social Rights (hereinafter the Committee) has construed the right to food and water under ICESCR Article 11 in several general comments. General Comment No. 3 on “the nature of States parties obligations” concluded that the ICESCR implies a minimum core obligation to address survival requirements including “essential foodstuffs” and asserts that a state must “demonstrate that it has made a maximum effort to use all the resources at its disposal” to ensure that these minimum needs are met.<sup>19</sup> In General Comment No. 14, the Committee reiterated this assertion, stating that states have an obligation “to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone” as well as “an adequate supply of safe and potable water.”<sup>20</sup>

In General Comment No. 12 on the right to adequate food, the Committee similarly determined that the right to food itself includes a core right to be free of hunger as well as a broader right to “adequate” food.<sup>21</sup> States cannot plead that they lack resources to address hunger on their territory if they cannot show that they have made “every effort” to address it immediately, including by seeking international assistance.<sup>22</sup> Moreover, “the prevention of access to humanitarian food aid in internal conflicts or other emergency situations” is

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<sup>19</sup> U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 3, *The Nature of States Parties Obligations*, ¶ 10, U.N. Doc. E/1991/23, Annex III (1990), reprinted in U.N. Doc. HRI/GEN/1/Rev.7 (2004), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/189/63/pdf/G9418963.pdf>.

<sup>20</sup> U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 14, *The Right to Highest Attainable Standard of Health*, ¶ 43(b)-(c), U.N. Doc. E/C.12/2000/4 (2000) [hereinafter General Comment No. 14].

<sup>21</sup> U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 12, *The Right to Adequate Food*, ¶ 6, U.N. Doc. E/C.12/1999/5 (1999) [hereinafter General Comment No. 12].

<sup>22</sup> *Id.* at ¶ 17.

also necessarily a violation of the right.<sup>23</sup> “Adequate” food implies “[t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture.”<sup>24</sup>

In General Comment No. 15, the Committee wrote that the right to water is intrinsic to the rights to food and health, and that it should also be independently implied as a component of an “adequate standard of living.”<sup>25</sup> To ensure the right to water, states must guarantee its availability in suitable quantity, its quality, and its accessibility (including physical and economic accessibility as well as non-discrimination).<sup>26</sup> States are also required to make special efforts on behalf of certain groups that have historically had difficulty exercising this right, including IDPs.<sup>27</sup>

*The Rights to Essential Medications, Medical Care and Sanitation*<sup>28</sup>

A number of instruments provide for a right to health, from which one can infer rights to essential medications, medical care, and sanitation.<sup>29</sup> These include UDHR Article 25(1), ICESCR Article 12, CRC Article 24(1), Revised European Social Charter of 1996 (ESC) Article 11, African Charter on Human and Peoples Rights (AfCHPR) of 1981 Article 16(1), American Declaration of the Rights and Duties of Man of 1948 (the American Declaration) Article XI,

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<sup>23</sup> *Id.* at ¶ 19.

<sup>24</sup> *Id.* at ¶ 8.

<sup>25</sup> U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 15, *The Right to Water*, ¶ 3, U.N. Doc. E/C.12/2002/11 (2002) [hereinafter General Comment No. 15].

<sup>26</sup> *Id.* at ¶ 12.

<sup>27</sup> *Id.* at ¶ 16(f).

<sup>28</sup> See chapter six of this volume on the rights of IDPs to health and basic services.

<sup>29</sup> ANNOTATIONS, *supra* note 12, at 47, 144.

and Protocol of San Salvador Article 10. The right can also be found in the preamble of the 1946 Constitution of the World Health Organization, which proclaims that “[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”

Some of these instruments refer specifically to a right to medical care. For example, ICESCR Article 12(2) requires states to take steps for the “prevention, treatment and control of epidemic, endemic, occupational and other diseases” as well as “[t]he creation of conditions which would assure to all medical service and medical attention in the event of sickness.”<sup>30</sup> Article XI of the American Declaration and Article 14(2)(h) of CEDAW also make specific reference to a right to sanitation as an element of the right to health and the right to adequate living conditions, respectively. The right to medical care has likewise been asserted in numerous international conference resolutions and declarations.<sup>31</sup>

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<sup>30</sup> Others include: Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 67<sup>th</sup> plen. mtg., art. 25(1), U.N. Doc. A/810 (1948) [hereinafter UDHR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, 21 U.N. GOAR Supp. No. 16 at 49, art. 12(2), U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) [hereinafter ICESCR]; CRC arts. 24(1), 39; Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, G.A. Res. 34/180, U.N. GAOR Supp. No. 46 at 193, art. 12, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) [hereinafter CEDAW]; the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. No. 14 at 47, art. 5(e)(iv), U.N. Doc. A/6014 (1966) [hereinafter CERD]; African Convention for Human and People’s Rights, AFCHPR, art. 16(2); American Declaration on Human Rights, Nov. 22, 1969, art. XI, OEA/Ser. K/XVI/1.1, Doc. 65, Rev.1, Corr. 1, O.A.S.T.S. No. 36 (1970), 1144 U.N.T.S. 123; 9 I.L.M. 99 (1969) [hereinafter American Convention].

<sup>31</sup> Declaration of Alma Ata, Int’l Conf. on Primary Health Care, USSR, Sept. 6-12, 1978, *available at* [http://www.who.int/hpr/NPH/docs/declaration\\_almaata.pdf](http://www.who.int/hpr/NPH/docs/declaration_almaata.pdf); Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, G.A. Res. 119, U.N. GAOR, 46<sup>th</sup> Sess., Supp. No. 49, Annex, princ. 1, at 188-92, U.N. Doc. A/46/49 (1991); International Conference on Population and Development, Report of the International Conference on Population and

In construing the right to health under Article 12 of the ICESCR, the Committee on Economic, Cultural and Social Rights' General Comment No. 14 directly addressed humanitarian assistance to IDPs as follows:

States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population.<sup>32</sup>

It also identified, as core obligations under the right to health, providing essential primary health care, adequate sanitation, and “essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs.”<sup>33</sup> With regard to the latter reference, since 1977, the World Health Organization has been periodically updating a Model List of Essential Medicines, most recently updated in 2005.<sup>34</sup> In collaboration with other

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Development, princ. 8, U.N. Doc. No. A/CONF.171/13 (1994); Report of the World Summit for Social Development, U.N. GAOR, 50<sup>th</sup> Sess., at 18, U.N. Doc. No. A/CONF.166/9 (1995); Report of Habitat: United Nations Conference on Human Settlements (Habitat II), U.N. GAOR, 51<sup>st</sup> Sess., ¶ 36, U.N. Doc A/CONF. 165/14 (1996).

<sup>32</sup> ECOSOC, General Comment No. 14, *supra* note 20, at ¶ 40.

<sup>33</sup> *Id.* at ¶ 43.

<sup>34</sup> World Health Organization, *Model List of Essential Medicines* (2007), available at [http://www.who.int/medicines/publications/08\\_ENGLISH\\_indexFINAL\\_EML15.pdf](http://www.who.int/medicines/publications/08_ENGLISH_indexFINAL_EML15.pdf).

agencies, it has also developed an Inter-Agency List of Essential Medicines for Reproductive Health<sup>35</sup> and an Inter-Agency Emergency Health Kit, setting out the core medicines and medical devices needed for ten-thousand people for three months.<sup>36</sup>

*The Rights to Adequate Clothing and other Necessities*

The right to adequate clothing is explicitly addressed as an element of an adequate standard of living in UDHR Article 25(1), ICESCR Article 11(1), and CRC Article 27(3).<sup>37</sup> Although it is not expressly mentioned in the text of the AfCHPR, the African Commission on Human and Peoples' Rights also asks states to report on the right to adequate clothing in their periodic reports, as an element of the rights to health and protection of the family, as provided for in AfCHPR Articles 16 and 18.<sup>38</sup>

This right has not been widely construed. In its Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies of 2002, the Office of the High Commissioner for Human Rights states that:

The right to adequate clothing forms an important part of the general right of everyone to an adequate standard of living. The type of clothing States shall make available to those in need, in particular the poor, depends on the respective

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<sup>35</sup> WORLD HEALTH ORGANIZATION, INTER-AGENCY LIST OF ESSENTIAL MEDICINES FOR REPRODUCTIVE HEALTH, Doc. No. WHO/PSM/PAR/2006.1 (2006), *available at* [http://www.who.int/reproductive-health/publications/essential\\_medicines/essential\\_medicines.pdf](http://www.who.int/reproductive-health/publications/essential_medicines/essential_medicines.pdf).

<sup>36</sup> WORLD HEALTH ORGANIZATION, THE INTERAGENCY EMERGENCY HEALTH KIT, Doc. No. WHO/PSM/PAR/2006.4 (2006), *available at* <http://www.who.int/medicines/publications/mrhealthkit.pdf>.

<sup>37</sup> ANNOTATIONS, *supra* note 12, at 47.

<sup>38</sup> African Commission on Human and Peoples' Rights, Guidelines for Periodic Reports under the African Charter (1998), ¶ 33, *available at* [http://www.chr.up.ac.za/hr\\_docs/themes/theme02.html](http://www.chr.up.ac.za/hr_docs/themes/theme02.html).

cultural, climatic and other conditions in the country concerned. As a minimum, poor people are entitled to clothes that enable them to appear in public without shame.<sup>39</sup>

In General Comment 5, the Committee on Economic, Cultural and Social Rights further noted that “[t]he right to adequate clothing...assumes a special significance in the context of persons with disabilities who have particular clothing needs, so as to enable them to function fully and effectively in society.”<sup>40</sup>

The Committee has also stated that the catalogue of rights listed in ICESCR Article 11(1) as component parts of the right to an adequate standard of living is not intended to be exclusive.<sup>41</sup> Thus, other necessary and common relief items such as blankets, cooking and water carrying utensils, tools, and the like ought also to be included in this provision.

### *The Right to Life*

The right to humanitarian assistance can also be derived from the right to life, guaranteed by UDHR Article 3, International Covenant on Civil and Political Rights (ICCPR) Article 6(1), CRC Article 6(1), American Declaration Article I, American Convention on Human Rights Article 4(1), European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) Article 2(1), and AfCHPR Article 4.<sup>42</sup> As the Human Rights Committee has

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<sup>39</sup> Office of the High Commissioner for Human Rights, Draft Guidelines on a Human Rights Approach to Poverty Reduction Strategies (2002).

<sup>40</sup> U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 5, *Persons with Disabilities*, ¶ 33, U.N. Doc. No. HRI/GEN/1/Rev.7 (2004).

<sup>41</sup> General Comment No. 15, *supra* note 25, at ¶ 3.

<sup>42</sup> Ruth Stoffels, *Legal Regulation of Humanitarian Assistance in Armed Conflicts: Achievements and Gaps*, 48 INT’ REV. OF THE RED CROSS & RED CRESCENT, 515-46, 517 (2004).



affirmed, the right to life requires states not only to refrain from perpetrating violence, but also to adopt positive measures such as eliminating malnutrition and epidemics.<sup>43</sup>

Likewise, the right to humanitarian assistance is supported by developments in international criminal law. Deliberately depriving civilians of food or other necessities by refusing or blocking humanitarian aid, whether in a situation of conflict or not, may amount to an act of genocide<sup>44</sup> or the crime against humanity of extermination.<sup>45</sup>

### *Sources Specific to Armed Conflict*

When the parties to an armed conflict are themselves the direct cause of the displacement of persons, they have an express duty to provide for the necessities of those affected. In the context of international conflict, Article 49 of the Convention (IV) Relative to the Protection of Civilian Persons in Time of War (hereinafter the Fourth Geneva Convention) specifies that such parties “shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, [and] that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition[.]” Article 17 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (hereinafter the Second Additional Protocol) extends this same requirement to internal armed conflicts. According to a recent study by the

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<sup>43</sup> Human Rights Committee, General Comment No. 6, ¶ 5, *The Right to Life*, reprinted in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. No. HRI/GEN/1/Rev.7 (2004), at 129.

<sup>44</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948), art. 2.

<sup>45</sup> Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (1998), arts. 7(1)(b)-(2)(b) [hereinafter ICC Statute]; Christa Rottensteiner, *The Denial of Humanitarian Assistance as a Crime under International Law*, 835 INT’L REV. OF THE RED CROSS, 555-582 (1999).

International Committee of the Red Cross (ICRC), this requirement has now also become a norm of customary law in both types of armed conflict.<sup>46</sup>

Even when a particular party is not directly responsible for displacement, a general duty nevertheless exists to provide humanitarian assistance to civilians in need when in the context of international armed conflict. Article 55 of the Fourth Geneva Convention provides that occupying powers have the duty, “to the fullest extent of the means available,” to “ensure the food and medical supplies of the population” in occupied territories. Pursuant to Article 56, they must likewise ensure “medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics.” To this list of items occupying powers must supply, Article 69 of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (hereinafter the First Additional Protocol) adds “clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.”

No similar general duty of armed parties to directly provide humanitarian assistance is articulated with respect to a party’s own territory in an international or internal armed conflict. However, the Second Additional Protocol does provide that civilians are to be protected from “the dangers arising from military operations,” (Art. 13), that children must be provided “the care and aid they require” (Art. 4(3)), and that the sick and wounded must be provided medical care (Art. 7(2)) in internal armed conflicts. Moreover, the human right norms discussed above would normally continue to apply.

### *The Duty to Allow Access to Humanitarian Assistance*

Regardless of an occupying power’s efforts along the lines of the obligations described above, it is also obligated to allow others to provide relief, both as a

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<sup>46</sup> INT’L COMM. OF THE RED CROSS, CUSTOMARY INT’L HUM. LAW, rule 131 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., Vols. I & II, 2005) [hereinafter ICRC CUSTOMARY LAW STUDY].

matter of positive and customary law. Article 59 of the Fourth Geneva Convention states that, “if the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population and shall facilitate them by all the means at its disposal.”

Such relief schemes include, but are not limited to, “the provision of consignments of foodstuffs, medical supplies and clothing.” As pointed out by the ICRC’s *Commentary* to the Fourth Geneva Convention, this provision is absolute. “In all cases where occupied territory is inadequately supplied the Occupying Power is bound to accept relief supplies destined for the population.”<sup>47</sup> On the other hand, those providing the relief must either be states or “impartial humanitarian organizations such as the International Committee of the Red Cross.”<sup>48</sup>

This duty is also extended to non-occupied territories in situations of armed conflict (i.e., an armed party’s own territory) by Article 70 of the First Additional Protocol, but with the qualification that any such relief operation is “subject to the agreement of the Parties concerned.” However, the *Commentary* asserts that the consent of the parties may normally not be withheld, in light of the prohibition in Article 54 of starvation as a method of warfare.<sup>49</sup>

Both the parties to an international armed conflict and other transit states are further required by Article 23 of the Fourth Geneva Convention to allow free passage of “medical and hospital stores and objects necessary for religious

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<sup>47</sup> Comm. of Red Cross, *Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 320 (Jean S. Pictet ed., 1958) [hereinafter *Commentary to GC IV*].

<sup>48</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 59 [hereinafter *Fourth Geneva Convention*].

<sup>49</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 820 (Yves Sandoz et al, eds., 1987) [hereinafter *Additional Protocols Commentary*].

worship intended only for civilians of another High Contracting Party” as well as “consignments of essential foodstuffs, clothing and tonics” but, in the latter case, only if they are “intended for children under fifteen, expectant mothers and maternity cases” and not reasonably likely to be diverted, particularly for military purposes. Article 23 specifies that, subject to “technical arrangements,” such consignments must be forwarded as quickly as possible. The *Commentary* to the Fourth Geneva Convention interprets this caveat to allow the state party in question to “check the consignments and arrange for their forwarding at prescribed times and on prescribed routes.”<sup>50</sup>

While the foregoing provisions are expressed in terms of the duties of parties to the conflict to provide or allow for relief, Article 30 of the Fourth Geneva Convention makes clear that humanitarian assistance is also a right that belongs to protected persons, providing that “protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.” The *Commentary* notes, “[t]he fact that the new Convention grants civilian war victims a formal and absolute right to appeal to supervising and relief agencies, a facility which up till then had depended solely on the goodwill of the Parties to the conflict, is of great significance[.]”<sup>51</sup> Similarly, Article 62 provides that “[s]ubject to imperative reasons of security, protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them.”<sup>52</sup>

With regard to internal armed conflict, common Article 3 of the Geneva Conventions does not expressly mention humanitarian assistance, but it does provide that parties are required to treat protected persons, including civilians, “humanely,” that “wounded and sick” are to be “collected and cared for” and that “[a]n impartial humanitarian body, such as the International Committee of

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<sup>50</sup> *Id.* at 184.

<sup>51</sup> *Commentary to GC IV, supra* note 47, at 215.

<sup>52</sup> Fourth Geneva Convention, *supra* note 48, art. 142 (providing for a right to access to humanitarian relief by detained persons).

the Red Cross, *may* offer its services to the Parties to the conflict” (emphasis added). Article 18(1) of the Second Additional Protocol adds to this that domestic “relief societies,” including the national Red Cross or Red Crescent Society, may “offer their services” as may the civilian population itself. International relief is addressed in Article 18(2), which states that where the civilian population “is suffering undue hardship” due to lack of necessities for survival “such as foodstuffs and medical supplies,” relief actions “of an exclusively humanitarian and impartial nature” carried out without adverse distinction “shall be undertaken subject to the consent of the High Contracting Party concerned.” In its *Commentary*, the ICRC concludes, as in the case of Article 70 of the First Additional Protocol, that consent may not be arbitrarily withheld here, again, due to the prohibition of starvation as a method of warfare.<sup>53</sup>

In its customary law study, the ICRC derived a general rule from existing state practice, applicable in both international and internal armed conflicts. The ICRC concluded that “[t]he parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without adverse distinction, subject to their right to control.”<sup>54</sup> It further concluded that “[t]here is practice which recognizes that a civilian population in need is entitled to receive humanitarian relief essential to its survival, in accordance with international humanitarian law.”<sup>55</sup>

### *Starvation as a Method of Warfare*<sup>56</sup>

As noted above, the starvation of civilians as a method of warfare is prohibited by international humanitarian law, both in international armed conflict, pursuant to Article 54(1) of the First Additional Protocol, and in internal

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<sup>53</sup> Additional Protocols Commentary, *supra* note 49, at 1479.

<sup>54</sup> ICRC Customary Law Study, *supra* note 46, Rule 55 at 193.

<sup>55</sup> *Id.* at 199.

<sup>56</sup> See chapter four of this volume on the rights of IDPs to food and water.

conflict, pursuant to Article 14 of the Second Additional Protocol. According to the ICRC, this prohibition has also become a requirement of customary law.<sup>57</sup>

The *Commentary* to the additional protocols notes that “the term ‘starvation’ is generally understood by everyone. To use it as a method of warfare would be to provoke it deliberately, causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies.”<sup>58</sup> It also notes the clear link between this rule and provisions concerning relief actions described above.<sup>59</sup> These provisions have also been strengthened by the codification of starvation as a prohibited method of war and as a war crime in the statute of the International Criminal Court.<sup>60</sup> Thus, the denial of access to food aid in conflict settings is clearly prohibited where it is likely to lead to starvation.

#### *Other Sources of Law on Humanitarian Assistance in Conflicts*

The duty of governments to provide and/or allow IDPs access to humanitarian assistance in situations of armed conflict has also been articulated in resolutions of the UN Security Council,<sup>61</sup> the General Assembly,<sup>62</sup> the Commission on Human Rights,<sup>63</sup> the International Conference of the Red

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<sup>57</sup> ICRC Customary Law Study, *supra* note 46, Rule 53 at 186.

<sup>58</sup> Additional Protocols Commentary, *supra* note 49, at 652.

<sup>59</sup> *Id.* at 1457.

<sup>60</sup> ICC Statute, *supra* note 45, art. 8.2(b)(xxv).

<sup>61</sup> U.N. Doc. No. S/RES/361 (1974), at ¶ 4; U.N. Doc. S/RES/688 (1991), at ¶ 5.

<sup>62</sup> U.N. Doc. No. A/RES/60/168 (2005), at ¶ 12; U.N. Doc. No. A/RES/58/177 (2004), at ¶ 11.

<sup>63</sup> Report of the High Commissioner for Human Rights on Human Rights and Mass Exoduses, Addendum, Thematic compilation of relevant reports and resolutions of the Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights, U.N. Doc. No. E/CN.4/2005/80/Add.1 (2005), at 11

Cross and Red Crescent,<sup>64</sup> and other bodies.<sup>65</sup> Many more such resolutions assert the general obligation to provide or allow humanitarian assistance to persons in need.<sup>66</sup>

*Sources Specific to Disasters*

There is no treaty relating to humanitarian issues in disasters comparable to the Geneva Conventions and their additional protocols. Those treaties that do exist focus on issues of facilitation and regulation of assistance, as discussed below. However, there are a number of “soft law” authorities pertinent to the right to humanitarian assistance in disasters. Some of these apply equally to disaster and conflict settings.

As in the laws of war, the primary instruments relevant to disasters emphasize the primary role and responsibility of states to provide humanitarian assistance. Thus, for instance, UN General Assembly Resolutions 46/182 of 1991, 45/100 of 1990, and 43/131 of 1988 all affirm the responsibility of each state “first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory.”<sup>67</sup> However, these instruments are also at pains to emphasize the sovereignty of the affected state vis-à-vis

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(citing U.N. Doc. Nos. E/CN.4/RES/2003/52, E/CN.4/RES/2000/55; E/CN.4/RES/2004/55; E/CN.4/RES/2003/51, E/CN.4/RES/2001/54; E/CN.4/RES/2000/53, E/CN.4/RES/2002/19, E/CN.4/RES/2001/19) [hereinafter Compilation].

<sup>64</sup> Principles and Action in International Humanitarian Assistance and Protection, Resolution 4 of the 26<sup>th</sup> International Conference of the Red Cross and Red Crescent Societies (1995), at 1(c).

<sup>65</sup> ICRC Customary Law Study, *supra* note 46, Vol. II, Part 2, at 2975-80.

<sup>66</sup> *Id.* Vol. II, Part 1, at 1189-1243.

<sup>67</sup> Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, G.A. Res. 46/182, U.N. GAOR, 78<sup>th</sup> plen. mtg., U.N. Doc. A/RES/46/182 (1991), annex, ¶ 4.

external aid providers. Thus, in contrast to the mandatory acceptance language of Article 59 of the Fourth Geneva Convention, Resolution 46/182 provides that “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.”<sup>68</sup> This is a consistent theme since the first General Assembly resolution on disasters was adopted in 1965.<sup>69</sup> These and other General Assembly resolutions have tended to refer to the “importance” rather than the “right” of humanitarian assistance in disaster settings.<sup>70</sup>

However, the same member states have not always been so coy. In 1995, the 26th International Conference of the Red Cross and Red Crescent (comprised of all components of the Red Cross/Red Crescent Movement as well as all state parties to the Geneva Conventions) amended (by consensus) its Principles and Rules for Red Cross and Red Crescent Disaster Relief to state, *inter alia*, that “[t]he Red Cross and Red Crescent...considers it a fundamental right of all people to both offer and receive humanitarian assistance.”<sup>71</sup> That same International Conference also “welcomed”<sup>72</sup> the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief,<sup>73</sup> which provides in Article 1 that “the right to receive humanitarian assistance, and to offer it, is a fundamental

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<sup>68</sup> *Id.* at ¶ 3.

<sup>69</sup> See Arjun Katoch, *International Natural Disaster Response and the United Nations*, in INTERNATIONAL DISASTER RESPONSE LAWS, PRINCIPLES AND PRACTICE: REFLECTIONS, PROSPECTS AND CHALLENGES (Victoria Bannon et al. eds., 2004).

<sup>70</sup> See U.N. Doc. Nos. A/RES/46/182 (1991), annex, ¶ 1; A/RES/45/150 (1990), ¶ 1; A/RES/43/131 (1988), ¶ 1.

<sup>71</sup> See Report of the Twenty-Sixth International Conference of the Red Cross and Red Crescent Societies (1995), annex IV, ¶ 2.1.

<sup>72</sup> *Id.* at 128.

<sup>73</sup> See Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, available at <http://www.ifrc.org/Docs/idrl/I259EN.pdf>.



humanitarian principle which should be enjoyed by all citizens of all countries.”

Similarly, participants at an international law conference organized by the State of Qatar and the inter-governmental Asian-African Legal Consultative Committee in 1994 declared that “the right of victims to humanitarian assistance should be reaffirmed as a basic human right. This right ensures respect for other basic human rights to life, health and protection against cruel and degrading treatment” and also “implies the right of access of victims to potential donors and access of qualified national and international organizations and other donors to the victims in conformity with the relevant international instruments.”<sup>74</sup> A general right to humanitarian assistance, whether in situations of conflict or disaster, has also been posited by declarations and similar documents by a number of prominent academic, legal, and humanitarian organizations.<sup>75</sup>

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<sup>74</sup> Doha Declaration on Priorities for Progressive Development of International Law in the United Nations Decade of International Law to Meet the Challenges of the 21<sup>st</sup> Century (Mar. 25, 1994), *reprinted in* American Society of International Law Newsletter No. 5 (June 1994), *available at* <http://www.lawschool.cornell.edu/library/asil/5qatar.htm>. *See also* The Secretary General, Report of the Secretary General on the United Nations Decade of International Law, ¶ 87, delivered to the Security Council and the General Assembly, U.N. Doc. No. A/49/323 (1994).

<sup>75</sup> Council of the International Institute of Humanitarian Law, Guiding Principles on the Right to Humanitarian Assistance, princ. 1 (Apr. 1993); Institute of International Law, *Resolution of the Institute of International Law on Humanitarian Assistance (Bruges Session 2003)*, art. II(2); *see generally* ISOBEL MCCONNAN, THE SPHERE PROJECT: HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN DISASTER RESPONSE (2000) [hereinafter the SPHERE PROJECT]; *see also* Jon M. Ebersole, *The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance*, 17 HUMAN RTS. QTRL 192, 195 (1995); Declaration of Minimum Humanitarian Standards, *reprinted in* Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995) [hereinafter *Turku Standards*]; International Law Institute, *The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*, art. 5, 63 INSTITUT DE DROIT INT'L ANNUAIRE 338 (1989).

*Sources Specific to Development*<sup>76</sup>

There are few international instruments specific to development-induced displacement, and most of those that do exist are focused on long-term resettlement issues. However, World Bank Operational Policy 4.12 on Involuntary Resettlement (the Policy) provides that any persons displaced by projects funded by the Bank should be assisted to “improve their standards of living” or at least to restore them to “pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher.”<sup>77</sup> Such displaced persons are also to be “meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs.”<sup>78</sup>

More closely related to the topic of this chapter, the Policy further notes that, immediately after displacement, affected persons should be provided with “assistance (such as moving allowances) during relocation,” and adequate alternative housing and, as appropriate, agricultural sites.<sup>79</sup> “Where necessary to achieve the purposes of the [resettlement policy]” they are also to receive “support after displacement, for a transition period, based on a reasonable estimate of the time likely to be needed to restore their livelihood and standards of living.”<sup>80</sup> Similar provisions on the care of persons post-

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<sup>76</sup> See chapter fifteen in this volume on development-induced displacement.

<sup>77</sup> World Bank Operational Policy on Involuntary Resettlement 4.12, ¶ 2(c) (2001), available at <http://www.chinaeol.net/wbi/chinacourse/documents/BP%204.12.pdf>.

<sup>78</sup> *Id.* at ¶ 2(b).

<sup>79</sup> *Id.* at ¶ 6(b).

<sup>80</sup> *Id.* at ¶ 6(c).

displacement can be found in the Involuntary Resettlement Policies of the Asian Development Bank<sup>81</sup> and the Inter-American Development Bank.<sup>82</sup>

In his 2007 report to the Human Rights Council, the Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living presented an expert-developed Basic Principles and Guidelines on Development-Based Evictions, which provides in relevant part that:

competent authorities shall ensure that evicted persons or groups, especially those who are unable to provide for themselves, have safe and secure access to: (a) essential food, potable drinking water and sanitation; (b) basic shelter and housing; (c) appropriate clothing; (d) essential medical services; (e) livelihood sources; (f) fodder for livestock and access to common property resources previously depended upon; and (g) education for children and childcare facilities.<sup>83</sup>

### **The Facilitation and Regulation of Humanitarian Assistance**

In both armed conflict and disaster settings, there are also international laws and standards specifically concerning the facilitation and regulation of humanitarian assistance. In the context of armed conflict, it is somewhat difficult to disentangle this obligation from the right to humanitarian assistance. In disaster settings, however, the distinction is easier to make as

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<sup>81</sup> See Asian Development Bank, *Involuntary Resettlement Policy*, ¶¶ 34(iii), VII (1995), available at [http://www.adb.org/Documents/Policies/Involuntary\\_Resettlement/involuntary\\_resettlement.pdf](http://www.adb.org/Documents/Policies/Involuntary_Resettlement/involuntary_resettlement.pdf).

<sup>82</sup> See Inter-American Development Bank, *Sectoral Operational Policy, Involuntary Displacement*, 10/98, IND-103 (1998), available at [http://www.iadb.org/sds/ind/publication/publication\\_138\\_102\\_e.htm](http://www.iadb.org/sds/ind/publication/publication_138_102_e.htm).

<sup>83</sup> The Special Rapporteur, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, ¶ 52, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) (prepared by Miloon Kothari).

most of the relevant instruments focus much more on the “how” of humanitarian assistance as opposed to whether it will be allowed.

### *Sources Specific to Armed Conflict*

As mentioned above, in the context of armed conflict, Article 23 of the Fourth Geneva Convention requires states to allow free passage of medical goods and some other items. Article 61 requires that relief consignments be “exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory” and that the occupying power “facilitate the[ir] rapid distribution[.]” It also calls on contracting parties to “endeavor to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories.”

Article 30 provides that “the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist” protected persons “shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.” It further provides that states must facilitate “visits to protected persons by the representatives of...organizations whose object is to give spiritual aid or material relief to such persons.” According to the *Commentary to the Fourth Geneva Convention*, these provisions mean that it is not enough for authorities to merely authorize relief work, they must also “facilitate and promote” it, for example through “the provision of facilities for delegates to move about and carry on correspondence, to have free access to all places where protected persons are living, transport facilities and facilities for distributing relief, etc.”<sup>84</sup>

This obligation is expressed more broadly in Article 70(2) of the First Additional Protocol, which states that “[t]he Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.” Likewise, Article 81 provides that the ICRC and

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<sup>84</sup> Commentary to GC IV, *supra* note 47, at 218.

national Red Cross and Red Crescent Societies, as well as other humanitarian organizations authorized to intervene, shall receive “all facilities within their power so as to enable [them] to carry out” their humanitarian functions pursuant to the Convention. The *Commentary on the First Additional Protocol* notes that:

[t]he intention of these words is to avoid any harassment, to reduce formalities as far as possible and dispense with any that are superfluous. Customs officials and the police in particular should receive instructions to this effect. The passage referred to may take place over land, water, or by air. However, the speed of the passage and whether it takes place unimpeded depends on local circumstances. Thus the obligation imposed here is relative: the passage of the relief consignments should be as rapid as allowed by the circumstances.<sup>85</sup>

While the Second Additional Protocol does not include specific language on facilitating access, the ICRC’s customary law study found enough practice to justify extending a requirement that, subject to a right of control, the “parties to the conflict must allow and facilitate rapid and unimpeded passage for humanitarian relief for civilians in need” to both international and internal conflicts.<sup>86</sup> It likewise specifically found that the parties to the conflict “must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions” subject only to temporary restrictions due to military necessity.<sup>87</sup>

As a corollary to these duties to facilitate humanitarian assistance and ensure freedom of movement of humanitarian personnel, international humanitarian law requires states to protect humanitarian personnel, goods, and equipment from attack and diversion from their intended beneficiaries. Article 70(3) and

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<sup>85</sup> Additional Protocols Commentary, *supra* note 49, at 823.

<sup>86</sup> ICRC Customary Law Study, *supra* note 46, Vol I, at 193-200.

<sup>87</sup> *Id.* at 200.

(4) of the First Additional Protocol provides that relief consignments shall not be diverted or delayed except “in cases of urgent necessity in the interest of the civilian population concerned” and must also be “protected.” Article 71(2) similarly provides that relief personnel shall be “protected and respected.”

No specific provisions of this kind are included in the Second Additional Protocol; however, the ICRC customary law study again found the above-described rules to be customary for both international and internal armed conflict.<sup>88</sup> This conclusion is buttressed by the protections for humanitarian personnel and objects articulated in the Convention on the Safety of United Nations and Associated Personnel of 1994<sup>89</sup> and the inclusion of deliberate attacks against “personnel, installations, material, units or vehicles involved in a humanitarian assistance” as a war crime in both international and internal armed conflict in the Rome Statute of the International Criminal Court.<sup>90</sup>

### *Sources Relevant to Disasters*

In the absence of a centralized treaty regime, international law on the regulation of humanitarian aid in disasters has appeared in a plethora of instruments. Many of these are bilateral treaties. However, there are also some important multilateral treaties and crucial “soft law” documents that help set the regulatory “stage” for humanitarian assistance in disaster settings.<sup>91</sup>

Relevant bilateral treaties range in subject matter from technical assistance to mutual assistance and agreements regulating humanitarian and/or recovery relief between the two state parties. The latter two categories tend to set out

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<sup>88</sup> *Id.* at 105-111.

<sup>89</sup> Convention on the Safety of United Nations and Associated Personnel, G.A. Res. 49/59, U.N. GAOR, 49<sup>th</sup> Sess., Agenda Item 141, U.N. Doc. A/RES/49/59 (1994), 34 I.L.M. 482 (1994).

<sup>90</sup> ICC Statute, *supra* note 45, arts. 8(2)(b)(iii), 8(2)(e)(iii), 8(2)(b)(xxiv), 8(2)(e)(ii).

<sup>91</sup> International Federation of Red Cross and Red Crescent Societies, INTERNATIONAL DISASTER RESPONSE LAWS, PRINCIPLES AND PRACTICE: REFLECTIONS, PROSPECTS AND CHALLENGES (Victoria Bannon et al. eds., 2003).

formal rules for the initiation and termination of assistance, require the designation of focal points on both sides for the exchange of relevant information, and set out modalities for instructions to emergency teams. They also “reflect a general intention to ensure that frontier-crossing formalities are minimized,” in particular with respect to visas and work permits for the assisting states’ relief personnel<sup>92</sup> and for customs controls on relief goods and equipment. Many bilateral treaties also require receiving states to assume liability for claims related to the assisting state’s assistance and some of them additionally require that assisting state personnel be provided with physical protection.

Some of the relevant multilateral treaties are specifically concerned with particular types of disasters. These include environmental treaties,<sup>93</sup> treaties concerning industrial or nuclear accidents,<sup>94</sup> and weapons control agreements.<sup>95</sup> Others are focused on a particular sector of assistance operations such as sea or air transport,<sup>96</sup> telecommunications,<sup>97</sup> satellite imaging,<sup>98</sup> health

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<sup>92</sup> Agreement between Denmark and the Federal Republic of Germany on Mutual Assistance in the Event of Disasters or Serious Accidents of 1985, art. 4.

<sup>93</sup> Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil and other Harmful Substances, art. 7, Official Journal of the European Communities, No. L 188/9 (July 16, 1984).

<sup>94</sup> Convention on the Transboundary Effects of Industrial Accidents, 2105 U.N.T.S. 460 (1992); Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1457 U.N.T.S. 134 (1986).

<sup>95</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, art. 8, 32 I.L.M. 804 (1993); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, art. 7, 26 U.S.T. 583 (1972).

<sup>96</sup> Convention on Facilitation of International Maritime Traffic, annex 1, sects. 5.11-5.12, 591 U.N.T.S. 265; 4 I.L.M. 502 (1965); Convention on International Civil Aviation of 1944, Annex 9, sect. 8.8, *reprinted in International Civil Aviation Organization, International Standards and Recommended Practices: Facilitation—Annex 9 to the Convention on International Civil Aviation* (12<sup>th</sup> ed., 2005).

emergencies,<sup>99</sup> civil defense,<sup>100</sup> food aid,<sup>101</sup> and customs.<sup>102</sup> At the regional level, mutual disaster assistance treaties have also been adopted in the Americas, Asia, and Europe.<sup>103</sup> The instruments with the broadest scope are non-binding recommendations, declarations, and guidelines, such as 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 International Conference of the Red Cross' Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations of

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<sup>97</sup> Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, June 18, 1998 [hereinafter Tampere Convention].

<sup>98</sup> Charter On Cooperation 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](http://www.disasterscharter.org/charter_e.html).

<sup>99</sup> Revised International Health Regulations, 58th World Health Assembly, Agenda Item 13.1, Doc. No. WHA58.3 (2005).

<sup>100</sup> Framework Convention on Civil Defense Assistance (2000), *available at* [http://untreaty.un.org/unts/144078\\_158780/16/2/7149.pdf](http://untreaty.un.org/unts/144078_158780/16/2/7149.pdf).

<sup>101</sup> Food Aid Convention of 1999, *available at* <http://untreaty.un.org/english/notpubl/notpubl.asp>. The 1999 version of the Food Aid Convention formally expired in 2003, but has been temporarily extended several times, most recently in 2005 for a two year period.

<sup>102</sup> International Convention on the Simplification and Harmonization of Customs Procedures, TIAS 6633 (1973) and its 1999 Protocol of Amendment, at annex J.5.

<sup>103</sup> Inter-American Convention to Facilitate Assistance in Cases of Disaster (1991); Agreement on Disaster Management and Emergency Response (2005) [hereinafter ASEAN Agreement]; 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 (1998).



1969.<sup>104</sup> Some of the human rights instruments mentioned above also have provisions related to the facilitation of disaster relief.<sup>105</sup>

While the resulting cohort of multilateral instruments is rather fragmented—both in terms of scope and geographic coverage, it is possible to discern many of the same themes addressed in the bilateral treaties discussed above, and in particular the primary concern with reducing barriers to the entry and efficient operation of international disaster relief actors, when they are needed, as highlighted by operative paragraph 6 of General Assembly Resolution 46/182: “States whose populations are in need of humanitarian assistance are called upon to facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines, shelter and health care, for which access to victims is essential.”

With regard to the entry of relief personnel, many of the relevant instruments accord with Recommendation E of the Measures to Expedite International Relief, which recommends “that all Governments waive requirements for transit, entry and exit visas for relief personnel acting in their official capacity as representatives of internationally-recognized relief agencies.”<sup>106</sup> Most of the relevant instruments also echo the 1970 Recommendation of the Customs Cooperation Council (predecessor to the World Customs Organization) that all states expedite and minimize customs inspections and documentation and to waive any otherwise applicable duties or restrictions on export, transit, or import of relief goods and equipment.<sup>107</sup> The Tampere Convention on the

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<sup>104</sup> Resolution XXVI, XXIst International Conference of the Red Cross (1969).

<sup>105</sup> See, e.g., Turku Standards, *supra* note 75, at ¶¶ 14-15.

<sup>106</sup> G.A. Res. 57/150, ¶ 3, U.N. Doc. A/RES/57/150 (Dec. 16, 2002); see also Tampere Convention, *supra* note 97, art. 9(2)(c); see generally International Federation of Red Cross and Red Crescent Societies, *Background Information Sheet: Entry of International Disaster Relief Personnel* (2006).

<sup>107</sup> Recommendation of the Customs Co-operation Council to expedite the forwarding of relief consignments in the event of disasters, Doc. No. T2-423 (1970). See generally, International Federation of Red Cross and Red Crescent Societies, *Background Information Sheet: International Standards on Customs and Disaster*

Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998 reiterates these principles with respect to telecommunications equipment and operating personnel, calling also for reduction of other regulatory barriers (such as licensing requirements) to the use of such equipment for disaster relief.<sup>108</sup> The Council of Europe's Agreement on the Temporary Importation, Free of Duty, of Medical, Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and other Medical Institutions for Purposes of Diagnosis or Treatment of 1960<sup>109</sup> contains parallel provisions with regard to medical equipment. Several instruments also call for the facilitation of transport of relief personnel, goods and equipment, particularly with regard to overflight, landing, and berthing rights.<sup>110</sup>

International protection for the security of disaster relief personnel took a step forward in 2005, when the General Assembly adopted the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel,<sup>111</sup> extending the original Convention's protections to peace building and "emergency humanitarian assistance" operations. The scope of this instrument is still rather limited, inasmuch as it only covers United Nations personnel and NGOs officially operating under agreement with the United Nations and

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*Relief* (2006), available at <http://www.ifrc.org/docs/pubs/idrl/idrl-visas-background.pdf>.

<sup>108</sup> See Tampere Convention, *supra* note 97.

<sup>109</sup> 376 U.N.T.S. 111 (1960), reprinted in Official Journal of the European Communities L 131, at 48-49 (May 17, 1986).

<sup>110</sup> See *supra* note 96 and accompanying text. See generally International Federation of Red Cross and Red Crescent Societies, *Background Information Sheet: Standards in Transport in International Disaster Operations* (2006), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp> [hereinafter IFRC Principles and Rights].

<sup>111</sup> U.N. Doc. No. A/C.6/60/L.11 (2005).

contains an express “opt out” clause with respect to natural disasters;<sup>112</sup> however, it sets a helpful precedent that security obligations can extend beyond the context of armed conflict.

The provisions of these instruments were recently reaffirmed at the 30th International Conference of the Red Cross and Red Crescent in 2007. At that conference, the state parties to the Geneva Conventions adopted a new set of non-binding *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (hereinafter the *IDRL Guidelines*)<sup>113</sup> designed to assist governments to integrate international norms and best practice on international relief into domestic law.

### *Sources Concerning the Quality of Aid*

International legal regulation of the quality of humanitarian assistance is rather weak. This has resulted from a combination of states’ reluctance to create legal frameworks that might be threatening to plenary control over their borders, and concern within the humanitarian community that any regulation of its activities could lead to a loss of independence and freedom of action.

The principles of humanity, impartiality, and neutrality are widely accepted as cornerstones of the quality of humanitarian action. They are codified for the Red Cross/Red Crescent Movement in its Fundamental Principles (found in its statutes) and have also been endorsed by the UN General Assembly as well as UN agencies.<sup>114</sup> They have also been incorporated in the most widely used documents on quality in the humanitarian community, the Code of Conduct of the Red Cross Red Crescent Movement and Non-Governmental Organizations in Disaster Relief,<sup>115</sup> drafted in 1994 and the *Sphere Project Humanitarian*

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<sup>112</sup> *Id.* at art. II(3).

<sup>113</sup> Resolution IV, XXXth International Conference of the Red Cross and Red Crescent Societies (2007).

<sup>114</sup> See IFRC Principles and Rights, *supra* note 110.

<sup>115</sup> Annex VI to the resolutions of the XXVIth International Conference of the Red Cross and Red Crescent Societies, Geneva, 1995.

*Charter and Minimum Standards in Disaster Response*, first published in 2000 and updated in 2004 (hereinafter the *Sphere Handbook*).<sup>116</sup> Although both refer to disaster in their titles, their text makes clear that they were meant for use both in disaster and conflict settings, and this has indeed been the practice. Both were created by humanitarian actors and are non-binding.

The Code sets out ten principles of conduct for aid organizations, calling on them to provide aid without discrimination, on the basis of need, without furthering a particular political, religious or governmental viewpoint, and in a manner respectful of the dignity, perspective and active role of beneficiaries and domestic relief actors. It also includes three annexes with recommendations for recipient state and donor governments and inter-governmental organizations to facilitate a propitious “working environment” for humanitarian assistance, including facilities for entry and operation of relief operations.

The *Sphere Handbook* includes a brief “charter” based on human rights, humanitarian and refugee law as well as a detailed set of quantitative and qualitative standards organized by sector, including water and sanitation, food, shelter and non-food items and health services. The Handbook makes clear that measures to increase the protection of beneficiaries are a crucial element of their quality, noting that “[t]he form of relief assistance and the way in which it is provided can have a significant impact (positive or negative) on the affected populations security.”<sup>117</sup> It therefore includes standards on issues such as prevention of sexual abuse and exploitation, and beneficiary registration.<sup>118</sup> Additional guidance on protection issues widely cited in the humanitarian community have been developed and/or adopted by the Inter-Agency Standing

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<sup>116</sup> SPHERE PROJECT, *supra* note 75.

<sup>117</sup> *Id.* at 12.

<sup>118</sup> *Id.*

Committee, a policy-making body of the United Nations (which also includes the participation of the ICRC, IFRC and several NGO networks).<sup>119</sup>

Another common theme of many of the documents and initiatives mentioned above is the importance of adequately informing and involving beneficiaries in the planning and execution of humanitarian assistance operations. This imperative is supported in the field of human rights by the right to receive information, as articulated by, inter alia, UDHR Article 19, ICCPR Article 19(2), AfCHPR Article 9, American Convention Article 13, and ECHR Article 10. The principles of the foregoing instruments were also reaffirmed in the recently adopted IDRL Guidelines, as discussed above.

Other important quality initiatives include the Principles and Practice of Good Humanitarian Donorship of 2003,<sup>120</sup> a donor document that mirrors the standards being developed by the humanitarian actors the Humanitarian Accountability Partnership International,<sup>121</sup> the Interaction PVO Standards,<sup>122</sup> the Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP),<sup>123</sup> and People in Aid.<sup>124</sup> These mechanisms

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<sup>119</sup> Protecting Persons Affected by Natural Disasters: IASC Operational Guidelines on Human Rights and Natural Disasters of 2006; Implementing the Collaborative Response to Situations of Internal Displacement: Guidance for UN Humanitarian Coordinators and Country Teams of 2004; Growing the Sheltering Tree: Protecting Rights Through Humanitarian Action of 2002; Plan of Action and Core Principles of Codes of Conduct on Protection from Sexual Abuse and Exploitation in Humanitarian Crisis of 2002, all *available at* <http://www.humanitarianinfo.org/iasc/>.

<sup>120</sup> Meeting Conclusions, International Meeting on Good Humanitarian Donorship, Stockholm, June 16-17, 2003.

<sup>121</sup> Humanitarian Accountability Partnership, <http://www.hapinternational.org>.

<sup>122</sup> InterAction, <http://www.interaction.org>.

<sup>123</sup> ALNAP, <http://www.alnap.org>.

<sup>124</sup> People In Aid, <http://www.peopleinaid.org>.

aim to increase understanding and effective evaluation of quality issues in humanitarian operations.

For the most part, the quality of disaster aid is not directly addressed in the major multi-lateral instruments on disaster relief. One exception is the Food Aid Convention, as revised in 1999, which sets out a number of progressive quality standards in the design and implementation of food aid operations.<sup>125</sup> The other is the Association of South East Asian Nations (ASEAN) Agreement on Disaster Management and Emergency Response of 2005, which provides that relief goods provided by relief providers under the treaty should “meet the quality and validity requirements of the Parties concerned for consumption and utilization.”<sup>126</sup> On the other hand, a number of bilateral treaties provide that relief personnel must be properly trained and qualified.<sup>127</sup>

#### *Sources Concerning the Treatment of Vulnerable Groups*

Another important aspect of the regulation of humanitarian assistance is the imperative to be responsive to the special needs of particularly vulnerable groups. This involves not only avoiding discrimination but also positive measures to ensure that they are not left out in relief operations.

Article 23 of the Fourth Geneva Convention specifically provides for free passage of “essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.” Moreover, Article 24 obliges parties to ensure the “maintenance” of children under fifteen who are orphaned or separated from their parents and Article 16 requires that “[t]he wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.”

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<sup>125</sup> The Food Aid Convention is one of two components of the International Grains Agreement of 1995, available at <http://www.igc.org.uk/en/downloads/brochure/iga1995.pdf>.

<sup>126</sup> ASEAN Agreement, *supra* note 103, art. 12(4).

<sup>127</sup> International Federation of Red Cross and Red Crescent Societies, *Background Information Sheet: International Standards of Quality in Disaster Relief* (2006), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

Article 70(1) of the First Additional Protocol adds that, “[i]n the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.” Other protections for women and children in particular are provided in Articles 76-78. Likewise, Article 4(3) of the Second Additional Protocol provides, as a “fundamental guarantee” of humane treatment that “[c]hildren shall be provided with the care and aid they require[.]” The ICRC has also found a more generalized customary norm of international law for both international and internal conflicts, that provides that children and “[t]he elderly, disabled and infirm” who are affected by armed conflict are “entitled to special respect and protection.”<sup>128</sup>

The CRC, CEDAW, African Children’s Charter, and other human rights instruments also call for positive measures to ensure that needs of children and women are met. The Compilation notes that General Comment No. 5 of the Committee on Economic Cultural and Social Rights<sup>129</sup> stated that the denial of reasonable accommodation on the basis of disability can negate the full enjoyment of economic, cultural, and social rights—and the rights of the elderly to be free of discrimination and to live in dignity and security has been recognized by the UN General Assembly.<sup>130</sup> More recently, the Committee on Economic Cultural and Social Rights has highlighted that priority in food aid and distribution of water in emergency situations should be given to the “most vulnerable or marginalized groups.”<sup>131</sup>

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<sup>128</sup> ICRC CUSTOMARY LAW STUDY, *supra* note 46, rules 135 & 138, at 489.

<sup>129</sup> U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 5, *Persons with Disabilities* (1994).

<sup>130</sup> United Nations Principles for Older Persons, princ. 18, U.N. Doc. A/RES/46/91 (1991); Compilation, *supra* note 63, ¶¶ 54, 57.

<sup>131</sup> See General Comment No. 12, *supra* note 21, ¶ 38; General Comment No. 15, *supra* note 25, ¶ 60.

In December 2006, the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities (the Disabilities Convention).<sup>132</sup> The Disabilities Convention entered into force on 3 May 2008 and presently has fifty states parties.<sup>133</sup> Article 11 of the Convention provides that “States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.”

The Sphere Handbook also identifies the needs of children, older people, and disabled people as well as gender issues as “cross-cutting issues” requiring special attention with regard to each sector of humanitarian assistance.<sup>134</sup> Similarly, in 2002, an international conference adopted the Madrid International Plan of Action on Ageing, which noted the particular vulnerabilities of the elderly in disaster and other emergency situations, and called upon states to take a number of specific measures to ensure them “[e]qual access...to food, shelter and medical care and other services.”<sup>135</sup>

## **OVERVIEW OF OBSTACLES TO THE IMPLEMENTATION OF THE GUIDING PRINCIPLES**

There are many common obstacles to the implementation of the provisions of the *Guiding Principles* and their underlying international law relevant to humanitarian assistance at the national level. Those in situations of armed conflict are the most obvious and familiar. They also tend to be the most acute, leading to intense deprivation and death in an alarming number of situations

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<sup>132</sup> G.A. Res. 61/106, U.N. Doc. No. A/RES/61/106 (Jan. 24, 2006).

<sup>133</sup> Status of ratifications and accessions as of 26 Mar. 2009. See the table at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=1&chapter=4&lang=en>.

<sup>134</sup> See SPHERE PROJECT, *supra* note 75, at 10-12.

<sup>135</sup> Madrid International Plan of Action on Ageing, *reprinted in* Report of the Second World Assembly on Ageing, U.N. Doc. No. A/CONF.197/9, ¶¶ 55, 56 (2002).



around the world. However, important obstacles to obtaining humanitarian assistance also exist with regard to disaster- and development-induced displacement, ranging from outright denial to more subtle legal, regulatory, and logistical barriers that delay or impede the effectiveness of relief.

## **Obtaining Humanitarian Assistance**

### *From All Providers*

Several common obstacles arise regardless of the source from which IDPs seek humanitarian assistance.

### Violence and Intimidation against IDPs

Violence and intimidation often impede IDPs from obtaining humanitarian assistance in conflict and post-conflict settings. In some cases, they are blocked from traveling to distribution points by order of an armed party, or by fighting, lawlessness, or other hazards (such as landmines or unexploded ordnance) in the area.<sup>136</sup> Sexual violence is a particular risk and barrier for many displaced women and girls.<sup>137</sup> In others, they are reluctant to accept assistance from one side in the fighting for fear of direct reprisal by the other or of inviting greater military involvement in their community, with its accompanying risks of abuses and/or attracting attack.<sup>138</sup> This is particularly

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<sup>136</sup> Internal Displacement Monitoring Centre, *Somalia: Window of Opportunity for Addressing One of the World's Worst Internal Displacement Crises* (Jan. 10, 2006).

<sup>137</sup> Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2005, 2006* INTERNAL DISPLACEMENT MONITORING CTR. 26 [hereinafter IDMC Global Overview].

<sup>138</sup> Representative of the Secretary-General, *Report of the Representative of the Secretary-General on Internally Displaced Persons*, submitted pursuant to Commission on Human Rights resolution 2002/56: Addendum Profiles in Displacement: Mexico, ¶ 26, U.N. Doc. No. E/CN.4/2003/86/Add.3 (2003); see also Project Counseling Services, *Deteriorating Bogota: Displacement and War in Urban Centers* (Dec. 2002).

common when camps and other places of refuge have become militarized by one of the parties to the conflict.

The same problem arises with regard to assistance from humanitarian organizations when they are perceived by one side of a conflict as favoring the other, or when it appears to be in the military interest of a party to weaken a portion of the population. IDPs may also hesitate to openly receive assistance from any source for fear that it will lead to attack by armed forces seeking to appropriate the aid for themselves.

### Inaccessibility and Lack of Information

IDPs affected by disaster and conflict are often geographically remote from national capitals where both national and international aid operations tend to be based, making them difficult to reach. Another important logistical challenge occurs when IDPs are difficult to locate—for instance if they are nomadic, dispersed in the homes of families or friends, or merging into pre-existing migration streams, such as to urban areas.<sup>139</sup>

Lack of information can be an important barrier both with regard to IDPs and aid providers. Where IDPs are not adequately informed about available assistance they do not know to seek it out. For providers, reliable data on the location, numbers, and needs of IDPs is frequently unavailable and difficult to obtain. Likewise, baseline population data is inadequate or sorely outdated in many countries, greatly complicating the process of determining and planning for humanitarian needs.<sup>140</sup>

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<sup>139</sup> Internal Displacement Monitoring Centre, *Armenia: General Lack of Attention Given to People Displaced as a result of the Conflict* (2000), available at <http://www.internal-displacement.org>; *Ethiopia: Poor Communication Hampering Flood Response*, REUTERS (Aug. 16, 2006), available at <http://www.alertnet.org>.

<sup>140</sup> Les Roberts & Charles-Antoine Hoffman, *Assessing the Impact of Humanitarian Assistance in the Health Sector*, 1 EMERGING THEMES IN EPIDEMIOLOGY 3 (2004), available at <http://www.pubmedcentral.gov>.

## Discrimination

Discrimination is a major barrier to some IDPs in obtaining humanitarian assistance. In some cases, it is an overt element of official policy. More often, however, discriminatory results occur in humanitarian assistance operations notwithstanding facially neutral policies, due to the ways in which they are carried out. Thus, for example, a human rights assessment of the response to the 2004 tsunami by ActionAid identified numerous instances of discrimination against ethnic minorities, migrants, and other disfavored populations by both governments and humanitarian organizations.<sup>141</sup> Likewise, a UN survey found that persons displaced by the tsunami in Indonesia received much less humanitarian assistance if they were living with host communities rather than government-run camps, but that the tsunami-affected overall received much more assistance than the conflict displaced.<sup>142</sup>

## Vulnerable Groups

Women, children, elderly, and disabled persons have traditionally found it more difficult to access humanitarian assistance. Displaced women and girls face high rates of sexual violence, limiting their ability to travel to receive aid. Moreover, sexual exploitation of IDP women and girls by both domestic and international providers of assistance in so-called “food for sex” schemes is disturbingly common.<sup>143</sup> In general, according to UNICEF, “displaced women and girls are worse off than men: they receive an unequal ration of food, eat

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<sup>141</sup> ActionAid, *Tsunami Response: A Human Rights Assessment*, at 49-52 (Jan. 2006), available at [http://www.reliefweb.int/library/documents/2006/tsunami\\_HR01.pdf](http://www.reliefweb.int/library/documents/2006/tsunami_HR01.pdf).

<sup>142</sup> Office of the United Nations Recovery Coordinator for Aceh and Nias, *Sample Survey on IDPs Living with Host Communities: Findings and Analysis* (2006), available at <http://www.internal-displacement.org>.

<sup>143</sup> IDMC Global Overview, *supra* note 137, at 27; Save the Children U.K., *From Camp to Community: Liberia Study on Exploitation of Children* (2006).

less and eat last.”<sup>144</sup> Female-headed households also tend to receive lesser allocations of food in emergency situations, particularly when distribution systems are controlled by men.<sup>145</sup> They also suffer particularly low rates of participation in the planning and execution of assistance operations.<sup>146</sup>

The special needs of the elderly and disabled tend to be forgotten in emergency situations. For instance, HelpAge International has noted that the elderly may have more difficulty sourcing fuel and water, greater difficulty accepting donated clothes different from those they traditionally wear, limited mobility (and ability to stand in queues, for instance), problems digesting some foods (due to general and dental health issues), and greater need for medicines and health services.<sup>147</sup>

### Corruption and Fraud

The social disruption caused by a disaster or armed conflict can greatly exacerbate the problem of corruption.<sup>148</sup> Programs to distribute humanitarian assistance to IDPs can become targets of those seeking to divert funds for their private gain. There has been little systematic study of this problem; however, it is generally recognized among humanitarians that external corruption is an important drain on their resources and a factor undermining the image of their operations both with beneficiaries and donors. At the same time, false

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<sup>144</sup> See Judy A. Benjamin & Khadija Fancy, *The Gender Dimensions of Internal Displacement: Concept Paper and Annotated Bibliography*, 1998 WOMAN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN 21.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 23.

<sup>147</sup> Helpage International, *Older People in Disasters and Humanitarian Crises: Guidelines for Best Practice* (2005), at 4.

<sup>148</sup> Barnaby Willitts-King & Paul Harvey, *Managing the Risks of Corruption in Humanitarian Relief Operations* (Overseas Development Institute, 2005), at 13, available at <http://www.adb.org/Documents/Events/2005/Tsunami-Relief/harvey.pdf>.

accusations of corruption can also be a potent political weapon against government or non-governmental aid providers.<sup>149</sup>

Corruption risks appear at every stage of the humanitarian process, from needs assessment to procurement and distribution.<sup>150</sup> At the same time, as experienced humanitarian organizations are well aware, applicants for aid also resort to fraud, for example, by falsely claiming displaced status and/or filing double claims.<sup>151</sup>

### Lack of Consultation

The primary dilemma with regard to implementing the *Guiding Principles* is the traditional lack of influence of beneficiaries. IDPs and other consumers of humanitarian assistance do not normally pay for the products and services they receive and thus have little influence over providers. While recent years have seen a great deal of discussion and new initiatives within the humanitarian community to increase consultation of beneficiaries in program planning and execution, recent evaluations of the sector indicate that real participation is still rare.<sup>152</sup> Most importantly, many IDPs lack any accessible mechanism to address complaints about problems with the assistance they receive.

### Lack of Coordination

The lack of coordination of domestic and international relief providers is among the most difficult problems in humanitarian assistance. Within governments, many ministries and departments may be involved in assistance

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<sup>149</sup> Pete Evans et al. for Transparency International, *Mapping the Risks of Corruption in Humanitarian Action* (2006), 67.

<sup>150</sup> *Id.* at 3.

<sup>151</sup> *Id.* at 66.

<sup>152</sup> TEC Synthesis Report, *infra* note 186, at 10; Humanitarian Accountability Partnership International, *Humanitarian Accountability Report 2005 11* (2006) [hereinafter Humanitarian Accountability Report], available at <http://www.hapinternational.org>.

operations for IDPs, as well as multiple branches of national government and local and provincial authorities, and it is still rare for countries to have comprehensive IDP policies. Thus, for instance, the Internal Displacement Monitoring Centre (the IDMC) reported that, in Cote d'Ivoire, where more than 700,000 persons have been internally displaced by internal conflict between 2002 and 2006, there was "no central government coordination mechanism for humanitarian response and no state body with overall responsibility for IDPs."<sup>153</sup> The same is reportedly true in forty-two out of the fifty-two countries monitored by the IDMC.<sup>154</sup>

Likewise, there are many states that either lack comprehensive national legislation and/or policy on disaster response, or whose institutional arrangements have proven too weak to handle the pressure of a major disaster. For instance, when the Pakistan earthquake struck on October 8, 2005, Pakistan lacked a disaster management agency or policy and new institutions and plans had to be created immediately to respond to the nation's worst natural calamity.<sup>155</sup>

Moreover, few governments have well-adopted and centralized systems for registering, monitoring, and facilitating the work of international humanitarian organizations. International actors thus frequently find that they seek assistance and permission of various types from multiple bureaus and officials who are not necessarily in communication or agreement with each other.

For its part, the international humanitarian community's mechanisms of coordination also have weaknesses.<sup>156</sup> Governments of affected states have often complained about the failure to respect their overall coordination role,

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<sup>153</sup> Internal Displacement Monitoring Centre, *Cote d'Ivoire: Need for Coherent Response* (2006), available at <http://www.internal-displacement.org>.

<sup>154</sup> See IDMC Global Overview, *supra* note 137, at 17.

<sup>155</sup> F.A. Khan, *The Response to the Earthquake in Pakistan: The View from the Federal Relief Commission*, 34 HUMANITARIA EXCH. 2 (2006).

<sup>156</sup> Constanza Adinolfi et al., *Humanitarian Response Review* (2005).

the changing mandates and activities of international actors, and the unrealistic expectations and demands placed on government agencies, particularly at the local level.<sup>157</sup>

### *Problems Specific to Obtaining Assistance from the Government or Other Relevant Authorities*

#### Blanket Denials

The failure to obtain support from the government or other duty-bearing party sometimes results from a refusal to acknowledge any obligation towards the displaced. This is particularly common where the government or an insurgent group is the cause of displacement in a conflict setting. Many insurgent groups, and even some government forces, directly prey on civilian populations rather than providing them with the sorts of assistance contemplated by international humanitarian law. According to IDMC, IDPs received insufficient or no humanitarian aid from their governments in three-quarters of the situations where humanitarian needs existed due to conflict in 2005, affecting nearly six million persons.<sup>158</sup>

Blanket denials of assistance also occur in some development-induced displacement settings—particularly when the displaced lack formal title to their land.<sup>159</sup> For instance, in May 2005, the Government of Zimbabwe launched a “clean up exercise” called Operation Murambatsivina, evicting the residents of fifty-two informal settlements and demolishing their homes,

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<sup>157</sup> See Piero Calivi-Parsett, *International Disaster Response Law Project: Report on Findings from South Asia, Southern Africa and Central America*, Mar. 2003, at 17, available at <http://www.ifrc.org/idrl>.

<sup>158</sup> See IDMC Global Overview, *supra* note 137, at 16.

<sup>159</sup> Courtland Robinson, *Risks and Rights: The Causes, Consequences and Challenges of Development-Induced Displacement*, Brookings Institution-SAIS Project on Internal Displacement Occasional Paper (2003).

eventually resulting in the displacement of over 569,000 persons.<sup>160</sup> As a result, it was reported that “[m]ost did not have enough food to feed their families and many families could not afford to send their children to school anymore.”<sup>161</sup> Nevertheless, the Government reportedly provided no humanitarian assistance.<sup>162</sup>

### Lack of Allocated Resources and Capacity

In many cases of massive displacement, governments make at least some effort to provide assistance to displaced persons. However, the result is often inadequate to meet the needs due to a lack of allocated resources or capacity. This problem is often acute in the cases of sudden, massive displacement, such as in the wake of a sudden-onset disaster—by which a government’s own personnel and infrastructure may be as deeply affected as the general population. For example, the December 26, 2004 tsunami that displaced over 566,000 in Aceh, Indonesia, also dealt over USD 80 million in damage to the regional government, with over 21 percent of its personnel directly affected, and 21 percent of public buildings and 19 percent of publicly-owned equipment destroyed.<sup>163</sup>

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<sup>160</sup> Internal Displacement Monitoring Centre, *Zimbabwe: Government Obstructs Humanitarian Access to Displaced as New Evictions Loom*, May 5, 2006 [hereinafter IDMC Zimbabwe Report], available at <http://www.internal-displacement.org>.

<sup>161</sup> International Federation of Red Cross and Red Crescent Societies, *Interim Final Report: Assistance to the Population Affected by the ‘Clean-up’ Exercise*, Appeal No. 05E016 (July 31, 2006) [hereinafter Federation Zimbabwe Report], available at <http://www.ifrc.org>.

<sup>162</sup> *Id.*; see also IDMC Zimbabwe Report, *supra* note 160.

<sup>163</sup> BAPENAS, *Indonesia: Preliminary Damage and Loss Assessment—The December 26, 2004 Natural Disaster* (Jan. 2005), at 64; Elisabeth Scheper, Arjuna Parakrama, Smruti Patel, *Impact of the Tsunami Response on Local and National Capacities* (Tsunami Evaluation Coalition, 2006), 23 [hereinafter TEC Local and National Capacities Report].



Governments also lack the resources adequately to respond in many situations of chronic displacement. Nearly half of the states monitored by the IDMC are included on the UN's list of "least developed countries."<sup>164</sup>

In some cases, however, the scarcity of domestic funds for assistance programs may be at least partially attributed to political decisions with regard to budgeting. For example, although the Ugandan government adopted a progressive national policy on the assistance, protection, and rehabilitation of IDPs in February 2005, it had reportedly failed to allocate any budgetary resources to implement it as of March 2006.<sup>165</sup> Similarly, a January 2004 judgment of the Colombian Constitutional Court held that the Colombian government had violated the constitutional and statutory rights of IDPs by failing to allocate adequate resources to their assistance and protection.<sup>166</sup>

Moreover, capacity-related problems do not only arise in developing countries. As a "lessons learned" report of the United States federal government acknowledged in February 2006, government relief efforts failed, mainly for institutional reasons, to adequately meet urgent needs for food, water, ice, and other necessities of persons displaced by Hurricane Katrina in August 2005.<sup>167</sup>

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<sup>164</sup> See IDMC Global Overview, *supra* note 137, at 78-79; United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, *List of Least Developed Countries*, available at <http://www.un.org/special-rep/ohrlls/ldc/list.htm>.

<sup>165</sup> Internal Displacement Monitoring Centre & Refugee Law Project, 'Only Peace Can Restore the Confidence of the Displaced'—Update on the Implementation of the Recommendations made by the UN Secretary-General's Representative on Internally Displaced Persons following his visit to Uganda, at 18-19 (Mar. 2006) [hereinafter IDMC Uganda Update].

<sup>166</sup> Corte Constitucional de Colombia, Sentencia N° T—025/04. Abel Antonio Jaramillo y otros v Red de Solidaridad Social y otros (2004).

<sup>167</sup> United States Department of Homeland Security, *The Federal Response to Hurricane Katrina: Lessons Learned*, 44-45 (Feb. 2006), available at <http://www.whitehouse.gov/reports/katrina-lessons-learned>.

In some cases, the question of capacity is related to the level of government. In many countries, local and provincial governments are delegated great responsibility for emergency response and humanitarian assistance, but control over the majority of public revenue is in the hands of national governments and is not disbursed consonant with the former responsibilities.<sup>168</sup>

### Lack of Documentation

Another common barrier to obtaining humanitarian aid from governments is the lack of identity or other necessary personal documents. In some countries, a high percentage of the entire population lack identity documents. For those who have such documents, they are frequently lost or destroyed in the process of displacement.

### *Problems Specific to Obtaining Assistance from Humanitarian Organizations*

#### Refusal of Entry, Restricted Movement, and Expulsion

Sometimes, governments and/or rebel groups refuse to allow the entry and/or free movement of humanitarian assistance organizations to assist IDPs. For example, the United Nations Emergency Relief Coordinator accused the Israeli military of severely restricting humanitarian access for over a month after its incursion into Lebanon beginning on July 12, 2006.<sup>169</sup> The IDMC reported that governments had restricted humanitarian access in one quarter of the countries it monitored in 2005.<sup>170</sup> In other cases, international humanitarian

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<sup>168</sup> Comisión Colombiana de Juristas, *Principales preocupaciones sobre el decreto 2131 de julio 2003 para el disfrute del derecho a la salud y a la atención médica de la población desplazada* (2003), at 3, available at <http://www.internal-displacement.org>.

<sup>169</sup> *UN Attacks Lebanon Aid 'Disgrace,'* BBC News, Aug. 10, 2006, available at [http://news.bbc.co.uk/2/hi/middle\\_east/4778591.stm](http://news.bbc.co.uk/2/hi/middle_east/4778591.stm).

<sup>170</sup> See IDMC Global Overview, *supra* note 137, at 16.

organizations, particularly NGOs, already in the country have been expelled or threatened with expulsion for their activities and/or statements.<sup>171</sup>

### Technical Entry Problems

Even where international assistance has been officially requested by a government, technical barriers can intervene to block or delay its entry. One such barrier is obtaining necessary visas and working permits for international personnel.<sup>172</sup> Another obstacle is customs clearance of relief goods and equipment. Particularly in sudden-onset situations, relief consignments are frequently blocked in customs due to slow procedures, ambiguous regulations, the need for approval by multiple ministries, an influx of inappropriate and/or insufficiently documented aid shipments, and lack of inspection capacity. A further frequent issue is whether, and to what extent, customs duties and other charges will be imposed on relief goods and equipment.<sup>173</sup>

### Problems with Originating and Transit States

A lesser known aspect of the problem of access begins well before humanitarian organizations reach the borders of the affected state. Obstacles range from deliberate sanctions regimes to every-day visa and customs rules ill-suited to facilitating emergency transit. Sanctions regimes, whether

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<sup>171</sup> Internal Displacement Monitoring Centre, *Eritrea: Uncertain Future for Thousands of Returning IDPs* (June 13, 2006), available at <http://www.internal-displacement.org>; *Niger says no Food Crisis, Threatens to Expel NGOs*, REUTERS, Nov. 29, 2005, available at <http://www.reliefweb.int>.

<sup>172</sup> International Federation of Red Cross and Red Crescent Societies, *Report on the European Forum in International Disaster Response Laws, Rules and Principles, Antalya, Turkey, May 25-26, 2006*, at 3, available at <http://www.ifrc.org/idrl> [hereinafter European IDRL Forum Report].

<sup>173</sup> Internal Displacement Monitoring Centre, *Angola: Relief Food Held up by Bureaucratic Obstacles*, Oct. 2002, available at <http://www.internal-displacement.org>; *Oxfam Pays \$1 million Tsunami Aid Duty*, BBC NEWS, June 17, 2005, available at [http://news.bbc.co.uk/2/hi/south\\_asia/4103054.stm](http://news.bbc.co.uk/2/hi/south_asia/4103054.stm).

originating from the multilateral or national level, can block or greatly delay the delivery of aid, even though exemptions for humanitarian assistance are generally allowed. As noted in a 1998 expert conference on sanctions hosted by the Overseas Development Institute:

The case studies illustrated that exemptions policies use too restricted definitions of what is required for “humanitarian” purposes. Vaccines may be allowed but cold chain equipment or educational materials not. Certain medicines may be exempted but the water and sanitation infrastructure of the country is allowed to collapse, because pumps, spare parts, chlorine and generators are embargoed as supposedly non-humanitarian or potentially “dual-use” items. But maintaining or restoring health in large populations requires more than basic medicines.<sup>174</sup>

Similarly, a 1999 report on sanctions by OCHA noted other examples, including how regional embargoes on Burundi and Sierra Leone, approved by the Security Council, delayed the importation of food, seeds, fertilizers, and fuel for the distribution of humanitarian relief for months.<sup>175</sup>

In the United States, past sanctions against Iraq, North Korea, and other countries have restricted the action of American humanitarian NGOs.<sup>176</sup>

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<sup>174</sup> Koenrad Van Brabant, *Can Sanctions be Smarter? -- The Current Debate: Report of an Overseas Development Institute Conference held in London, 16-17 Dec. 1998*, at 25 (1999), available at <http://www.odihpn.org/pdfbin/sanconf.pdf>.

<sup>175</sup> Claude Bruderlein, *Coping with the Humanitarian Impact of Sanctions: An OCHA Perspective* (UN Office of Humanitarian Affairs, 1999), available at [http://www.reliefweb.int/ocha\\_ol/pub/sanctions.html](http://www.reliefweb.int/ocha_ol/pub/sanctions.html).

<sup>176</sup> International Rescue Committee, *American Aid Groups Are Being Shut Out of Iraq by U.S. Sanctions, says International Rescue Committee; President Bush Could Fix Problem With Stroke of a Pen* (2003), available at [http://www.theirc.org/news/american\\_aid\\_groups\\_are\\_being\\_shut\\_out\\_of\\_iraq\\_by\\_us\\_sanctions\\_says\\_international\\_rescue\\_committee\\_president\\_bush\\_could\\_fix\\_problem\\_with\\_stroke\\_of\\_a\\_pen.html](http://www.theirc.org/news/american_aid_groups_are_being_shut_out_of_iraq_by_us_sanctions_says_international_rescue_committee_president_bush_could_fix_problem_with_stroke_of_a_pen.html); Report of the Church World Service and Witness

Additional restrictions have impeded American NGOs from exporting necessary equipment for use in the field.<sup>177</sup>

Transit states also sometimes erect barriers, particularly to aid from disfavored sources. For instance, Pakistan was accused in 2006 of blocking transit of shipments of aid from India to Afghanistan.<sup>178</sup> Obtaining overflight permission for humanitarian purposes has also been a problem over time.<sup>179</sup>

Visa restrictions in neighboring states may also obstruct humanitarian aid. In April 2004, the Government of Kenya ceased accepting Somali passports after the reported discovery of a significant number of such passports “pre-stamped” with fraudulent Kenyan entry visas.<sup>180</sup> As the hub of many humanitarian agencies intervening in Somalia, Nairobi thus became off limits to Somali staff, significantly hampering operations.

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[CWSW] Unit Committee Study Group on the Humanitarian Impact of Economic Sanctions: Implications for the Ministry of Church World Service and Witness (1998), available at <http://www.nccusa.org/98ga/sanctpol.html>.

<sup>177</sup> United States Department of Commerce Bureau of Industry and Security, *2005 Report on Foreign Policy-Based Export Controls*, Appendix I: Summary of Public Comments on Foreign Policy Export Controls (Nov. 16, 2004 Comment of Interaction), available at <http://www.bis.doc.gov/PoliciesAndRegulations/05ForPolControls/AppendixI.htm>.

<sup>178</sup> *Transit Denial by Pak Hampering Afghan Reconstruction*, Islamic Republic News Agency, Aug. 9, 2006, available at <http://www.irna.ir/en/news/view/menu-236/0608097142181634.htm>.

<sup>179</sup> *Sudan Refuses Overflight Rights for Humanitarian Chief to visit Chad*, AFP, Apr. 4, 2006, available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/VBOL-6NJGBH?OpenDocument>; Mohamed el Baradei, *Model Rules for Disaster Relief Operations*, at 29-30 (1982).

<sup>180</sup> Internal Displacement Monitoring Centre, *Symptoms of Complex Emergencies Hamper Humanitarian Work in Most of Southern and Central Somalia* (2004), available at <http://www.internal-displacement.org>.

## Insecurity and Attacks on Humanitarians

In conflict settings, insecurity is usually the largest barrier to humanitarian organizations seeking access to provide assistance to IDPs. For instance, nearly one-half million needy persons in Darfur were out of the reach of international humanitarian assistance due to insecurity in August 2006.<sup>181</sup> Increasingly, aid workers are also direct targets of combatants,<sup>182</sup> as demonstrated by murders in Sudan and Sri Lanka.<sup>183</sup> Insecurity can also be an issue in disaster settings when the rule of law is not assured.

## Domestic Legal Personality

Difficulties obtaining domestic legal personality are a substantial problem for NGOs and national Red Cross or Red Crescent Societies responding internationally to disasters, leading to delay and additional expense in their aid operations.<sup>184</sup> In most countries, the time required for formal registration under domestic law is substantial. Thus, the emergency operations of foreign organizations not already present in a country are often carried out in a situation of at least ambiguous legality.

## Scarcity/Proliferation of Responders

The flip side of the access issues discussed above comes from the supply side of international humanitarian assistance. First, in many major displacement situations, international funding and actors are extremely scarce. IDMC has noted ten major IDP situations worldwide where in 2005 the UN was not

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<sup>181</sup> Office for the Coordination of Humanitarian Affairs, *Sudan: Half a Million Darfurians Cut off from Aid*, Aug. 16, 2006, available at <http://www.reliefweb.int>.

<sup>182</sup> *Aid by Numbers: Violence is Top Cause of Aid Worker Deaths*, REUTERS, Feb. 8, 2006, available at <http://www.alertnet.org/thefacts/reliefresources/113941858325.htm>.

<sup>183</sup> *Global Aid Workers Walking a Tricky Tightrope*, REUTERS, Aug. 9, 2006, available at <http://www.alertnet.org/thenews/newsdesk/COL213773.htm>.

<sup>184</sup> European IDRL Forum Report, *supra* note 172, at 4.

involved in providing assistance or protection to IDPs.<sup>185</sup> On the other hand, in some high-profile disasters, a proliferation of international actors has greatly impaired coordination, encouraged duplication and competition, increased costs, impeded the delivery of needed aid, and increased the incidence of inappropriate types of aid.<sup>186</sup> For example, after the December 2004 tsunami, it was reported that there were twenty-two medical NGOs working in the health sector on one part of the west coast of Aceh, eighty-five working on shelter, and more than sixty working in education.<sup>187</sup> In disaster settings, many governments have been unable or unwilling to track, monitor, and coordinate the work of so many actors.

### Unneeded, Unprofessional and Inappropriate Assistance

Related to the issue of proliferation of actors is the growing phenomenon of unneeded, unprofessional and/or inappropriate aid. This problem is closely linked with media attention to disaster situations: the so-called “CNN effect.” In response to high-profile disasters, governments and international humanitarian actors sometimes vie with each other to publicly “plant their flag” with a sponsored project in the affected country, leading to supply-driven aid. Greater public attention also tends to mobilize inexperienced actors unfamiliar with humanitarian operations and local conditions. While this problem is more common in disaster settings, it has also been reported in some conflict situations.<sup>188</sup>

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<sup>185</sup> See IDMC Global Overview, *supra* note 137, at 19.

<sup>186</sup> John Telford & John Cosgrave, *Joint Evaluation of the International Response to the Indian Ocean Tsunami: Synthesis Report*, TSUNAMI EVALUATION COAL., at 55-61 (2006) [hereinafter TEC Synthesis Report].

<sup>187</sup> *Id.* at 56.

<sup>188</sup> Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, *International Response to the Conflict and Genocide: Lessons from the Rwanda Experience—Synthesis Report*, at 29 (Mar. 1996).

## SUBSTANTIVE AND PROCEDURAL ELEMENTS OF STATE REGULATION

What are governments to do in light of these varied and serious obstacles? Legislation is plainly not a complete answer, but there are some legal steps that can make an important difference.

### During Displacement

#### *Domestic Right to Humanitarian Assistance*

Domestic law should clearly provide all civilians—whether displaced or not—with the right to assistance in case of humanitarian need. This may be partially accomplished through incorporating the human rights to an adequate standard of living and health into national law. Many states have taken long strides down this path. For example, twenty states have reportedly enshrined the right to food in their national constitutions and at least thirteen have similarly codified the right to health (or at least a state duty to provide health care).<sup>189</sup> However, it is also important to separately articulate and elaborate upon an entitlement (whether in constitutional, statutory, or other law) to humanitarian assistance in crisis situations, such as armed conflict and disaster, because of the peculiar exigencies of these circumstances. A good example is Indonesia's recently-adopted law on disaster management, which provides that “every person affected by a disaster is entitled to assistance fulfilling basic needs.”<sup>190</sup>

While the right to assistance is independent of the cause of displacement, national law should also clearly provide that when the state itself displaces civilians (e.g. for military or development reasons), it must provide them with

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<sup>189</sup> Food and Agricultural Organization, *Focus—Food: A Fundamental Human Right*, available at <http://www.fao.org/FOCUS/E/rightfood/right7.htm>; Iain Byrne, *Making the Right to Health a Reality: Legal Strategies for Effective Implementation*, Paper presented at the Commonwealth Law Conference (Sept. 2005), available at <http://www.interights.org/doc/health%20paper.doc>.

<sup>190</sup> Law Concerning Disaster Management, arts. 1(1), 26(2), adopted Mar. 31, 2007 (Indonesia) (unofficial translation on file with Author).



adequate food, clothing, medical care, and other humanitarian needs. Many military manuals already provide for this in the conflict context.<sup>191</sup>

Laws and regulations implementing the right to assistance should be made as concrete as possible, without sacrificing all flexibility, in order to ensure transparency and equity in distribution. For example, Article 23 of the Japanese Disaster Relief Act of 1947 (as amended in 1985) provides that prefectural governors shall ensure, among other things:

- 1) Provision of accommodations (including emergency temporary housing);
- 2) Distribution of cooked rice and other foods, supplies of drinking water;
- 3) Distribution and/or loan of clothing, bedding, and other basic necessities;
- 4) Medical and natal care;
- 5) Rescue of disaster victims;
- 6) Emergency repairs of housing subject to disaster;
- 7) Distribution and/or loan of funding, equipment, and materials required to maintain livelihoods;
- 8) Distribution of school supplies
- 9) Interment;
- 10) Other matters in addition to those in the preceding sub-paragraphs as specified by government ordinance.<sup>192</sup>

With even greater detail, the Thai Ministry of Finance has issued a very detailed set of Criteria and Practice of Providing Assistance for Disaster Victims in Case of Emergency setting forth rules and amounts of cash assistance to be provided to victims of natural disasters, with precise amounts to cover meals, kitchen utensils, purchase of clean water, bedding, soap, washing powder, toothpaste, buckets, gasoline, and a great number of other items—but also including a savings clause stating that “[i]n case it is

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<sup>191</sup> See ICRC CUSTOMARY LAW STUDY, *supra* note 47, Vol. II, Part 2, 2972-73.

<sup>192</sup> Disaster Relief Act of 1947 (Law No. 108; October 18, 1947), as amended on December 25, 1984, available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

necessary to provide assistance beyond these criteria and practice, an approval should be sought from the Ministry of Finance.”<sup>193</sup>

The right to humanitarian assistance should also be understood to encompass the right to request assistance from humanitarian organizations or other parties without fear of reprisal. In occupied territory, this must include the right to directly solicit assistance from international humanitarian organizations. It should also extend to the right to seek assistance from the opposing party in any type of conflict, when that party exercises de facto control over the territory where the person in need is located (and is therefore duty-bound to provide assistance under international humanitarian law, as described above). Similarly, regulations should provide that international humanitarian assistance will not be blocked from entering “enemy territory.” A number of states have directly integrated language from the Geneva Conventions and their additional protocols into domestic military manuals concerning these types of obligation.<sup>194</sup>

Moreover, the right to humanitarian assistance includes not only materials such as food and clothing, but also primary health services. These should be taken to include mental health and reproductive health services, often neglected in disaster and conflict situations.<sup>195</sup> Another area of concern in humanitarian medical services is the tendency among some governments to seek “cost recovery” (i.e., user fees) from service users.<sup>196</sup> These fee systems usually provide for exemptions for those without any resources, and it is argued that such systems can help to rebuild shattered health infrastructure. However, studies have shown that the income from such systems is negligible

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<sup>193</sup> Criteria and Practice of Providing Assistance for Disaster Victims in Case of Emergency, B.E. 2546 (2003), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

<sup>194</sup> ICRC CUSTOMARY LAW STUDY, *supra* note 46, Vol. II, Part 1, at 1179-82.

<sup>195</sup> Jan Egeland, United Nations Emergency Relief Coordinator, Keynote Address to the NGOs for the Committee on Mental Health (Nov. 18, 2004), available at [http://www.who.int/mental\\_health/resources/en/Egeland\\_address.pdf](http://www.who.int/mental_health/resources/en/Egeland_address.pdf).

<sup>196</sup> *Id.* at 12.

whereas they cause a dramatic decline in usage of health services among the poor, even where exemptions exist.<sup>197</sup> Given this imbalance of risks to benefits, it would not be difficult to recommend that the right to urgent medical care in conflict and disaster situations should be without charge.

*Eligibility and IDP status*

Both international human rights and humanitarian law call for the allocation of humanitarian assistance on the basis of need. However, this can be easier said than done at the domestic level, as it is not always immediately obvious who does and does not need to be provided assistance and a thorough investigation of every individual's circumstances is usually impractical.

IDP status is a criterion that some states have used for providing assistance and this can frequently be appropriate given the specific vulnerabilities that so often accompany the loss of one's home. Moreover, some limiting mechanism for state assistance is plainly necessary and appropriate, in light of the potential for fraud and the value of equitable and prudent use of state resources. However, in creating such a status, it is important to guard against discrimination, including against those who have not been displaced but who nevertheless also have humanitarian need, and between different groups of IDPs. Thus, if an IDP status is created in national law with eligibility for a broad range of assistance in mind, other routes for eligibility for life-sustaining assistance should also be available for non-IDPs. Moreover, the definition of "IDP" should be sufficiently broad to encompass those placed in similarly difficult circumstances by different causes outside their control (e.g., conflict, disaster, and development). Good examples of this are Angola's Standard Operational Procedures for the Enforcement of the Norms on the Resettlement of Displaced Populations of 2002,<sup>198</sup> Uganda's National Policy for Internally

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<sup>197</sup> *Id.*

<sup>198</sup> Angolan Council of Ministers Decree No. 79/02, annex, art. 1 (Dec. 6, 2002), available at <http://www.internal-displacement.org>.

Displaced Persons of 2004,<sup>199</sup> and Azerbaijan's Law on the Status of Refugees and Forcibly Displaced Persons,<sup>200</sup> all of which adopt a broad definition of IDP consistent with the *Guiding Principles*.

In other states that have adopted laws or policies on IDPs, the focus has been limited to only some causes of displacement. For example, the IDP laws of Peru,<sup>201</sup> Croatia,<sup>202</sup> Colombia,<sup>203</sup> Georgia,<sup>204</sup> and Russia<sup>205</sup> only apply to persons fleeing individualized persecution, massive violations of human rights, or armed conflict. This constrained approach makes for poor preparedness for future displacement situations and increases the potential that persons displaced by one cause will receive better care than those displaced by another. At the very least, states should adopt laws that have prospective effect

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<sup>199</sup> Office of the Prime Minister, Department of Disaster Preparedness and Refugees, *The National Policy for Internally Displaced Persons*, at x (Aug. 2004), available at [http://www.brook.edu/fp/projects/idp/idp\\_policies\\_index.htm](http://www.brook.edu/fp/projects/idp/idp_policies_index.htm).

<sup>200</sup> Law of the Republic of Azerbaijan on the Status of Refugees and Forcibly Displaced Persons, art. 1 (1999), available at [http://www.brook.edu/fp/projects/idp/idp\\_policies\\_index.htm](http://www.brook.edu/fp/projects/idp/idp_policies_index.htm).

<sup>201</sup> Republic of Peru, Law No. 28223 Concerning Internal Displacements, art. 2 (May 19, 2004), available at [http://www.brookings.edu/projects/idp/Laws-and-Policies/idp\\_policies\\_index.aspx](http://www.brookings.edu/projects/idp/Laws-and-Policies/idp_policies_index.aspx).

<sup>202</sup> Law on the Status of Displaced Persons and Refugees of 1993, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b4de30>.

<sup>203</sup> República de Colombia, Ley 387 de 1987, Diario Oficial No. 43.091, art. 1 (July 24, 1997), available at [http://www.brookings.edu/projects/idp/Laws-and-Policies/idp\\_policies\\_index.aspx](http://www.brookings.edu/projects/idp/Laws-and-Policies/idp_policies_index.aspx).

<sup>204</sup> Law of Georgia on Internally Displacement Persons, art. 1 (as amended on June 9, 2006), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?Docid=44ab85324>.

<sup>205</sup> Amended Law of the Russian Federation on Forced Migrants, art. 1 (Dec. 28, 1995), available at [http://www.brookings.edu/projects/idp/Laws-and-Policies/idp\\_policies\\_index.aspx](http://www.brookings.edu/projects/idp/Laws-and-Policies/idp_policies_index.aspx).

—dealing with possible future displacement crises and not only the IDP caseload from a single event (e.g., a recent civil war).<sup>206</sup>

Even if discrimination concerns are met, it is also important to ensure that the process of determining IDP status does not itself create a bureaucratic barrier or other problems. The absence of corroborating documents, for example, should not be allowed to block applications, in light of the frequency with which displaced persons lose such documents as a result of their displacement. Moreover, although not the topic of this chapter, creating an IDP status tied primarily to humanitarian need can sometimes complicate IDPs' ability to obtain assistance with return or resettlement and/or remedies for human rights violations associated with their displacement after their immediate humanitarian needs have been met. Finally, application processes should ensure a right to appeal initial refusals in light of the potential for error. In this respect, Colombian<sup>207</sup> and Russian<sup>208</sup> laws provide good examples.

#### *Legislation on Disaster Management*

Regardless of any IDP-specific legislation or policy, states should develop comprehensive national laws and/or policies on disaster management, dealing holistically with disaster risk reduction, relief, and recovery. Botswana, for example, adopted a National Policy on Disaster Management in 1996, setting out a framework for the development and updating of contingency plans, setting out some institutional responsibilities, and emphasizing the

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<sup>206</sup> See, e.g., Law of Georgia on Internally Displaced Persons, *supra* note 204, art. 1 (applying both to past and future displacement due to conflict or massive human rights violations).

<sup>207</sup> Decreto No. 2569, de 12 de diciembre de 2000, art. 11 (Colombia).

<sup>208</sup> Federal Law No. 202-FY of Dec. 20, 1995, on Introducing the Amendments and Addenda to the Law of the Russian Federation on the Forced Migrants, art. 3(5) (2003), available at [http://www.brook.edu/fp/projects/idp/idp\\_policies\\_index.htm](http://www.brook.edu/fp/projects/idp/idp_policies_index.htm).

connections between risk reduction, relief, recovery, and development.<sup>209</sup> Either together with the foregoing or separately,<sup>210</sup> states should also have laws dealing with civil protection and rehabilitation in the event of armed conflict. These laws should plainly lay out their responsibilities to provide humanitarian assistance on the basis of need and without discrimination.

*Legislation on Development-Induced Displacement*<sup>211</sup>

States should likewise develop laws regulating the process of displacement by publicly-funded development projects. Such laws should ensure that any persons affected are given entitlement to subsistence aid as well as resettlement, rehabilitation assistance, and compensation.

*Attention to Vulnerable Groups*

National law or policy on humanitarian assistance to IDPs (and other groups) should specifically provide for attention in humanitarian assistance programs to ensure that the special needs of vulnerable groups such as women, children, the elderly, and disabled are met. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War offers a good example by making specific reference to "special attention" for such groups.<sup>212</sup> Many

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<sup>209</sup> National Policy on Disaster Management, Presidential Directive No. CAB 27/96 (Jan. 9, 1996) (Republic of Botswana), *available at* <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

<sup>210</sup> Emergency Preparedness Act, RT1 2000, 95, 613 (Nov. 22, 2000) (Republic of Estonia), *available at* <http://www.ifrc.org/what/disasters/idrl/publication.asp> (covering civil protection and contingency planning for both disasters and conflict situations); *see also* Law Concerning Disaster Management (Indonesia), *supra* note 190.

<sup>211</sup> See Chapter 15 of this volume on development-induced displacement.

<sup>212</sup> THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT AND THE LAW OF THE SOUTH CAUCASUS: GEORGIA, ARMENIA & AZERBAIJAN 280 (Roberta Cohen, et al. eds., 2003) [hereinafter THE LAW OF THE SOUTH CAUCASUS].

other states have included similar provisions in military manuals.<sup>213</sup> Such provisions are currently rare in disaster laws, which tend to be strongly focused on institutional arrangements.

### *Minimum Standards*

National law or policy should also set out and enforce minimum quality standards for the materials and conduct of humanitarian assistance, both in the aid it provides and, in non-conflict disasters, with respect to aid provided by humanitarian organizations. This is an element of states' underlying responsibility to provide or ensure adequate assistance to persons in humanitarian need. However, these standards should be flexible enough to ensure that humanitarian organizations retain sufficient independence to abide by humanitarian principles.

Many existing laws articulate specific amounts of assistance to be provided. However, the quality of such assistance should also be regulated consonant with international standards. The Sri Lankan and Indonesian governments took steps along these lines in response to the 2004 tsunami, when the former required that all transitional housing structures must comply with the Sphere Handbook's minimum standards<sup>214</sup> and the latter decreed that international recovery assistance providers must submit plans indicating how they plan to involve local communities, rehabilitation actors in their projects, and abide by a code of ethics.<sup>215</sup>

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<sup>213</sup> See ICRC CUSTOMARY LAW STUDY, *supra* note 46, Vol. II, Part 2, at 3060-63, 3101-04.

<sup>214</sup> See The Office of the UN High Commissioner for Refugees [UNHCR], Press Release, *Transitional Shelter—Summary of Government Policy and Present Discussion on Utilities (Water & Electricity) (Draft)*, July 7, 2005, available at [http://www.humanitarianinfo.org/srilanka/catalogue/Files/Reference/Guidelines/United%20Nations/gl\\_Transitional%20Shelter%20Summary%20Of%20Government%20Policy%20And%20Present%20Discussion%20On%20Utilities%20\(Water%20&%20Electricity\).pdf](http://www.humanitarianinfo.org/srilanka/catalogue/Files/Reference/Guidelines/United%20Nations/gl_Transitional%20Shelter%20Summary%20Of%20Government%20Policy%20And%20Present%20Discussion%20On%20Utilities%20(Water%20&%20Electricity).pdf).

<sup>215</sup> See Decree of President of the Republic of Indonesia Number 69 of 2005 Concerning Participation of Foreign Organizations/Individuals in Providing Grants for

*Criminalizing the Obstruction and Diversion of Aid*

States should ensure that measures to obstruct and divert humanitarian aid are subject to criminal sanction. A number of states have long provided for specific crimes for grave breaches of the Geneva Conventions (as required by those instruments),<sup>216</sup> and many more have recently codified war crimes, crimes against humanity, and genocide into the national law as a result of their adherence to the Rome Statute of the International Criminal Court.<sup>217</sup> States should also ensure that corruption in humanitarian assistance, whether by government or non-state actors, is proscribed and suitably punished, in both war and peacetime settings.

*Information and Consultation of IDPs*

National law and policy should provide for the involvement of beneficiaries in the planning and execution of government assistance programs to the extent possible. They should also set out obligations concerning informing IDPs about potential benefits and how to access them. For example, Nepal's 2007 policy provides for "massive dissemination" of information on IDP relief programs and calls for IDP organizations to be "involved in the process of delivery of services."<sup>218</sup>

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the Rehabilitation and Reconstruction of the Region and Life in Nanggaroe Aceh Darussalam Province and Nias Islands in North Sumatra Province (Nov. 14, 2005).

<sup>216</sup> See, e.g., Geneva Conventions Act (R.S., 1985, c. G-3) (Canada), available at <http://lois.justice.gc.ca/en/G-3/index.html>.

<sup>217</sup> See ICRC CUSTOMARY LAW STUDY, *supra* note 46, Vol. II, Part 1, at 1184-86; Amnesty Int'l, *International Criminal Court: Implementation*, IOR 40/009/2007, May 30, 2007, available at <http://web.amnesty.org/pages/icc-implementation-eng>.

<sup>218</sup> National Policies on Internally Displaced Persons, 2063 (Nepal), secs. 8.2.10 & 8.2.13 (2007), available at [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/634C98DB1EB6BD2DC12572D70029553B/\\$file/IDP+Policy.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/634C98DB1EB6BD2DC12572D70029553B/$file/IDP+Policy.pdf).



### *Protection of Recipients*

States should make clear in their military manuals and any specific laws on armed conflict, humanitarian assistance, and/or IDPs that they will be responsible for the safety of IDPs and other civilians in conflict situations.

### *Facilitation and Coordination of Humanitarian Assistance*

#### Initiation and Invitation

National disaster laws should clearly set out procedures for undertaking needs assessments and determining when international assistance is required. They should also set out the steps and responsible organs for requesting such assistance. Fiji's National Disaster Management Plan of 1995 provides a good model in this regard.<sup>219</sup> It provides that an initial appeal, either general or to specific countries, is made by the Prime Minister on the advice of the national Disaster Controller, a high-level official. Once this overarching appeal has been made, specific requests for particular elements of operational support and relief assistance are made by the National Disaster Controller through the Ministry of Foreign Affairs, after consultation with the Emergency Committee (comprised of a number of ministries and the Fiji Red Cross). Even before the government has made an official appeal, recognized NGOs may seek support from their respective international organizations, provided the National Disaster Controller is notified.

In disaster settings, in particular, governments have wide authority under international law to choose from whom they will seek assistance (so long as those in need receive assistance from someone). In light of experiences with recent highly-televised disasters, they should take steps to ensure that they have the legal and institutional capacity to exercise this power of choice so that they are not overrun by inappropriate or unneeded aid and/or incompetent providers from abroad. At the same time, the need for speed in sudden-onset

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<sup>219</sup> International Federation of Red Cross and Red Crescent Societies [IFRC], *Fiji: Laws, Policies, Planning and Practices on International Disaster Response*, at 14-15 (July 2005), available at <http://www.ifrc.org/idrl>.

disasters requires that this selection process be accomplished as quickly as possible so as not to constitute a bureaucratic delay to the “right” aid.

In the context of conflict, international humanitarian law imposes a stronger obligation on states to accept specific offers of aid from international humanitarian organizations. This obligation should be clearly reflected in national law, as it is for example, in Peru’s Law Concerning Internal Displacements, which specifically provides that “[w]hen the magnitude of the problem demands it, the State must call upon the participation of International Organizations, including Agencies of the United Nations System, in order to participate in terms of protection and assistance or to collaborate in an advisory capacity.”<sup>220</sup> In a somewhat similar vein, Article 2 of Colombia’s Law 387 provides that “[t]he forcibly displaced have the right to request and receive international assistance and that engenders the international community’s corresponding right to provide humanitarian assistance.”<sup>221</sup> National law should also recognize the special status of the ICRC under the Geneva Conventions and accord its request for access particular consideration.

### Entry of International Assistance

Once international assistance has been accepted, national law should facilitate its smooth entry. This includes provisions for waiving or expediting the granting of visas and work permits for relief personnel. To date, few states have instituted particular provisions on the entry of humanitarian personnel in crisis situations in their immigration laws, relying instead on ad hoc or catch-all exceptions.

National law should also reduce restrictions and procedures for customs clearance of relief goods and equipment, and waiving customs duties and tariffs on relief consignments. A number of states have instituted legal rules in this area, although problems still persist. Such exceptional rules should also be in place for the originating and transit countries and provide for appropriate exceptions for any trade or security-related restrictions or sanctions.

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<sup>220</sup> Law Concerning Internal Displacements, art. 4, sec. 4.2 (2005).

<sup>221</sup> República de Colombia, Ley 387 de 1987 (July 24, 1997), *supra* note 203.

In addition to providing for permissive rules, states are well advised to set up dedicated institutional means to implement them. For example, in Guatemala, national law provides for the deployment of Centers for the Coordination of Humanitarian Assistance consisting of mobile teams of representatives from the various ministries and governmental departments with authority over the entry of persons, goods and equipment into the country at air, sea and land ports, in order to provide speedy processing for international relief. This system was tested for the first time during the response to Tropical Storm Stan in 2005 to great success.<sup>222</sup>

### Operations and Coordination

Domestic law should allow for expedited procedures for the registration of foreign humanitarian organizations and for them to benefit quickly from the legal personality necessary to open bank accounts, enter into contracts, hire staff, etc. To the extent possible, they should also be exempted from taxation.<sup>223</sup> In disaster settings, these registration procedures should be connected to state coordination structures for international aid efforts. Like quality control, domestic coordination of international aid is an element of a state's duty to ensure that aid reaches those in need and it can also substantially improve the impact of international aid. Particularly in conflict situations, however, such coordination must allow humanitarian organizations a substantial degree of independence to fulfill their mandates and not be perceived to be under the control of a party to the conflict.

Domestic law should also allow for and promote the effective operation of domestic relief societies in order to ensure that they are able to provide

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<sup>222</sup> International Federation of Red Cross and Red Crescent Societies [IFRC], *Legal Issues in the International Response to Tropical Storm Stan in Guatemala*, at 20 (2007).

<sup>223</sup> For international organizations such as the United Nations, such exemptions are required by the doctrine of privileges and immunities. Similar rights have been extended to the international components of the Red Cross/Red Crescent Movement. See International Federation of Red Cross and Red Crescent Societies, *Background Information Sheet: Privileges and Immunities and Disaster Relief* (Apr. 26, 2006), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

assistance to IDPs. In addition to the facilities mentioned above, this includes a balance between adequate coordination and sufficient independence from governmental control to allow them to work according to humanitarian principles as well as permission to receive foreign funding and donations. Other facilities will depend upon the national context, but the Venezuelan law on civil protection provides an interesting example in mandating that qualified personnel of “voluntary organizations” providing disaster relief in conjunction with the civil defense authorities be provided logistical assistance, as well as life and accident insurance, during their activities.<sup>224</sup>

### *Monitoring of Aid and Other Remedies*

Traditional, and particularly judicial, mechanisms are generally insufficient to ensure the enforcement of the right to humanitarian assistance. Such remedies are simply too slow and inaccessible for persons in crisis. For this reason, contemporaneous monitoring of the aid process for adequacy, integrity, quality, and coordination should be made a specific priority in domestic law or policy, including through designation of institutional means to accept and address complaints (preferably including the involvement of a national human rights institution, if available, as discussed below).

Nevertheless, judicial remedies also have a role to play. Some courts, such as the Constitutional Court of Colombia as discussed above, have effectively intervened to ensure governments abide by their commitments. Moreover, effective enforcement of laws criminalizing diversion and obstruction of aid are necessary to ensure their deterrent value.

### *Budgeting Appropriately for Humanitarian Assistance Needs*

It is not enough to create clear entitlements to government-sponsored humanitarian relief—the means to fulfill them must also be provided for in the budgeting process. To accomplish this, some states have created dedicated relief funds, like the National Disaster Prevention and Preparedness Fund

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<sup>224</sup> Ley de la Organización Nacional de Protección Civil y Administración de Desastres, art. 21, Official Gazette of the Bolivarian Republic of Venezuela, No. 5.557 (Nov. 13, 2001).

established by the Ethiopian National Policy on Disaster Prevention and Management<sup>225</sup> and the National Emergency Fund in the Costa Rican National Emergency Law.<sup>226</sup> It is particularly important to guard against the creation of entitlements by national legislation that must be fulfilled by provincial and/or local levels of government without making corresponding allocations from the national budget or at least providing these entities with the authority to obtain necessary funds themselves.

While there is quite a lot of bad news when it comes to funding for domestic humanitarian assistance, there are also examples of best practice. For instance, the Government of Azerbaijan has drawn praise for assigning increasing portions of its state oil funds for the assistance and resettlement of IDPs (although these funds still remain largely inadequate to meet the enormous needs).<sup>227</sup> Likewise, Sri Lanka was applauded in 1994 for providing the bulk of the expenditure on food aid to persons displaced by the conflict in the north of the country—including to Tamils.<sup>228</sup>

### **In the Context of Durable Solutions**

An important question in the context of durable solutions is when is it reasonable to cease providing humanitarian assistance. By its nature, humanitarian assistance is meant to be a temporary solution for a crisis

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<sup>225</sup> Transitional Government of Ethiopia, *National Policy on Disaster Management and Prevention*, art. 11.1 (Oct. 1993), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

<sup>226</sup> República de Costa Rica, *Ley Nacional de Emergencias*, No. 7914, arts. 35-37 (Feb. 3, 2002), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

<sup>227</sup> Internal Displacement Monitoring Centre, *Azerbaijan: New Government Programme Improves IDP Conditions, but Still no Return in Sight*, at 3 (Feb. 22, 2005), available at <http://www.internal-displacement.org>.

<sup>228</sup> Representative of the Secretary General, *Report of the Representative of the Secretary-General on Internally Displaced Persons*, submitted pursuant to Commission on Human Rights resolution 1993/95—Profiles of Internal Displacement: Sri Lanka, ¶ 55, U.N. Doc. No. E/CN.4/1994/44 (1994).

situation. However, IDPs often find themselves in an ongoing state of crisis, particularly in chronic conflict situations where continuing fighting blocks the ability to resume normal employment. Moreover, it is clear that return and resettlement can often be practically impossible without some transitional assistance, such as food to tide the IDP over while crops are replanted and tended. On the other hand, overextended periods of humanitarian assistance can lead to dependency and undermine the resilience of recipients.

Most existing IDP laws provide strict limits on the amount of humanitarian aid to be provided. For example, Russia's Law on Forced Migrants provides for a "one-off cash allowance per each member of the family to the amount and in keeping with the procedure established by the government of the Russian Federation, but not less than a minimum salary established by the federal law." Additionally, the Russian law provides for one-time assistance with transportation to a place of temporary accommodation, longer term temporary accommodation, and ongoing free medical assistance and medication (up to the limit of the forced migrant status, which is set at a maximum of five years).

While rigid limits may be undesirable, laws and policies that do not provide details about how much aid will be provided can lead to uncertainty and a lack of specific commitment. On balance, reasonable limits on the amount and timing of assistance are appropriate so long as (1) they are closely tied with rehabilitation and resettlement assistance initiatives—in particular help with establishing a livelihood—such that IDPs can reasonably be expected to provide for themselves and (2) they retain enough flexibility to account for situations where an ongoing crisis make rehabilitation impossible for a specific period of time.

Like the ending point for recipient eligibility, the question of whether and when to terminate special legal facilities (particularly with regard to customs and taxation) for humanitarian actors has often proven problematic. National law tends to be silent or vague as to when such facilities will change and decisions are thus made on an ad hoc basis. For example, four months after the tsunami struck Sri Lanka, the government decided to discontinue exempting humanitarian organizations from a 300 percent duty on imported vehicles, resulting in a \$1 million customs duty imposed on Oxfam for the vehicles it

brought in for its recovery work.<sup>229</sup> As noted above, international standards call for the exemption of relief consignments from customs duties, and national law should provide that this rule remain in effect so long as such relief is needed. Similarly, other facilities offered to humanitarian organizations ought to continue—at least until all humanitarian needs have been fulfilled and most reasonably through the recovery phase as well.

## **INSTITUTIONAL ELEMENTS OF STATE REGULATION**

### **During Displacement**

#### *Role of National, Provincial and Local Governments*

National disaster and emergency laws and policies should clearly specify roles and responsibilities of different ministries at the national level, but also of provincial and local governments. If there is a stand-alone IDP law or policy, it should provide a similar type of mapping of responsibilities.

At the national level, both a central executive office and a committee or commission (frequently including at least one high level policy-making body and one or more technical committees) are usually necessary to coordinate the contributions that inevitably must be made by a number of different ministries. It has been recommended that the former executive office be located directly within the prime minister's office, as is the case for the disaster management offices in Tanzania and Colombia, to ensure the requisite authority and to avoid jealousies between line ministries.<sup>230</sup> The central executive offices should also serve as a focal point for international humanitarian actors and ensure that their assistance is facilitated, coordinated, and monitored for quality.

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<sup>229</sup> BBC NEWS, *supra* note 173.

<sup>230</sup> InterWorks, *Model for a National Disaster Management Structure, Preparedness Plan, and Supporting Legislation*, at 5 (July 1998), available at <http://www.undmtp.org>.

In many countries, significant authority for relief activities remains at the provincial and local levels. This can lead to problems of coordination—particularly with international humanitarian actors—if the national structures mentioned above are weak.<sup>231</sup> On the other hand, lower levels of government have greater understanding of local circumstances and communities. One model for handling this dilemma is Nicaragua’s National System for the Prevention, Mitigation and Response to Disasters (SINAPRED). SINAPRED provides for parallel committees and executive disaster offices at the national, regional, and municipal levels, with clear lines of communication between them and incorporating civil society at each level.<sup>232</sup> A similar approach is taken by Uganda and Angola in their respective IDP policies.<sup>233</sup>

### *Role of Police and Military Forces*

In many cases of ongoing or chronic conflict, the role of the police can become subsumed to that of the armed forces. However, the latter frequently lack an express mandate in national law to affirmatively protect civilians, including IDPs, or humanitarian aid providers. These issues should be addressed as a matter of law or policy. It is particularly important that responsibilities for security in camp situations are made clear, given the heightened dangers of lawlessness and militarization of these settlements, which are frequently outside of normal commercial and social networks. A good model is Uganda’s national IDP policy, which sets out that the national police are responsible for security among the residents of IDP camps and communities, and the army is responsible for guarding their perimeters and protecting humanitarian assistance.

In some states, national militaries themselves play an important role in relief activities, both in disaster and conflict settings. Where this is the case, governing regulations should guard against the potential for blurring the

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<sup>231</sup> *Id.*

<sup>232</sup> Decreto No. 53-2000, Reglamento de la Ley Número 337, Ley Creadora del Sistema Nacional para la Prevención, Mitigación, y Atención de Desastres (Nicaragua), available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

<sup>233</sup> See *supra* notes 198-199.



perceived distinction between military and civilian actors and undermining the appearance of neutrality of humanitarian actors. Ideally, military actors should be assigned by law to a supporting role to civilian humanitarian actors (e.g., providing transport, repairing infrastructure, and facilitating logistics rather than directly distributing assistance). In any event, they should be required to comply with, and receive training about, the relevant provisions of human rights, humanitarian law, and humanitarian quality standards mentioned above. In particular, governing regulations should prohibit the violation of principles of humanity and impartiality, for instance, by conditioning humanitarian assistance on the provision of information or other collaboration by affected persons.

### *Role of National Red Cross and Red Crescent Societies and Other Domestic Relief Actors*

In many countries, the most important relief actor apart from the government is the national Red Cross or Red Crescent Society. According to the statutes of the International Red Cross and Red Crescent Movement, in order to be recognized by the Movement, a national society must, among other things, be recognized by national law as “auxiliary to the public authorities in the humanitarian field” while at the same time retaining “an autonomous status which allows it to operate in conformity with the Fundamental Principles of the Movement.”<sup>234</sup> Moreover, as noted above, national societies are attributed a specific role in humanitarian assistance by the Geneva Conventions.

In most, but not yet all, countries, national societies have a formal role in the governmental national disaster plan. This defined role is crucial to identifying responsibilities and tasks and to ensure proper coordination with governmental authorities as well as other actors. It is also a necessary means to fulfill the required “auxiliary status.” Accordingly, where national disaster plans are being formulated or updated, the role of the national society should be expressly included. Consideration should also be given to bringing in other

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<sup>234</sup> Statutes of the International Red Cross and Red Crescent Movement adopted by the 25th International Conference of the Red Cross at Geneva in Oct. 1986 and amended by the 26th International Conference of the Red Cross at Geneva in Dec. 1995, art. 4, available at <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

relevant civil society actors into planning frameworks and bodies for relief activities.

### *Role of National Human Rights Institutions*

National human rights institutions (NHRIs) have an important potential to undertake the “real-time” monitoring of humanitarian assistance recommended above, in light of their autonomous yet semi-public status, their commitment to human rights, and their established practices for addressing individual complaints. In 2005, NHRIs in the Asia-Pacific region adopted a set of guidelines affirming such a role,<sup>235</sup> and a number of institutions both in the region and elsewhere have already been active in this regard.

For example, the Uganda Human Rights Commission has established itinerant tribunals in northern Uganda to hear complaints of human rights violations; reported extensively on these issues to the parliament and other parts of government; and is integrated into national institutional structures for dealing with IDPs, including the Inter-Agency Task Force and the Human Rights Promotion and Protection Subcommittee.<sup>236</sup> Likewise, NHRIs in India, Indonesia, Nepal, the Philippines, and Thailand have all taken active roles in addressing IDP rights issues.<sup>237</sup>

Important precedents in this area have been set by the Sri Lanka Human Rights Commission (SLHRC). In 2002, the SLHRC created a very successful

<sup>235</sup> Guidelines on Internally Displaced Persons in the Context of Natural Disasters: A Common Methodology for National Human Rights Institutions (2005), available at [http://www.asiapacificforum.net/training/idp/brookings-bern/natural\\_disasters.htm](http://www.asiapacificforum.net/training/idp/brookings-bern/natural_disasters.htm).

<sup>236</sup> Uganda Human Rights Commission, Sixth Annual Report, chap. 7 (Sept. 2004), available at <http://www.uhrc.org/reports.php?y=2003&subCatId=1>; Brookings Institution-University of Bern, *Background Paper for the Workshop on the Implementation of Uganda's National Policy for Internally Displaced Persons*, Kampala, Uganda, July 3-4, 2006, at 5, available at [http://www.brookings.edu/~media/Files/events/2006/0704\\_uganda/20060704\\_Uganda\\_bgpaper.pdf](http://www.brookings.edu/~media/Files/events/2006/0704_uganda/20060704_Uganda_bgpaper.pdf).

<sup>237</sup> See the reports on the IDP activities of each of these institutions, available at <http://www.asiapacificforum.net/training/idp/brookings-bern/national.htm>.

IDP project supported by UNHCR, including the creation of seven regional offices for addressing IDP complaints and issues.<sup>238</sup> In the wake of the 2004 tsunami, the SLHRC also created a Disaster Relief Monitoring Unit, with the responsibility of monitoring both government and non-government sector aid, consulting with beneficiaries, and advising operational departments of the government.<sup>239</sup> It received and acted on a large number of complaints (up to two hundred per day in the initial phases), organized consultative meetings of aid beneficiaries, and also developed a Code of Conduct for Civil Servants to address issues of allocation of resources, community empowerment, information sharing, and corruption, among other topics.<sup>240</sup>

### **In the Context of Durable Solutions**

There is sometimes a shift of responsibility among ministries or levels of government when relief gives way to rehabilitation programming. When this occurs, it is important to ensure, as mentioned above, that help with subsistence needs is not terminated before it is really possible for IDPs to meet their own needs through employment, cultivation, or otherwise. Similarly, any change in institutional focal points for international relief and recovery actors should ensure that necessary facilities, coordination, and monitoring remain available through the rehabilitation phase.

### **REGULATORY FRAMEWORK**

While much will obviously depend on local traditions, legal systems, and circumstances, it can generally be recommended that the legal issues of

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238 Asia Pacific Forum of National Human Rights Institutions/Brookings Institution—SAIS Project on Internal Displacement, *National Human Rights Institutions and Internally Displaced Persons—Visit to the Sri Lanka Human Rights Commission: 30th November-3rd December 2004*, available at <http://www.asiapacificforum.net/training/idp/brookings-bern/srilanka.doc>.

239 International Federation of Red Cross and Red Crescent Societies [IFRC], *Legal Issues in the International Response to the Tsunami in Sri Lanka*, July 2006, at 33, available at <http://www.ifrc.org/Docs/pubs/idrl/report-srilanka.pdf>.

240 *Id.*

humanitarian assistance examined in this chapter can best be addressed through a combination of enacted laws and policies. The institutional organizations discussed here should be set forth in a single national document which clearly sets out tasks and authorities. In many countries this has been accomplished by a policy rather than a law when existing ministries and structures were deemed sufficient and the main task was to organize their cooperation with each other. However, when a new agency, committee or commission that goes beyond simply serving as a forum for existing ministries is needed, legislation will likely be required to provide it a firm position in the state hierarchy and access to budgetary allocation.

A number of the requirements of military actors can be articulated in policies and, particularly, military manuals. But issues such as the criminal prosecution of war crimes, crimes against humanity, and corruption obviously must be in the form of law. Likewise, “hard law” of some form is required to clearly set out the right to humanitarian assistance discussed above and to assign adequate funding to humanitarian activities. Moreover, the legal facilities for humanitarian organizations must be expressed in “hard law” in order to adequately circumvent everyday rules of customs, visas, organizational registration, etc.

In some states, much reliance is placed on bilateral agreements with international humanitarian actors, including UN agencies, the ICRC and IFRC, and, increasingly, large NGOs, to address some of the facilitation issues discussed in this chapter. While this can work well with regard to the individual organization, in situations of massive disaster it is common that a number of new organizations offer their assistance and the process of negotiating bilateral agreements with each of them is simply too great. For this reason, it is advisable that the authority to quickly grant the necessary legal facilities in these circumstances be already provided to a specific institution by national law.

## **INTERNATIONAL ROLE**

At the international level, there are several organizations with the mandate and capacity to assist states in the development of national laws, policies, and institutions on humanitarian assistance for IDPs.

### **United Nations**

#### *OCHA*

While primarily focused on coordination and policy at the international level, OCHA has provided assistance to a number of states in developing laws and policies with regard to humanitarian assistance. For example, its IDP Division has worked with governments in Uganda and Sudan, among others, to develop IDP-specific policies. In recent years, the United Nations Disaster Assessment and Coordination (UNDAC) teams organized by OCHA have begun undertaking “preparedness” missions at the request of states to provide advice to them on improving their disaster management systems, including legal and institutional issues.

#### *UNHCR*

The United Nations High Commissioner for Refugees has traditionally worked closely with governments to develop legislation for the protection and assistance of refugees and asylum seekers, as well as to address statelessness. In light of UNHCR’s increasing international role with regard to the protection of IDPs, it is possible that it will begin to apply its expertise to laws for assistance to this population as well, particularly if it is requested to do so by interested governments.

### **Red Cross/Red Crescent Movement**

#### *ICRC*

The International Committee of the Red Cross is mandated by the Geneva Conventions and by the statutes of the Red Cross and Red Crescent Movement to disseminate international humanitarian law and assist governments and

other relevant actors to implement it. In addition to the publication and dissemination of model laws, manuals, and scholarly information on international humanitarian law, the ICRC maintains a dedicated Advisory Service to assist states to incorporate international humanitarian law into domestic law as well as an online database of enacted laws from around the world. The Advisory Service also encourages and assists states to set up national committees on international humanitarian law.

### *IFRC*

The International Federation of Red Cross and Red Crescent Societies is an international membership organization formed by the national Red Cross and Red Crescent Societies around the world. The Federation's International Disaster Response Laws, Rules and Principles (IDRL) Programme gathers and disseminates information on national and international law on international disaster relief and recovery, as well as outstanding legal issues in this area. In addition to its legal database, publications and trainings, it has provided support to national societies for their advocacy with governments for the development of appropriate law and policy in these areas.

### **Private Actors**

#### *Brookings Institution-University of Bern Project on Internal Displacement*

The Brookings Institution-University of Bern Project on Internal Displacement is associated with the Representative of the United Nations Secretary-General on the Human Rights of Internally Displaced Persons. In addition to supporting the activities of the Representative's mandate, the Project organizes international, regional, and national seminars and publishes books, studies, and papers on IDP policy related issues. It has been called upon by a number of governments to provide support for the development of IDP-related policies and laws.

*Norwegian Refugee Council, Internal Displacement Monitoring Centre*

The Norwegian Refugee Council's Internal Displacement Monitoring Centre<sup>241</sup> has been mandated by the United Nations' Inter-Agency Standing Committee to maintain a database of conflict-related IDP situations around the globe. Its web-based database is probably the world's largest and most accessible repository of such information. It also provides trainings and workshops to governments, humanitarian organizations, and other actors on IDP issues.

## **SUMMARY OF RECOMMENDATIONS**

### **Guaranteeing the Right to Humanitarian Assistance for IDPs**

1. Governments should ensure that national law explicitly guarantees IDPs and others the right to request and receive humanitarian assistance without discrimination, including adequate food, water, medical supplies, clothing, and similar necessities as well as essential services, such as emergency medical care and sanitation measures.
2. Laws and policies on humanitarian assistance should be concrete, but not overly rigid, as to the types and amounts of assistance to be provided by government, including through the establishment of an adequate budget.
3. Procedures for establishing eligibility for assistance should be accessible, expeditious, and well disseminated to IDP populations.
4. If an "IDP status" is created, it should encompass all causes of displacement and have prospective effect. Eligibility should not be blocked by the lack of documentation. Avenues of appeal should be available for adverse decisions on eligibility. IDP status should not be the sole avenue for receiving humanitarian assistance.

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<sup>241</sup> For more information, see the website of the Internal Displacement Monitoring Center: <http://www.internal-displacement.org>.

5. National law should set out minimum quality standards for humanitarian assistance provided by the government consistent with internationally-accepted standards.
6. Humanitarian assistance should only be terminated with the end of humanitarian need, and in a manner linked with measures to assist with rehabilitation, including livelihood development.
7. IDPs' right to medical care in conflict and disaster settings should include psychological, reproductive, and preventive care and should be made available without charge in the period of emergency.
8. National law or policy should specifically address gender barriers, discrimination, and the humanitarian assistance needs of vulnerable groups, including children, the disabled, and the elderly.
9. National law should require that IDPs, particularly women, be appropriately consulted and informed about assistance programs.
10. Diversion and obstruction of humanitarian aid should be criminalized, monitored, and prosecuted.
11. Policies and laws concerning development-induced displacement should provide for a duty to provide subsistence as well as compensation, resettlement, and rehabilitation assistance to IDPs.

### **Ensuring Institutional Coherence**

12. National law or policy, coordinated by an executive office and a high-level inter-ministerial committee, should establish the roles and responsibilities of different ministries and levels of government with regard to humanitarian assistance for persons in need, including IDPs.
13. Provincial and local governments, in coordination with national authorities, should retain sufficient authority to contribute to assistance activities.



14. A national focal point with sufficient authority should be assigned by law to assist with the facilitation, regulation, and coordination of international humanitarian assistance.

15. National Red Cross and Red Crescent Societies and other relevant domestic actors should be fully integrated into national assistance plans and policies.

16. With regard to humanitarian relief, national law or policy should clearly define roles of the police and military forces in protecting the security of IDPs and aid providers, including specifying that the military act only in a supporting role to civilian efforts.

17. National human rights institutions or other institutional means should be supported to receive and act upon IDP complaints and to monitor assistance activities by all actors.

### **Facilitation and Regulation of Humanitarian Assistance**

18. National law should allow for and promote the operation of domestic relief societies.

19. National law should provide for waiver or expedited issuance of visas and work permits, lower customs barriers, no duties and charges, and expedited export and transit of such items as vehicles, telecommunications and information technology, and appropriate medicines for assistance to other countries.

20. National law should provide for expedited registration of foreign humanitarian organizations providing them with full domestic legal personality, including expeditious temporary recognition of foreign qualifications of professionals (e.g. doctors).

21. National law should exempt relief goods and bona fide humanitarian organizations from taxation, duties, and similar charges, with the exception of reasonable user fees.

22. National law or policy should include the obligation to ensure the security of relief personnel, goods, vehicles, and equipment.

23. National law should also provide for appropriate facilities to speed the transit of international humanitarian assistance through national territory on its way to an affected population in another state.

24. Where national law provides for sanctions or restrictions against another state, exceptions should be available for the shipment of humanitarian assistance, when required.

### **Facilitation and Regulation of Humanitarian Assistance in Armed Conflict Situation**

25. In conflict settings, national law should ensure that government controls over humanitarian relief are kept to a minimum, related solely to the means of ensuring against improper diversion of assistance and time and route restrictions imposed by military necessity.

26. National law and/or military regulation should provide that domestic and international relief societies be permitted to operate on behalf of civilians in need, both on territory controlled by the government and on “enemy” territory.

27. Military regulations should provide that, in occupied territories, IDPs and other civilians have the right to directly solicit assistance from international as well as domestic relief providers without fear of reprisal.

### **Facilitation and Regulation of Humanitarian Assistance in Disaster Situations**

28. Governments should make use of the 2007 Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (the IDRL Guidelines) to prepare their laws to facilitate and regulate disaster relief.

29. Where domestic means are insufficient to provide needed humanitarian assistance to IDPs in disaster settings, national law and/or policy should provide that international assistance be requested.

30. National law and regulation should clearly set out procedures for assessing needs and domestic capacities in order to rapidly decide upon the need for international assistance in disaster settings. Joint needs assessments with international relief providers should be encouraged.

31. National law should clearly set out rules for the facilitation, regulation, and coordination of international humanitarian assistance, including how it is initiated and terminated.

32. National law on disaster response should provide governments with the means to choose which type of assistance they require and from which actor. In conflict settings, international offers of humanitarian assistance should not be arbitrarily denied.

33. Government coordination of international assistance should guarantee sufficient independence to humanitarian actors to abide by fundamental principles and in particular guarantee them freedom of movement and access to IDPs.

34. National law should provide for a means to monitor the adequacy and quality of humanitarian assistance provided by international relief providers.