

COMMENTARIES

DISASTER RELIEF AND GOVERNANCE AFTER THE INDIAN OCEAN TSUNAMI: WHAT ROLE FOR INTERNATIONAL LAW?

DAVID P FIDLER*

[The tsunami in the Indian Ocean at the end of 2004 has produced heightened scrutiny of how international disaster relief is supplied and governed. This scrutiny connects to arguments by the International Federation of Red Cross and Red Crescent Societies that more effective and efficient disaster relief requires the significant development of international law on disaster relief. This commentary analyses the historical and current relationship between international law and disaster relief and challenges the arguments that more international law on disaster relief is needed.]

CONTENTS

- I Introduction
- II Natural Disasters and International Law
 - A Disasters, Wars, Epidemics and Accidents
 - B Historical Overview of International Law and Natural Disasters
 - 1 Rise and Fall of the International Relief Union
 - 2 Disaster Relief and International Law after World War II
 - 3 IGO and NGO Capacities for Disaster Response
- III From International Humanitarian Relief to Domestic Governance Resilience: International Law and Shifts in Policy on Natural Disasters
 - A From Episodic Humanitarianism to Systemic Interests: Rethinking the Political Nature of Natural Disasters
 - B In-Depth Disaster Governance: Prepare, Protect and Respond
 - C Disaster Relief in the Era of Globalisation
 - D Implications for the Role of International Law
- IV Conclusion

I INTRODUCTION

The tsunami in the Indian Ocean caused by the massive earthquake on 26 December 2004 generated an unprecedented challenge for the countries affected and the international community at large. Although response and recovery operations have not yet concluded, many experts believe that the humanitarian response to this natural disaster has been impressive. One positive result is the absence of epidemic disease outbreaks, an outcome that was feared

* M Phil (Oxon), BCL (Oxon); JD (Harvard); Professor of Law and Harry T Ice Faculty Fellow, Indiana University School of Law, Bloomington, US. Hurricane Katrina struck the Gulf Coast of the US after this article was substantially completed, precluding consideration of this disaster. Brief references to the still unfolding relief efforts in the US are, however, made at points in the analysis. The earthquake that struck South Asia on 8 October 2005, and that is estimated (to date) to have killed over 42 000, occurred as this article was finalised for publication and thus could not be factored into the commentary's analysis.

when the extent of the tsunami's devastation first became clear.¹ More broadly, the United Nations Secretary-General praised the international humanitarian response system because it 'was able to provide massive relief to all tsunami-affected communities in the Indian Ocean, against all odds, in the course of a few weeks'.²

Although generally well perceived, the international response to the tsunami has heightened scrutiny of how states, intergovernmental organisations ('IGOs'), and non-governmental organisations ('NGOs') prepare for and respond to natural disasters.³ This scrutiny converges with efforts pre-dating the tsunami to reshape strategies and mechanisms for handling large-scale disasters. An important feature of the discourse on how to improve policies on natural disasters involves international law. This commentary analyses the historical and current relationship between international law and disaster policy and specifically addresses whether governance of natural disasters in the future requires the role of international law to be expanded and deepened.

II NATURAL DISASTERS AND INTERNATIONAL LAW

A *Disasters, Wars, Epidemics and Accidents*

Analysing the relationship between international law and natural disasters (such as earthquakes, floods, tsunamis, typhoons, hurricanes, volcanoes and droughts) reveals that the relationship has historically been weak. The International Federation of Red Cross and Red Crescent Societies ('International Federation'), the mission of which is to provide assistance to populations affected by peacetime disasters, has called disaster response a 'long-neglected facet of international law' and argued that 'it is unlikely that any other challenge looming so large in world affairs has received so little attention in the legal realm'.⁴ The International Federation has contrasted the neglect of peacetime

¹ The World Health Organization has observed that:

The large numbers of displaced persons, crowded conditions, flooding and a vulnerable population posed an increased risk of communicable diseases following the tsunami. However, timely establishment of disease surveillance systems by health authorities, helped prevent any major outbreak.

WHO, 'Tsunami Recovery Process Focuses on Long-Term Health Capacity Development' (Press Release, 24 June 2005) available at <http://www.who.int/mediacentre/news/releases/2005/pr30_searo/en/index.html> at 1 October 2005.

² *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, 59th sess, agenda items 45 and 55, [203], UN Doc A/59/2005 (21 March 2005) ('*In Larger Freedom*').

³ See 'Symposium on International Response to Catastrophes' (forthcoming 2006) *Chicago Journal of International Law*. For pre-tsunami analyses of catastrophes, see Richard Posner, *Catastrophe: Risk and Response* (2004); David Caron and Charles Leben (eds), *The International Aspects of Natural and Industrial Catastrophes* (2001).

⁴ International Federation, *World Disasters Report 2000* (2000) 157 ('*World Disasters Report 2000*').

disasters with the extensive body of international humanitarian law,⁵ which applies in times of armed conflict.⁶

The neglect of peacetime natural disasters as a subject of international law also stands out against the use of international law to address other extreme peacetime events, such as epidemics and industrial accidents. As explored elsewhere, states and IGOs have used international law extensively since the late 19th century to address epidemic diseases.⁷ International law on epidemics recently underwent an historic revision because the World Health Organization adopted in May 2005 a radically transformed set of international legal rules that apply to disease outbreaks and risks.⁸ Similarly, one can identify frequent use of international law to facilitate responses to industrial, nuclear and maritime accidents.⁹

As explored below, the relationship between international law and natural disasters is more complex than the concept of neglect suggests; but recognising the complexity does not blunt the conclusion that international policy on natural disasters has not depended on international legal instruments. This reality raises questions about why this situation developed, and still prevails, in the early 21st century.

Conceptually, one reason why natural disasters have a different history with international law than wars, epidemics and technological accidents involves the difference between a natural disaster and these other events in terms of the dynamics of the international system. The extensive use of international law in the contexts of war, epidemics and accidents reflects how these events, generally speaking, have systemic impact over time on the fundamental material interests that states have in international relations. International humanitarian law developed in response to warfare — a key instrument of state policy in a political system characterised by anarchy. State interests in international trade drove the evolution of international law on epidemic disease.¹⁰ Increasing industrialisation and use of hazardous technologies in modern economies produced greater potential for transboundary pollution and friction between states affected by such pollution.

⁵ The body of international humanitarian law involves many treaties and customary international law. See International Committee of the Red Cross, *What is International Humanitarian Law?* (2004) <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian_law:IHL_in_brief?OpenDocument> at 1 October 2005.

⁶ *World Disasters Report 2000*, above n 4, 147–9.

⁷ See David P Fidler, *International Law and Infectious Diseases* (1999).

⁸ World Health Assembly, *Revision of the International Health Regulations*, WHA Res 58.3, 58th sess, 8th plen mtg, WHA Doc A58/VR/8 (23 May 2005). On the revised *International Health Regulations*, see David P Fidler, 'From International Sanitary Conventions to Global Health Security: The New International Health Regulations' (2005) 4 *Chinese Journal of International Law* 1.

⁹ See, eg, *Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency*, opened for signature 26 September 1986, 1457 UNTS 133 (entered into force 26 February 1987); *Convention on Early Notification of a Nuclear Accident*, opened for signature 26 September 1986, 1439 UNTS 275 (entered into force 27 October 1986); *International Convention on Oil Pollution Preparedness, Response and Cooperation*, opened for signature 30 November 1990, 1891 UNTS 77 (entered into force 13 May 1995); *Convention on the Transboundary Effects of Industrial Accidents*, opened for signature 17 March 1992, 2105 UNTS 457 (entered into force 19 April 2000).

¹⁰ Fidler, *International Law and Infectious Diseases*, above n 7, 35–42.

By contrast, natural disasters have, historically, proven episodic, short-lived events that did not systemically affect state interactions in the manner that war, trade and technological development did. The episodic nature of natural disasters meant that they were most often connected with humanitarianism, not the systemic coordination of states' pursuit of their material national interests. In 1758, Emmerich de Vattel captured the humanitarian nature of natural disasters when he argued that famine or other calamities triggered a natural law duty for other states to provide assistance.¹¹ 'To give assistance in such extreme necessity', Vattel wrote, 'is so essentially conformable to humanity, that the duty is seldom neglected by any nation that has received the slightest polish of civilization'.¹²

Ever the realistic diplomat, Vattel qualified the moral duty to provide disaster relief sufficiently to leave states with discretion on whether and how to provide relief. Vattel asserted that the duty to provide other countries with assistance did not mean that states should expose 'themselves to scarcity'.¹³ Further, Vattel argued that

if that nation is able to pay for the provisions thus furnished, it is perfectly lawful to sell them to her at a reasonable rate; for they are not bound to furnish her with what she is herself capable of procuring; and, consequently, there is no obligation of gratuitously bestowing on her such things as she is able to purchase.¹⁴

Vattel's emphasis on the humanitarian nature of disaster relief did not mean that assistance to a state suffering from a disaster lacked political calculation. Humanitarian assistance could be a way of achieving other foreign policy or national security objectives. The prospect that assistance could be a cover for ulterior, power-political objectives highlighted the importance for the victim state to retain sovereign control over whether and how such assistance would be accepted.

The way in which the episodic, short-lived nature of natural disasters correlated with the material interests of giving and receiving states meant that each state had a strong interest in maintaining as much sovereign discretion as possible. This situation provides little prospect for the development of rules of international law designed to limit state sovereignty with respect to disaster relief. Put another way, states typically craft international law where their interests converge on the need to regulate sovereignty. With natural disasters, the interests of both the victim and assisting states converge on maintaining as much sovereignty as possible — a convergence that does not stimulate the robust development of international law.

¹¹ '[I]f a Nation is suffering from famine, all those who have provisions to spare should assist it in its need, without, however, exposing themselves to scarcity ... Whatever be the calamity affecting a Nation, the same help is due to it': Emmerich de Vattel, *The Law of Nations, or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Charles G Fenwick trans, 1916 ed) bk II, ch I, § 5 [trans of: *Le Droit des gens, ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains*, first published 1758].

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

B *Historical Overview of International Law and Natural Disasters*

This conceptual explanation finds empirical support in the historical record. According to the International Federation, the 20th century witnessed the creation of only two multilateral treaties directly on disaster response, the adoption dates of which were separated by 71 years and one of which completely failed.¹⁵ By contrast, the 20th century saw the role and importance of both IGOs and NGOs grow significantly in response to natural disasters through non-binding actions and activities — what international lawyers sometimes call ‘soft law’. Thus, as a policy matter, the absence of multilateral treaties — ‘hard law’ — has not equated to an absence of capabilities within IGOs and NGOs. The mobilisation of IGO and NGO assistance in the wake of the Indian Ocean tsunami illustrates that the lack of international law has not prevented significant and sophisticated intergovernmental and non-governmental disaster relief capacities from developing. The gap between international law and IGO/NGO capabilities raises the question whether international legal development on natural disasters is required, as many experts on disaster relief have claimed.

1 *Rise and Fall of the International Relief Union*

The seminal story in international disaster relief from the late 19th century through World War II concerns the International Relief Union (‘IRU’), established in 1932.¹⁶ The IRU was created to facilitate the desire of states ‘to render aid to each other in disasters, to encourage international relief by a methodical coordination of available resources, and to further the progress of international law in this field’.¹⁷ The IRU’s creation was the culmination of efforts to build international governance mechanisms for disaster relief that began in the late 19th century.

As Vattel’s thoughts on disaster relief suggest, this topic was not unknown in international relations prior to the 20th century. The push for international policy and legal regimes on disaster relief began in the late 19th century when International Red Cross Conferences began calling for Red Cross capacities to address public calamities other than war, and for the application of the 1864 *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*¹⁸ to victims of natural disasters.¹⁹ As with international humanitarian law, the effort to develop international law on natural disaster relief has been linked with the Red Cross movement ever since the late 19th century.

¹⁵ *World Disasters Report 2000*, above n 4, 151. The two treaties are the *Convention and Statute Establishing an International Relief Union*, opened for signature 12 July 1927, 135 LNTS 247 (entered into force 27 December 1932) (‘*IRU Treaty*’) and the *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations*, opened for signature 18 June 1998 (entered into force 8 January 2005) available at <<http://www.reliefweb.int/telecoms/tampere/icet98-e.htm>> at 1 October 2005 (‘*Tampere Convention*’).

¹⁶ See *IRU Treaty*, above n 15. For more on the history of the development of international disaster relief, see Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (1985) 17–21; John Hutchinson, ‘Disasters and the International Order: Earthquakes, Humanitarians, and the Ciraolo Project’ (2000) 22 *International History Review* 1.

¹⁷ *IRU Treaty*, above n 15, preamble.

¹⁸ Opened for signature 22 August 1864, 129 Consol TS 362 (entered into force 22 June 1865).

¹⁹ *World Disasters Report 2000*, above n 4, 149.

In 1919, the League of Red Cross Societies ('LRCS') was formed as an international federation of then-existing national Red Cross and Red Crescent societies to provide humanitarian relief in peacetime to victims of natural disasters.²⁰ In 1921, led by the President of the Italian Red Cross, Giovanni Ciraolo, the LRCS began promoting the creation of an international organisation dedicated to providing relief to the victims of natural disasters in times of peace.²¹ The formation of the League of Nations provided the LRCS's proposal for an international relief organisation with an intergovernmental forum for consideration.²² The proposal for an international relief body progressed through the Assembly of the League of Nations until the adoption of the *Convention and Statute Establishing an International Relief Union* ('*IRU Treaty*') in July 1927.²³

The strategy in the *IRU Treaty* involved, foremost, centralising and harmonising efforts at disaster relief. The IRU was to furnish aid to populations affected by 'any disaster due to *force majeure*' and to coordinate the efforts made by relief organisations.²⁴ The treaty emphasised the participation of LRCS and national Red Cross societies in the IRU's functioning, giving the Red Cross movement a leadership role similar to the one the International Committee of the Red Cross had in international humanitarian law.²⁵ Indeed, the *IRU Treaty* in some ways gives the Red Cross movement quasi-intergovernmental status.²⁶ Interestingly, the IRU was also charged with studying 'preventive measures against disasters',²⁷ which indicates that states were aware of the way in which human activities exacerbated disasters. In addition the *IRU Treaty* required that the principle of non-discrimination in relief provision guide IRU activities.²⁸

Although the *IRU Treaty* created an IGO charged with coordinating disaster relief, it did not impinge on sovereignty for states giving or receiving assistance.²⁹ Any IRU action 'in any country is subject to the consent of the Government thereof'.³⁰ Similarly, beyond an obligation to contribute a one-time

²⁰ Peter Macalister-Smith, 'The International Relief Union: Reflections on Establishing an International Relief Union of July 12, 1927' (1986) 54 *Legal History Review* 363, 365. On the history of the IRU, see also John Hutchinson, 'Disasters and the International Order — II: The International Relief Union' (2001) 23 *International History Review* 253.

²¹ Macalister-Smith, 'The International Relief Union', above n 20, 364–5. But see Hutchinson, 'Earthquakes, Humanitarians, and the Ciraolo Project', above n 16, 15–26, discussing problems within the LRCS, and between the LRCS and the International Committee of the Red Cross, concerning the proposal for an international relief organisation.

²² Article 25 of the *Covenant of the League of Nations* contained the agreement of its Members to encourage the establishment and cooperation of national Red Cross societies in order to facilitate 'the improvement of health, the prevention of disease and the mitigation of suffering throughout the world'.

²³ Above n 15.

²⁴ *Ibid* art 2.

²⁵ *Ibid* arts 5–6.

²⁶ Macalister-Smith, 'The International Relief Union', above n 20, 368, comments that the IRU 'gave the Red Cross a potentially important intergovernmental channel by which to further its aims'.

²⁷ *IRU Treaty*, above n 15, art 2.

²⁸ *Ibid* art 3.

²⁹ See Hutchinson, 'The International Relief Union', above n 20, for a detailed historical account of how the proposal for an international relief organisation was systematically weakened to suit the interests of states and their sovereignty.

³⁰ *IRU Treaty*, above n 15, art 4.

payment for an initial fund,³¹ the *IRU Treaty* created no further duties on states parties to provide disaster assistance.

Although a seminal development in disaster relief, the IRU failed. Part of its failure can be attributed to bad timing because the Union began its existence on the cusp of the world's descent toward World War II. The IRU suffered, however, from design flaws — one of the most important of which was a lack of financial resources to provide disaster relief.³² The IRU also never managed to achieve progress on developing international law on disaster relief.³³ Apart from studies on the prevention and mitigation of disasters, the IRU essentially ceased to operate before World War II. It was not formally terminated until 1968, when the UN Educational, Scientific and Cultural Organization took over what was left of it.³⁴

2 *Disaster Relief and International Law after World War II*

Unlike the aftermath of World War I, which saw the LRCS use the League of Nations to create an IGO dedicated to disaster relief, the period after World War II was characterised more by adoption of bilateral treaties on disaster relief rather than multilateral treaty-making.³⁵ Some regional treaty efforts occurred,³⁶ but analysis of international law relevant to disaster relief has noted that 'there is a significant absence of treaties concluded at a regional level in Asia, Africa and the Middle East'.³⁷ Arguments and efforts were made in the 1970s and 1980s concerning a multilateral treaty on disaster relief,³⁸ but nothing came of proposals on this issue, including the UN Disaster Relief Coordinator's

³¹ Ibid art 9.

³² See Macalister-Smith, 'The International Relief Union', above n 20, 370, noting that the IRU 'was unable to achieve its objective of international mutual humanitarian assistance primarily because, lacking financial resources, it was prevented from giving immediate relief upon the first occurrence of disasters'. See also Hutchinson, 'The International Relief Union', above n 20, 286 observing that the IRU 'would have almost no money to put towards disaster relief'.

³³ Macalister-Smith, 'The International Relief Union', above n 20, 372.

³⁴ See *Agreement on the Transfer to the United Nations Educational, Scientific and Cultural Organization of Certain Responsibilities and of the Assets of the International Relief Union*, opened for signature 18 December 1968, 656 UNTS 345 (entered into force 24 December 1968).

³⁵ Horst Fischer, 'International Disaster Response Law Treaties: Trends, Patterns, and Lacunae' in International Federation, *International Disaster Response Laws, Principles and Practice: Reflections, Prospects, and Challenges* (2003) 24, 24–5, discusses bilateral disaster relief treaties concluded after World War II.

³⁶ See Council of Europe, *Open Partial Agreement on the Prevention of, Protection against, and Organization of Relief in Major Natural or Technological Disasters*, established by Council of Europe Committee of Ministers Resolution (87)2 (20 March 1987); *Inter-American Convention to Facilitate Disaster Assistance*, opened for signature 7 June 1991 (entered into force 16 October 1996) available at <<http://www.oas.org/juridico/english/treaties/a-54.htm>> at 1 October 2005.

³⁷ Fischer, above n 35, 39.

³⁸ See, eg, UN Development Programme Administrator Bradford Morse, arguing that 'a convention is the best means available to resolve the complex tangle of issues surrounding disaster relief': Bradford Morse, 'Practice, Norms and Reform of International Humanitarian Rescue Operations' (1977) 157 *Recueil des cours* 121, 189. The *World Disasters Report 2000* also mentions several initiatives in the 1980s to develop international law on disaster relief: above n 4, 149–51. For an overview of legal proposals and studies during this time period, see Macalister-Smith, *International Humanitarian Assistance*, above n 16, 150–61.

proposal in 1984 for a *Convention on Expediting the Delivery of Emergency Assistance*.³⁹ Some multilateral treaties on other subjects included provisions on facilitating disaster relief,⁴⁰ but these provisions did not constitute robust use of international law for responding to natural disasters. The only multilateral treaty adopted in the last half of the 20th century directly concerning disaster relief was the *Tampere Convention*.⁴¹

Looking back over the post-World War II period, the International Federation has argued that the international legal developments mentioned in the previous paragraph

are all at the periphery of the issue. At the core is a yawning gap. There is no definitive, broadly accepted source of international law which spells out the legal standards, procedures, rights and duties pertaining to disaster response and assistance. No systematic attempt has been made to pull together the disparate threads of existing law, to formalize customary law or to expand and develop the law in new ways. ... At the dawn of the 21st century, a cohesive approach to international disaster response law is not much farther along than it was at the start of the 20th.⁴²

The fragmented, incomplete nature of international law on disaster relief prompted the International Federation to launch the International Disaster Response Law ('IDRL') Project in November 2001.⁴³ The IDRL Project is evaluating the existing international and national law in order to determine how law can play a more effective role in helping states, IGOs and NGOs respond effectively to victims of disasters.

3 IGO and NGO Capacities for Disaster Response

The lack of international legal development should not, however, obscure the significant growth that occurred after World War II with respect to IGO and NGO disaster relief capabilities. The UN became the most important IGO coordinating disaster assistance, and the UN has undertaken numerous initiatives

³⁹ See Office of the UN Disaster Relief Coordinator, *Convention on Expediting the Delivery of Emergency Assistance (Draft)*, UN Doc A/39/267/Add.2 (18 June 1984), as reproduced in Macalister-Smith, *International Humanitarian Assistance*, above n 16, 222–30.

⁴⁰ *World Disasters Report 2000*, above n 4, 152 provides a description of the disaster relief provisions in the *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947); *Convention on Facilitation of International Maritime Traffic*, opened for signature 9 April 1965, 591 UNTS 265 (entered into force 5 March 1967); *International Convention on the Simplification and Harmonization of Customs Procedures*, opened for signature 18 May 1973, 950 UNTS 269 (entered into force 25 September 1974); *Convention concerning International Carriage by Rail*, opened for signature 9 May 1980, 1397 UNTS 75 (entered into force 1 May 1985); and *Convention on Temporary Admission*, opened for signature 26 June 1990, 1762 UNTS 121 (entered into force 27 November 1993).

⁴¹ Above n 15.

⁴² *World Disasters Report 2000*, above n 4, 145, 157.

⁴³ 'Introduction' in International Federation, *International Disaster Response Laws, Principles and Practice: Reflections, Prospects, and Challenges* (2003) 9, 9.

and reforms to enhance its ability to respond to disasters.⁴⁴ These efforts, which date back to the late 1960s, have included proposals for creating a ‘New International Humanitarian Order’,⁴⁵ various reorganisations of UN agencies to facilitate better humanitarian assistance,⁴⁶ and the UN’s declaration of 1990–2000 as the International Decade for Natural Disaster Reduction.⁴⁷ In the UN Secretary-General’s opinion, these various UN efforts have produced a more effective UN humanitarian response system — but one that still needs much work.⁴⁸

In addition to the development of the UN’s role, the world has seen growth during the post-World War II period in the scale of NGO capacities to provide humanitarian assistance. This growth was apparent in the response to the Indian Ocean tsunami, as hundreds of NGOs contributed by delivering assistance and/or raising money. Although the NGO effort with respect to the tsunami was unprecedented, the scale of the NGO activities reveals the tremendous development since World War II of NGO capabilities in providing disaster relief.

Using international law directly to bridge IGO and NGO activities on disaster relief, which was characteristic of the movement to establish the IRU, is not apparent in the post-World War II period. IGO and NGO capacities to marshal, coordinate and deliver disaster relief grew despite few developments in international law on natural disaster mitigation. Such developments were obviously not required for IGOs and NGOs to increase their disaster response capabilities to the point where the humanitarian response system could respond to the Indian Ocean tsunami, one of the worst natural disasters in human history.

III FROM INTERNATIONAL HUMANITARIAN RELIEF TO DOMESTIC GOVERNANCE RESILIENCE: INTERNATIONAL LAW AND SHIFTS IN POLICY ON NATURAL DISASTERS

The historical overview of the relationship between international law and disaster relief indicates that, in the early 21st century, international law has not moved far from what Vattel described in 1758 — both assisting and victim states retain virtually unfettered sovereignty in the context of natural disaster policy. Around this unchanged core legal reality, IGOs and NGOs have tried to improve the effectiveness of assistance to disaster victims; and these efforts have produced results, even if the global humanitarian assistance system continues to

⁴⁴ For a review of the UN, humanitarian assistance and coordination of relief, see Macalister-Smith, *International Humanitarian Assistance*, above n 16, 93–110, 129–47; Arjun Katoch, ‘International Natural Disaster Response and the United Nations’ in International Federation, *International Disaster Response Laws, Principles and Practice: Reflections, Prospects, and Challenges* (2003) 47.

⁴⁵ Macalister-Smith, *International Humanitarian Assistance*, above n 16, 158–9.

⁴⁶ For an analysis of UN involvement in disaster response, see Zama Coursen-Neff, ‘Preventive Measures pertaining to Unconventional Threats to the Peace such as Natural and Humanitarian Disasters’ (1998) 30 *New York University Journal of International Law and Politics* 645, 645–69; Katoch, above n 44, 51–4.

⁴⁷ The General Assembly decided that the objective of the International Decade for Natural Disaster Reduction was ‘to reduce through concerted international actions, especially in developing countries, loss of life, property damage and social and economic disruption caused by natural disasters’: *International Decade for Disaster Reduction*, GA Res 42/169, UN GAOR, 42nd sess, 96th plen mtg, [4], UN Doc A/RES/42/169 (11 December 1987).

⁴⁸ *In Larger Freedom*, above n 2, [202]–[211].

suffer problems and setbacks.⁴⁹ In looking forward, the International Federation has argued that the development of international law on disaster relief is essential for more progress to be made,⁵⁰ and its IDRL Project is spearheading the effort in this regard.⁵¹ This Part of the commentary probes whether international legal development is critical to the future effectiveness of humanitarian assistance to disaster victims.

In assessing the future role of international law, understanding changes in how disaster policy is now being conceptualised is important. In the last 10 to 15 years, a number of changes have converged in a way that reshapes the conceptual and technical contexts of disaster policy. This convergence reflects, and contributes to, a more complex and demanding governance environment for states, IGOs and NGOs. This environment provides the background for thinking about international law's role in disaster policy in the early 21st century.

A *From Episodic Humanitarianism to Systemic Interests: Rethinking the Political Nature of Natural Disasters*

As argued earlier, a dilemma for thinking about using international law to promote more effective responses to natural disasters was the convergence of the self-interests of assisting and victim states on preserving as much sovereignty as possible. This paradigm reflects rational calculations of self-interested states confronted with episodic, short-lived crises that are handled as humanitarian matters, part of the 'low politics' of international relations. An interesting development in policy discourse on natural disasters involves attempts to shift the traditional paradigm to one in which natural disasters connect directly to more serious political interests that states possess.

An important element of this shift is the effort to demonstrate how natural disasters are increasing, how costly natural disasters are in economic and human terms worldwide, and how these costs continue to increase.⁵² In December 2004, the UN reported that, since 1994,

there have been about 7,100 disasters resulting from natural hazards around the world. They have killed more than 300,000 people, and caused more than US\$ 800 billion in losses. Some estimates suggest that well over 200 million people have been affected every year by 'natural' disasters since 1991.⁵³

⁴⁹ For an analysis of various deficiencies in the current approach to disaster management, see Peter Walker et al, 'Smoke and Mirrors: Deficiencies in Disaster Funding' (2005) 330 *British Medical Journal* 247.

⁵⁰ 'During the early decades of the 21st century, a strong, new international law of disaster response could, and should, be counted among the International Red Cross and Red Crescent Movement's contributions to the world community': *World Disasters Report 2000*, above n 4, 157.

⁵¹ For an IDRL Project presenting a compilation of experts' views on international law and disaster relief, see International Federation, *International Disaster Response Laws, Principles and Practice: Reflections, Prospects, and Challenges* (2003).

⁵² Statistics on the human and economic impact of disasters can be found in EM-DAT, a specialised disaster database maintained by the Center for Research on the Epidemiology of Disasters, available at <<http://www.em-dat.net>> at 1 October 2005.

⁵³ UN World Conference on Disaster Reduction, *Review of the Yokohama Strategy and Plan of Action for a Safer World*, UN GAOR, [11], UN Doc A/CONF.206/L.1 (20 December 2004) (citations omitted).

The message that such empirical data sends is that natural disasters are far from episodic, short-lived events of merely humanitarian concern, but are crises that have serious systemic effects for states and peoples. More specifically, the scale of the impact of disasters threatens goals related to economic development in the developing world. In March 2005, the UN Secretary-General argued that '[u]nless more determined efforts are made to address the loss of lives, livelihoods and infrastructure, disasters will become an increasingly serious obstacle to the achievement of the Millennium Development Goals'.⁵⁴

The scale and impact of the economic and human damage done by natural disasters also helps experts connect disaster policy with international human rights law. Linkages between disaster policy and human rights emerged more strongly as international human rights law developed after World War II,⁵⁵ and these linkages emphasised the duty of states to facilitate, and the right of individuals to have access to, disaster relief.⁵⁶ The post-Cold War period has seen, however, an increase in the use of international human rights law in discourse about natural disaster policy.⁵⁷ Linking international human rights law and natural disasters also extends scrutiny of disaster policy beyond short-term responses to include long-term recovery activities as part of efforts to ensure that such activities do not discriminate on gender, racial or ethnic grounds; that the rights of children are adequately addressed; and that property rights of the poor and vulnerable are respected. Framing natural disaster policy as a matter of international human rights law differs politically from presenting the problem as one of humanitarian compassion.

The evidence concerning the threat that natural disasters pose has also factored into new ways of thinking about security. In the past 20 years, experts have challenged the traditional definitions of security that focus on the military power of the state. The development of notions of 'human security' — the security of individuals within the state from chronic or sudden threats —

⁵⁴ *In Larger Freedom*, above n 2, [65]. See also the UN Millennium Project, discussing the need to address countries' vulnerability to natural hazards as part of achieving Millennium Development Goals: UN Millennium Project, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (2005) 179–82; International Strategy for Disaster Reduction, *The Link between Millennium Development Goals (MDGs) and Disaster Risk Reduction* (2005) <<http://www.unisdr.org/eng/mdgs-drr/link-mdg-drr.htm>> at 1 October 2005.

⁵⁵ A link with rights-based thinking was part of Ciralo's original conception of an international relief organisation because Ciralo believed 'that a people struck by calamity should have a right to receive international assistance': Hutchinson, 'The International Relief Union', above n 20, 261.

⁵⁶ See, eg. Rohan Hardcastle and Adrian Chua, 'Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters' (1998) 325 *International Review of the Red Cross* 589.

⁵⁷ The International Federation argues for human rights to be a foundation of international law on disaster response: *World Disasters Report 2000*, above n 4, 156; the Sphere Project uses the human rights to protection and assistance as the basis for its Charter and standards: The Sphere Project, *Humanitarian Charter and Minimum Standards in Disaster Response* (2004) 5.

connected this concept with the dangers posed by natural disasters.⁵⁸ The costs of handling natural disasters could also affect more traditional notions of national security because these costs represent a drain on a state's material sources of power,⁵⁹ especially for developing countries. In addition, badly handled disasters have '[i]n the past ... led directly to uprisings and the overthrow of regimes'.⁶⁰

These examples indicate that the political nature of natural disasters is being significantly reframed so that policy for such disasters connects directly to systemic interests states have in international relations. These arguments reformulate incentives that assisting and victim countries have toward disaster policy and international relief efforts so that such countries participate more vigorously in disaster governance nationally and globally. Rather than an effort to penetrate or overcome sovereignty, the reframing of the political nature of natural disasters seeks to transform how states exercise their sovereignty to achieve systemic interests.

B *In-Depth Disaster Governance: Prepare, Protect and Respond*

The political reframing of natural disasters connects to another change apparent in approaches to natural disasters. Although attention has been paid to disaster prevention in the past, most efforts have focused on making relief assistance available to disaster victims faster and more effectively. These objectives remain important, but the last decade has seen increasing emphasis on the 'front end' of disaster policy, namely efforts to prepare for, and protect against, natural disasters.⁶¹ Experts partly attribute the fall in deaths from disasters in the last two decades to better early warning and preparedness systems.⁶² Thus, we have seen the emergence of strategies to build disaster governance in-depth within countries; and the Indian Ocean tsunami's impact

⁵⁸ Some proponents of human security include natural disasters within the ambit of factors influencing human security: see, eg, Human Security Centre, *Human Security Explained* (2005) <<http://www.humansecuritycentre.org>> at 1 October 2005. Fabien Nathan argues that 'disaster risk is one of the most important threats to Human Security': Fabien Nathan, 'Disaster and Human Security' (Paper presented at the International Studies Association Conference, Montreal, Canada, 18 March 2004) available at <http://www.afes-press.de/pdf/Nathan_Mont_8.pdf> at 1 October 2005.

⁵⁹ Hurricane Katrina revealed that developed countries too may have their national power adversely affected by natural disasters, as illustrated by the severe political and economic impact of the hurricane on US oil production and refining of gasoline in the Gulf Coast region, the federal government's finances in a time of record budget deficits, and other countries' perceptions about the US' weaknesses and vulnerabilities.

⁶⁰ Walker et al, above n 49, 429.

⁶¹ See International Strategy for Disaster Reduction, *Living with Risk: A Global Review of Disaster Reduction Initiatives* (2004) 7–8 ('*Living with Risk*'), which observes a policy shift towards disaster reduction in the last decade.

⁶² Walker et al, above n 49, 249. One could compare the cost in lives exacerbated by the lack of a tsunami warning system in the Indian Ocean with the many lives saved by evacuations made possible by sophisticated forecasting involved in tracking Hurricane Katrina before it hit the Gulf Coast of the US.

has reinforced the need not only to respond effectively to disasters but also to prepare for, and protect communities from, disasters that occur.⁶³

The Indian Ocean tsunami illustrates the direction experts believe disaster policy must take. Although the global response to the tsunami devastation has been unprecedented, the disaster response community understands that little had been done to prepare and protect populations vulnerable to tsunamigenic seismic activity in the Indian Ocean. For example, despite knowledge of the clear and present danger tsunamis posed in the Indian Ocean, no early warning system for tsunamis in the region had ever been established.

A major UN emphasis in the past decade has been on disaster reduction initiatives integrated into economic development strategies.⁶⁴ In connection with natural disasters, which cannot often be prevented from occurring, disaster reduction focuses on minimising the human, social, economic and environmental impact of natural disasters. Minimisation of disaster impact involves pre-disaster reduction of risks that would exacerbate a disaster's effects. The governance objective is community resilience to the short, medium and long-term impact of natural disasters.⁶⁵ Such resilience requires not only international cooperation in the delivery of relief assistance (the traditional focus), but also governance reforms and initiatives within countries from the national to the local levels.⁶⁶ Resilience through in-depth disaster governance requires the participation of state and non-state actors globally, nationally and locally.

⁶³ 'The sheer scale of the tsunami emergency has brought into stark relief the vital importance of effective, grassroots community disaster preparedness programs': International Federation, 'More Must Be Done to Protect Vulnerable Communities from Disaster' (Press Release, 24 June 2005) available at <<http://www.ifrc.org/docs/News/pr05/4105.asp>> at 1 October 2005. See also the World Conference on Disaster Reduction, where it was observed that '[t]here is now international acknowledgement that efforts to reduce disaster risks must be systematically integrated into policies, plans and programmes for sustainable development and poverty reduction': UN World Conference on Disaster Reduction, *Building the Resilience of Nations and Communities to Disasters: Hyogo Framework for Action 2005–2015*, [4], UN Doc A/CONF.206/L.2/Rev.1 (2 February 2005) ('*Hyogo Framework*'). One of the lessons already clear from the aftermath of Hurricane Katrina in the US is that developed countries also need to pay more attention to in-depth disaster governance in terms of preparation, protection and response at all levels of government.

⁶⁴ World Conference on Natural Disaster Reduction, *Draft Yokohama Strategy and Plan of Action for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation*, UN Doc A/CONF.172/L.2 (25 May 1994). 'Disaster reduction has emerged as an essential prerequisite for sustainable development. The UN General Assembly includes disaster reduction in its treatment of the sustainable development items in its annual deliberations': *Living with Risk*, above n 61, 20. The *Hyogo Framework* asserts that '[s]ustainable development, poverty reduction, good governance and disaster risk reduction are mutually supportive objectives': above n 63, [4].

⁶⁵ See *Living With Risk*, above n 61, 19, noting that disaster reduction 'is about improving standards of safety and living conditions with an eye on protection from hazards to increase resilience of communities'. For a description of the World Conference on Disaster Reduction's emphasis on 'the need for ... building the resilience of nations and communities to disasters', see *Hyogo Framework*, above n 63, [4].

⁶⁶ For example, the International Strategy for Disaster Reduction discusses efforts to use micro-finance tools 'to reduce disaster risk and increase community resilience to disasters': International Strategy for Disaster Reduction, *2005 World Disaster Reduction Awareness Campaign Focuses on Reducing Risk Using Micro-Finance Tools and Safety Nets* (2005) available from <<http://www.unisdr.org>> at 1 October 2005.

C Disaster Relief in the Era of Globalisation

A third area to consider concerns changes to the traditional focus of international disaster policy on the provision of humanitarian assistance. As tsunami relief efforts demonstrated, humanitarian assistance for natural disasters in the early 21st century involves increasingly complex and technical tasks that require undertaking as swiftly as possible. The globalisation of IGO and NGO capabilities, combined with the speed of modern transportation and communications technologies, creates opportunities for rapid responses to natural disasters. This potentiality contrasts with the bottleneck that sovereignty becomes when the crisis hits. The coordinator of the IDRL Project highlighted this problem in connection with the tsunami relief effort in arguing that:

The tsunami operation has once again highlighted the complexities of getting relief across borders in the shortest time and with maximum efficiency ... Humanitarian organisations are not only having to cope with damaged infrastructure, they are also dealing with 12 different governments and 12 different sets of customs regulations. Delays in getting aid to those who need it cost lives.⁶⁷

The need for a template for facilitating provision of relief assistance was highlighted in the international legal proposals made in the late 1970s and 1980s, proposals which were more demanding in terms of technical requirements for governments sending and receiving assistance than what appeared in the *IRU Treaty*.⁶⁸ The IDRL Project has identified many technical aspects of disaster response that remain inadequately addressed by international law.⁶⁹ The *Tampere Convention* deals with some of these technical issues but only with regard to the provision of telecommunications assistance.⁷⁰ The technical complexity involved in disaster relief provision today requires that any template, whether binding or non-binding, contain detailed provisions across many areas affected by humanitarian assistance. The more extensive these requirements the more concerns arise about whether many governments would have the governance capacity to comply with them.

D Implications for the Role of International Law

The current policy context described above raises questions as to whether the progressive development of international law is critical for the future of disaster relief. In many respects, the attempt to change the political conceptualisation of natural disasters, the emphasis on in-depth disaster governance, and concerns about the capacities of many countries to carry out extensive technical obligations in facilitating humanitarian assistance, place the focus on domestic law and governance rather than on international law. The objective of moving

⁶⁷ International Federation, 'Tsunami Operation Offers Reminder of Need for Disaster Reduction Measures' (Press Release, 12 January 2005) available at <<http://www.ifrc.org/docs/news/pr05/0605.asp>> at 1 October 2005.

⁶⁸ See, eg, *Convention on Expediting the Delivery of Emergency Assistance (Draft)*, above n 39.

⁶⁹ See Fischer, above n 35, 39.

⁷⁰ On privileges and immunities for those providing emergency telecommunications assistance, and on regulatory barriers (respectively), see *Tampere Convention*, above n 15, arts 5, 9.

policy from focusing on international humanitarian relief to supporting domestic governance resilience requires transforming how states exercise sovereignty within their own territories. The policy effort is thus going deeper into the heart of sovereignty on a significant scale, which may make it more difficult to overcome the reluctance of assisting and receiving states to bind themselves to rules of international law. Concerns and controversies about advocacy for a right of humanitarian intervention grounded in a 'responsibility to protect' reinforce the reticence of many states to bind themselves to rules concerning disaster relief.⁷¹

Put another way, the manner in which the policy dynamics are unfolding encourages states that provide disaster assistance to emphasise that states affected by disasters have the responsibility for dealing with such events. Assisting states do not want legally binding obligations to pay for the significant costs that in-depth disaster governance presents for many countries.⁷² States facing potentially adverse effects from disasters will likewise stress sovereignty in the face of a potential avalanche of demands from the international community on preparing for, protecting against and responding to natural disasters.

One can, in fact, see evidence supporting these observations in the way that UN Member States have dealt with sovereignty in General Assembly efforts addressing natural disasters. Arjun Katoch's analysis of General Assembly resolutions on disasters from 1981 until 2002 reveals an increasingly explicit emphasis on sovereignty.⁷³ This period corresponds to the shift in international disaster policy from a focus on international humanitarian relief to promoting domestic governance resilience. Such a strong trend in favour of sovereignty's prerogatives does not bode well for expanding and deepening the role of international law in disaster policy.⁷⁴

⁷¹ On the 'responsibility to protect,' see International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001). The UN Secretary-General advocated the responsibility to protect in his proposals for reforming the UN: *In Larger Freedom*, above n 2, [135].

⁷² The kind of legal obligation for financial commitments states want to avoid is proposed by Walker et al, who argue that 'UN relief agencies should be funded by assessed contributions from member countries rather than having to appeal for money after each disaster': Walker et al, above n 49, 249.

⁷³ Katoch, above n 44, 49–50.

⁷⁴ The adoption of the *Tampere Convention* in 1998 indicates that the strong trend toward protecting sovereignty is not an absolute bar to the development of international legal instruments on disasters. The *Tampere Convention* does not, however, alter at all the sovereignty of states receiving or giving assistance — both activities remain entirely voluntary: 'Each State Party to which a request for telecommunication assistance is directed ... shall promptly determine and notify the requesting State Party whether it will render the assistance requested': above n 15, art 4.3; 'No telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party': art 4.5. In addition, the *Tampere Convention*, at present, does not reach much of the international system. As of 2 June 2005, the *Tampere Convention* had 31 States Parties, or 16 per cent of the 191 Member States of the UN: *List of Signatories to the Tampere Convention* (2005) <<http://www.reliefweb.int/telecoms/tampere/signatories.html>> at 1 October 2005. As one expert argued, 'it can be feared that in practice the problems resulting from reservations and non-universal acceptance of a multilateral relief convention might even increase the difficulties faced by those involved in humanitarian actions': Macalister-Smith, *International Humanitarian Assistance*, above n 16, 160.

IV CONCLUSION

This commentary's analysis suggests that the direct role of international law with respect to policy on natural disasters will not grow significantly. As indicated by the reaffirmation of the strategy to develop resilience in disaster governance at the World Conference on Disaster Reduction in January 2005,⁷⁵ the policy focus for the foreseeable future will involve political dynamics that make states hesitant to negotiate and accept far-reaching treaties that impose legally binding responsibilities with respect to disaster preparedness, protection, and response. Developments in the area of natural disaster policy are unlikely to follow the pattern established by international humanitarian law — comprehensive rules of international law binding on states through treaties and customary international law. International legal developments are, thus, likely to be limited and tactical rather than strategic.

These conclusions flow from analysis of the underlying policy shift that has taken place in this area in the past 10 to 15 years. Few would argue that this policy shift is wrong because it makes the development of international law on natural disasters potentially more difficult. Without states understanding their own self-interests in disaster governance resilience, multilateral treaties on the provision of disaster relief that are complex, technically detailed, and economically demanding may, even if adopted, constitute Sisyphean humanitarianism. In that environment, humanitarian demand for assistance generated by natural disasters will exhaust humanitarian supply of relief, tarnishing badly, to paraphrase Vattel, the polish of civilisation responsible for the desire to provide assistance when others suffer extreme adversity.

⁷⁵ *Hyogo Framework*, above n 63.