

Fast Food: Regulating Emergency Food Aid in Sudden-Impact Disasters

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I. INTRODUCTION

A rich and varied literature has grown up around food aid,¹ in particular with regard to its use as a development tool, in response to slow-onset disasters (such as droughts and desertification), and in armed conflicts. Given that these applications make up the bulk of the millions of tons of food aid recorded annually and present some of the thorniest operational issues, perhaps it is not surprising that the regulation of food aid provided in sudden-impact disasters (such as earthquakes, tsunamis, wind storms, and floods) has not been as thoroughly examined.

Still, while the amount of food involved is comparatively small, the lives and dignity of millions of people depend on speedy, effective, and appropriate food assistance in sudden-impact disasters as well. In practice, regulatory problems pose significant obstacles to meeting this need. While there are some relevant international instruments and norms, they have had less impact than might be hoped in addressing the most common operating issues. Moreover, existing international standards on food aid fail to address the particular dynamics of sudden-impact disasters, do not go far enough to link food assistance to other sectors of disaster relief, and ignore the growing role of the non-governmental and private sectors in disaster relief. Since reform is currently in the air in global food aid,² this is also the time to address these related issues.

Part II of this Article will provide some background on food aid in sudden-impact disasters as a subset of global food aid and signal some trends in the composition of the aid-providing community. Part III will look to some examples of common legal problems in providing food aid, including not only regulation of the food itself but also

1. See Food & Agric. Org. of the U.N. [FAO], *FAO Legislative Study No. 87: Perspectives and Guidelines on Food Legislation, with a New Model Food Law* 87, 130 (2005), available at <http://www.fao.org/legal/legstud/ls87/ls87e.pdf> (prepared by Jessica Vapnek & Melvin Spreij) (“What constitutes ‘food aid’ is a matter of considerable controversy. Some authors define it as ‘the international sourcing of concessional resources in the form of or for the provision of food’, while others include national domestically funded distribution of food in the definition.”). This paper will operate under the definition advocated by FAO: “Food aid is the international sourcing of concessional resources in the form of or for the provision of food.” FAO, *The State of Food and Agriculture 2006: Food Aid for Food Security?*, at 11 (2006) [hereinafter *Food Aid for Food Security*]. This definition includes both in-kind provision of food as well as cash assistance provided for the purchase of food. However, it does not include just any programme with potential effects on food security or domestic assistance efforts. *Id.*

2. See, e.g., Press Release, FAO, FAO Urges Food Aid Reform, (Jan. 24, 2007), available at <http://www.fao.org/newsroom/en/news/2007/1000482/index.html> (noting that there is a proposal for “a series of major changes in the way international food aid is managed and delivered”).

indirect barriers to importing and distributing the right food at the right time. Part IV will examine existing international law in light of these common problems. Part V will offer some thoughts on one way forward on these issues.

II. BACKGROUND

A. *Food Aid for Sudden-Impact Disasters in Context*

In light of the limitations of major data sources for global food aid, it is difficult to draw a clear statistical picture of the food provided in response to sudden-impact disasters in particular. However, it is reasonable to conclude that the amount provided is modest compared to other types of food aid, including emergency aid for armed conflict situations and droughts.

According to the World Food Programme's (WFP) International Food Aid Information System (INTERFAIS), the proportion of global food aid devoted to emergencies, as opposed to economic support and development,³ increased from thirty-four percent in 1996 to sixty-four percent in 2005, and rose in absolute terms from 2.7 million tons in 1996 to 5.2 million tons in 2005.⁴ However, this "emergency" category includes all types of natural and man-made disasters. Of the top nine recipients of emergency food aid in 2005 reported by INTERFAIS, five had experienced a sudden-onset disaster, but together the nine recipients represented only eleven percent of overall emergency aid.⁵

Similarly, according to the Office for the Coordination of Humanitarian Affairs' (OCHA) Financial Tracking Service (FTS), of the \$15.7 billion donated for food-sector assistance in humanitarian relief operations from 1999 to 2007, \$3.8 billion, or twenty-four percent, were for natural disasters (of both slow- and sudden-onset varieties).⁶ Thus, the large majority of donations were devoted to

3. INTERFAIS tracks food aid in three categories: "programme," "project," and "emergency." See WORLD FOOD PROGRAMME INTERFAIS, FOOD AID MONITOR—2006 FOOD AID FLOWS, at vi (2006) [hereinafter Food Aid Monitor]. "Programme" food aid refers to food provided on grant or loan to a government for its economic support. *Id.* "Project" food aid refers to food provided as part of poverty-reduction or disaster prevention activities aimed a specific beneficiaries. *Id.* "Emergency" food aid is food provided for free to the victims of natural or man-made disasters. *Id.*

4. See *id.* at Tbl. 9; see also Development Assistance Comm., Org. for Econ. Co-operation and Dev. [OECD], Table 18: Major Aid Uses by Individual DAC Donors, <http://www.oecd.org/dataoecd/52/11/1893159.xls> (last viewed May 21, 2007) (noting that humanitarian aid from the major donor countries rose from 1.9 percent of all DAC aid in 1984–85 to 10 percent in 2004–2005).

5. See Food Aid Monitor, *supra* note 3, at 19.

6. U.N. Office for the Coordination of Humanitarian Affairs [OCHA], Financial Tracking Service[FTS], *Trends Analysis—Evolution Of Funding By Sector*

situations of armed conflict, which are considered to be “the most severe emergencies in terms of widespread food insecurity, starvation and excess mortality.”⁷

On the other hand, available country-level statistics on sudden-impact disaster relief operations show that food aid can play a substantial role in those operations. For instance, the United Nations’ Flash Appeals for the 2007 floods in Bolivia and Mozambique both devoted more than forty percent of the total amount requested to food assistance.⁸ Moreover, the absolute numbers of persons requiring food in these types of disasters can sometimes be impressive. For example, after the 2004 Indian Ocean tsunami, WFP provided food to over 2.2 million persons across six countries.⁹ After the October 2005 earthquake in Pakistan, 2.3 million persons required food assistance in that one country alone.¹⁰ Thus, while normally eclipsed by the size and complexity of food operations in slow-onset disasters and armed conflicts, sudden-impact disasters can also sometimes reach an epic scale.

B. Food Aid Requirements in Sudden-Impact Disasters

Still, whereas major slow-onset disasters frequently create food needs, slow-onset disasters only do so sometimes.¹¹ Floods, windstorms, tsunamis and tidal waves are the most common of the sudden-impact disasters to create food needs,¹² in large part by destroying harvests, foods stocks, animals and seeds.¹³ Volcanic

Over The Last 9 Years, 1999-2007, http://ocha.unog.ch/fts2/by_sector.asp (last viewed Sept. 3, 2007).

7. See SUSAN JASPERS & HELEN YOUNG, GENERAL FOOD DISTRIBUTION IN EMERGENCIES: FROM NUTRITIONAL NEEDS TO POLITICAL PRIORITIES 8 (Relief and Rehabilitation Network 1995).

8. OCHA, FTS, *Flash Appeal: Bolivia Flash Appeal 2007, Table D: Requirements, Commitments/Contributions and Pledges per Sector as of 3-Sept-2007*, available at http://ocha.unog.ch/fts/reports/daily/ocha_R3sum_A759_07090307.pdf (requesting \$4.9 million for food out of a total appeal for \$12.1 million); OCHA, FTS, *Flash Appeal: Mozambique Floods and Cyclone Flash Appeal 2007, Table D: Requirements, Commitments/Contributions and Pledges per Sector, as of 22-May-2007*, available at http://ocha.unog.ch/fts/reports/daily/ocha_R3sum_A760_07090307.pdf (requesting \$16.1 million for food out of a total appeal for \$37.6 million).

9. Press Release, World Food Programme, Tsunami One Year On: WFP Extends Food Aid For Indonesia and Sri Lanka (Nov. 29, 2005), available at <http://www.wfp.org/english/?ModuleID=137&Key=1940>.

10. OCHA, Pakistan Earthquake: OCHA Situation Report No. 24 (Nov. 20, 2005), available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/KHII-6JC2PK?OpenDocument>.

11. See PAN AMERICAN HEALTH ORG., HUMANITARIAN ASSISTANCE IN DISASTER SITUATIONS: A GUIDE FOR EFFECTIVE AID 16–17 (1999).

12. See *id.* Note that flooding is not always rapid, and this type of disaster can thus straddle the divide between sudden- and slow-onset.

13. INT’L FED’N OF RED CROSS & RED CRESCENT SOCIETIES, DISASTER EMERGENCY NEEDS ASSESSMENT 24 (2000). This is significant in light of the fact that

eruptions can also result in food needs due to widespread destruction of crops.¹⁴ Earthquakes occasionally cause significant food shortages, as they did in Pakistan in 2005 and Bam, Iran in 2003.¹⁵ This is particularly true when the earthquake destroys food distribution systems and markets.¹⁶ However, this is not commonly the case.¹⁷ For example, notwithstanding the significant devastation of the 2001 earthquake in Gujarat, India, food supplies were not greatly disrupted.¹⁸

In general, food needs that do result from sudden-impact disasters are urgent but temporary, whereas in slow-impact disasters—such as droughts or locust infestations—food needs develop gradually and tend to be longer-lasting.¹⁹ In the first critical hours and days after a sudden-impact emergency, “[t]here will be insufficient time for extensive or detailed assessment and the organization of large-scale external support.”²⁰ Consequently, “[t]o give any useful benefit, external help must involve delivery of very specific packages of aid to reinforce existing [local] activity.”²¹ Moreover, different types of food aid—in particular, prepared rather than dry foods—may make more sense in the immediate aftermath of sudden-impact disasters than in the slow-onset context.²²

floods and storms have evolved over the last thirty years to become the most frequent types of disaster, and current predictions are that global warming will lead to increases in these and other hydrological disasters in the coming years. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers, in* WORKING GROUP II CONTRIBUTION TO THE FOURTH ASSESSMENT REPORT 14–15 (2007), available at <http://www.ipcc-wg2.org/index.html>.

14. See PAN AMERICAN HEALTH ORG., NATURAL DISASTERS: PROTECTING THE PUBLIC’S HEALTH 59 (2000) (hereinafter PROTECTING THE PUBLIC).

15. See Rahul Bedi, *Pakistan Winds Down Rescue to Focus on Recovering the Dead*, IRISH TIMES, Oct. 15, 2005, at 10, available at <http://www.ireland.com/newspaper/world/2005/1015/1127148500909.html>; OCHA, *Workshop of Lessons Learnt on the National and International Response to the Bam Earthquake*, Keran, Iran, Apr. 14–15, 2004, Report, 14 (prepared by Piero Calvi-Pariseti) [hereinafter Bam Workshop Report].

16. Ellen Messer & Laurie de Rose, *Food Shortage*, in WHO’S HUNGRY? AND HOW DO WE KNOW?: FOOD SHORTAGE, POVERTY AND DEPRIVATION 62 (Laurie Derose et al., eds., 1998).

17. See PROTECTING THE PUBLIC, *supra* note 14, at 59.

18. DISASTERS EMERGENCIES COMM., THE EARTHQUAKE IN GUJARAT, INDIA: REPORT OF A MONITORING VISIT FOR THE DISASTERS EMERGENCY COMMITTEE ¶ 27 (2001), available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/ACOS-64C64L?OpenDocument>.

19. See FOOD AID FOR FOOD SECURITY, *supra* note 1, ch. 4.

20. United Nations Dev. Program, DISASTER ASSESSMENT 24 (2nd ed. 1994), available at <http://proventionconsortium.org/themes/default/pdfs/DisasterAssess.pdf>.

21. *Id.*

22. See SPHERE PROJECT, HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN DISASTER RESPONSE 155 (2004). Thus, for example, WFP has observed that high-energy biscuits “are often the most adequate food commodity in the first two weeks of a crisis, both during the initial acute phase during which the affected population would not be able to cook due to displacement or lack of access to the basic facilities (clean

However, even when a disaster causes food needs, it does not necessarily follow that international assistance is required. In fact, the overwhelming majority of disasters are addressed entirely by affected communities, domestic authorities, national Red Cross and Red Crescent Societies, and other domestic actors.²³ Thus, for instance, while 790 natural disasters were recorded worldwide in 2006,²⁴ international assistance was reportedly provided for only 46 of them.²⁵

C. Providers of Food Aid in Sudden-Impact Disasters

Where international relief is required, it might be provided by a variety of actors. According to INTERFAIS, as of 2005, governments provided ninety-five percent of all food aid, and the United States alone provided forty-nine percent of the global total.²⁶ However, donors channeled that aid in different ways: fifty-four percent was routed through “multilateral channels”, twenty-four percent was provided through NGOs, and only twenty-two percent was provided directly by governments of assisting states.²⁷

Nearly all of the “multilateral” aid went to just one agency, WFP.²⁸ However, a majority of that aid was then “sub-contracted” for distribution to NGOs (in addition to the twenty-four percent that they received from governments directly)²⁹ and, particularly in the emergency context, national Red Cross and Red Crescent Societies.³⁰ Thus, these non-governmental actors were involved in the distribution of approximately two-thirds of all food aid.³¹

water and cooking equipment[.]” World Food Programme, *Regional Emergency Preparedness Operation to Pre-position High Energy Biscuits in Latin America and the Caribbean*, at 2, EMOP 10487.0 (2005), available at http://www.wfp.org/operations/current_operations/project_docs/104870.pdf.

23. See OHCA, FTS, Natural Disasters in 2006, <http://ocha.unog.ch/fts2/pageloader.aspx?page=emerg-emergencies§ion=ND&Year=2006> (last visited Oct. 9, 2007) [hereinafter *Natural Disasters in 2006*] (listing the only 46 natural disasters that received international funding in 2006).

24. Em-Dat Emergency Disasters Data Base, <http://www.em-dat.net/disasters/list.php> (choose “All Countries,” “2006,” and “Natural”; then follow “Next Step”).

25. See *Natural Disasters in 2006*, *supra* note 23.

26. See Food Aid Monitor, *supra* note 3, at 29.

27. See *id.* at 23.

28. See SOPHIA MURPHY & KATHY MCAFEE, INST. FOR AGRIC. & TRADE POL’Y, U.S. FOOD AID: TIME TO GET IT RIGHT 14 (2005) (noting that WFP “handles about 98 percent of multilateral food aid”).

29. See Food Aid Monitor, *supra* note 3, at 23.

30. See Press Release, Int’l Fed’n of Red Cross & Red Crescent Societies and WFP Working Together in Southern Africa Food Crisis (Sept. 10, 2002), available at <http://www.ifrc.org/docs/News/pr02/6502.asp> (announcing the cooperation of Red Cross Red Crescent and WFP in “response to the unfolding food crisis in southern Africa”).

31. See Food Aid Monitor, *supra* note 3, at 23.

Accordingly, although WFP is by far the largest single humanitarian actor in this field, it is certainly not alone.

The foregoing highlights an overall trend of expansion in the size, number, and diversity of actors involved in international disaster relief. More “non-traditional” government donors,³² more national Red Cross and Red Crescent societies, and more U.N. agencies are becoming involved. The increased participation of the NGO sector has been particularly dramatic.³³ It is estimated that there are currently between 3,000 and 4,000 international NGOs in Western countries, approximately 260 of which are regularly involved in humanitarian relief.³⁴

The private sector and the general public are also taking an increasing interest in international relief, particularly in sudden-impact disasters. This interest is manifested not only by large donations to humanitarian actors in highly mediatised situations (during the tsunami operation, private contributions to NGOs and U.N. agencies were reportedly \$5.5 billion, exceeding governmental donations for the first time) but also by directly sending aid or travelling to disaster sites in an effort to help.³⁵

III. REGULATORY PROBLEMS FOR FOOD AID IN SUDDEN-IMPACT DISASTERS

Notwithstanding this increasing diversity of food aid channels, recent debates about food aid have mainly focused on legal restrictions by donor states on the type, origin, and delivery methods

32. See, e.g., ADELE HARMER & LIN COTTERRELL, HUMANITARIAN POLICY GROUP, DIVERSITY IN DONORSHIP: THE CHANGING LANDSCAPE OF OFFICIAL HUMANITARIAN AID 3 (2005) (noting that “[m]ore and more governments are becoming involved in the response to complex crises and natural disasters”); NORTH ATLANTIC TREATY ORG. [NATO], NATO’S ROLE IN DISASTER ASSISTANCE 6 (2nd ed. 2001) (NATO “[r]ecognizing the importance of enhanced international cooperation in the field of disaster relief”); Arjun Katoch, *The Responders’ Cauldron: The Uniqueness of International Disaster Response*, 59 J. INT’L AFFAIRS 153, 157 (2006) (recognizing a “sudden influx of international agencies, NGOs, and increasingly, private companies into a disaster site”).

33. See Abby Stoddard, *Humanitarian NGOs: Challenges and Trends*, in HPG REPORT 14, 25 (2003), available at <http://www.odi.org/uk/hpg/papers/hpgreport14.pdf> (noting that NGOs are “controlling a larger share of humanitarian resources than ever before”).

34. *Id.*

35. See, e.g., Tom Phelan & Brent Woodworth, *IBM Crisis Response Team Aids Tsunami Recovery Efforts*, Feb. 22, 2005, <http://www-935.ibm.com/services/us/index.wss/summary/bcrs/a1009006?cntxt=a1000265> (last visited Sept. 3, 2007) (noting that “[w]ithin four hours of the December 26th Indian Ocean earthquake and tsunami, IBM’s Crisis Response Team was on the phone making contact with personnel in the region, arranging to dispatch team members to the affected areas”).

of the aid they provide.³⁶ This debate is critical for both slow-onset and sudden-impact disasters because the costs and particularly the delay associated with these restrictions are substantial. However, less attention has been paid to important quality and coordination issues in food aid, particularly in sudden-impact disaster settings.

Moreover, these debates have not dwelt on the regulatory problems on the receiving end of food aid.³⁷ Some of these problems are similar to those of any international transaction. Notwithstanding the advances of globalization, it remains a complex task to move goods, personnel, and organizations across borders. However, in disaster relief settings, those complexities are magnified. The regulatory capacity of the affected state government is frequently reduced, and the political difficulties in accepting foreign assistance can generate unique obstacles.

While this may be true in any kind of disaster, the factor of time is particularly critical in sudden-impact disasters in light of the lack of advance warning and opportunity for preparation. Moreover, due to the greater “CNN effect” sudden-impact disasters can generate,³⁸ they are a greater draw for the newer actors in disaster relief described above. While these actors have brought new energy and resources to relief efforts, they have also aggravated some of the common regulatory dilemmas.

A. Supply-Side Problems

1. Tied Aid

Much of the controversy about food aid has centred on “tying,” which has been defined as “loans or grants which are either in effect tied to procurement of goods and services from the donor country or which are subject to procurement modalities implying limited geographic procurement eligibility.”³⁹ For purposes of food aid, this

36. See Olga Manda, *Controversy Rages Over ‘GM’ Food Aid*, AFRICA RECOVERY, Feb. 2003, at 5 (noting the debate over genetically modified food aid); FOCUS ON ETHIOPIA, Mar. 31, 2006, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/HMYT-6NJNEV?OpenDocument> (discussing a debate over the efficacy of a new delivery method for aid).

37. See Manda, *supra* note 36; FOCUS ON ETHIOPIA, *supra* note 36 (none of which discusses regulatory problems on the receiving end of food aid).

38. See, e.g., INT’L FED’N OF RED CROSS & RED CRESCENT SOCIETIES, WORLD DISASTERS REPORT 2005: FOCUS ON INFORMATION IN DISASTERS 130 (2005) (hereinafter WORLD DISASTERS REPORT 2005) (noting that a 2002 volcanic eruption in the Democratic Republic of the Congo generated an unprecedented media response whereas the sporadic and complex armed conflict that had been ongoing there for years had failed to capture headlines).

39. DEV. ASSISTANCE COMM., OECD, *Guiding Principles for Associated Financing and Tied and Partially Untied Official Development Assistance*, in DIRECTIVES FOR REPORTING TO THE CREDITOR REPORTING SYSTEM AID ACTIVITY

generally refers to restrictions as to where food aid may be purchased and how it may be transported.⁴⁰

In the United States, nearly all official food aid is required by national law to be provided in-kind from domestic sources, and seventy-five percent of it must be transported by American shipping.⁴¹ These requirements have been associated with heightened costs and substantial delays. For example, a 2007 report by the United States Government Accountability Office (GAO) found that domestic shipping requirements generated an average of \$134 million in additional costs from 2001 to 2005.⁴² Similarly, a multi-donor study by the Organization for Economic Cooperation and Development (OECD) in 2006 concluded that “[t]he actual cost of tied direct food aid transfers was, on average, approximately 50% more than local food purchases, and 33% more costly than procurement of food in third countries.”⁴³ Moreover, it has been reported that “[f]ood aid shipments from the U.S. take an average of five months to reach their destination—making them pointless for rapid response.”⁴⁴

Other large donors, such as Australia, Canada, and Denmark, also provide the large majority of their food aid as in-kind shipments.⁴⁵ In contrast, the European Union (E.U.) has changed its rules to privilege local purchases (i.e., purchasing food aid within the

DATABASE Annex 2, § 2, ¶ 5 (1987). Under these guidelines, aid is considered “partially tied” if sourcing options are limited but include “substantially all developing countries.” *Id.*

40. See OECD, THE DEVELOPMENT EFFECTIVENESS OF FOOD AID: DOES TYING MATTER? 40–42 (2005) [hereinafter DOES TYING MATTER?].

41. See MURPHY, *supra* note 28, at 14.

42. U.S. GOV'T ACCOUNTABILITY OFFICE, No. GAO-07-95T, FOREIGN ASSISTANCE- VARIOUS CHALLENGES LIMIT THE EFFICIENCY AND EFFECTIVENESS OF U.S. FOOD AID 9 (2007).

43. *Id.* at 12.

44. MURPHY, *supra* note 28, at 30. To a limited extent, these problems have been offset in emergency situations through diversion of foods in the pipeline destined for development purposes, pre-positioning of food stocks, and small-scale local purchases permitted through a separate fund administered by the United States Agency for International Development (USAID). See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 9–10; Thomas Marchione, *Foods Provided through the U.S. Government Emergency Food Aid Programs: Policies and Customs Governing their Formulation, Selection and Distribution*, 132 J. NUTRITION 2107S (2002). USAID also has statutory authority to waive certain rules when providing emergency assistance for natural disasters. However, the agency has interpreted this authority (known as “notwithstanding authority” because of the wording of the relevant provision) as disallowing it to depart from domestic sourcing requirements. See Andrew S. Natsios, Administrator, U.S. Agency for Int'l Dev., Remarks at the Kansas City Export Food Aid Conference (May 3, 2005), available at www.usaid.gov/press/speeches/2005/sp050503.html (“I have been told in no uncertain terms by our USAID lawyers that we cannot use our notwithstanding authority for local purchases.”).

45. See DOES TYING MATTER?, *supra* note 43, at 58 (table showing that the three countries each send the vast majority of their aid in the form of “Direct Transfers”).

affected state) and “triangular purchases” (i.e., purchasing food aid outside of the donor and affected state, usually in a nearby developing state).⁴⁶ Still, even cash-only transactions can be slow if accompanied by significant bureaucracy. It has been asserted that “[t]he E.U. disbursement of food aid funds is so slow that the timing of their assistance . . . can make it less useful than in-kind donations.”⁴⁷

In addition to issues of costs and delay, concerns have long been voiced about the appropriateness of in-kind food as a type of response in many situations, particularly in light of its potential impact on local agricultural markets and the dependency and resiliency of affected communities.⁴⁸ These arguments have been primarily aimed at slow-impact disaster settings, though even in sudden-impact disasters, it has been argued that “food aid—especially food aid sourced from donor countries—is often overemphasized” because food can be available in unaffected parts of the affected state.⁴⁹

Defenders of aid tying—particularly in the United States—argue that, by benefiting domestic agricultural and shipping interests, these rules create a political constituency in support of food aid in whose absence much less aid would be provided to people in need.⁵⁰ In other words, imperfect aid is better than no aid at all. Indeed, in response to E.U. arguments made during Doha Round trade negotiations in 2005 that U.S. food aid was a disguised export subsidy, the United States noted the substantial decline in European food assistance since 1995 in conjunction with its “cash-only” orientation.⁵¹ Nevertheless, the Bush administration has subsequently proposed that U.S. law be changed in order to allow one quarter of the budget for emergency food aid to be used for local or triangular purchases.⁵²

2. Food Quality

Aside from the appropriateness of in-kind food in general, there have also been serious questions as to the type and quality of foods

46. *Id.* at 26.

47. MURPHY, *supra* note 28, at 30.

48. See *Food Aid for Food Security*, *supra* note 1, at 32–46.

49. See *id.* at 48–49. Cf. Oxfam, *Making the Case for Cash: Humanitarian Food Aid Under Scrutiny*, Oxfam Briefing Note, at 3 (Apr. 8, 2005) (arguing that the long delivery delay of US food aid pledged to Sri Lanka and Indonesia after the tsunami would lead to its arrival just as local harvests were occurring and act to depress prices).

50. See DOES TYING MATTER?, *supra* note 45, at 36.

51. See Press Release, U.S. Dept. of State, U.S. Disagrees with EU’s “Cash Only” Food Assistance Policy (Jan. 6, 2006), available at <http://usinfo.state.gov/ei/Archive/2006/Jan/09-13090.html> (noting that “[c]urrently, the European Union provides less than 1.5 million tons a year of overall food assistance while the United States has remained consistent at 4 million tons of food a year”).

52. Celia Dugger, *Bush Administration Gains Support for New Approach on Global Food Aid*, N.Y. TIMES, Apr. 22, 2007.

provided in response to disasters. Most disturbing is the evidence of differing standards of quality of aid provided to European and non-European countries.⁵³ In other cases, it has seemed that certain types of food were “dumped” on disaster-affected countries.⁵⁴

For example, after the 2003 earthquake in Bam, Iran, high-protein biscuits were distributed with the label: “gift for the children of Afghanistan.”⁵⁵ Similarly, after the 2004 tsunami in Indonesia, customs officials measured the amounts of expired foods they had received—some with expiration dates over a year old—by the truckload.⁵⁶ Similar problems were reported in Sri Lanka during the same disaster.⁵⁷

The donation of culturally insensitive or otherwise unusable foods is also common and raises significant local ire. For example, canned pork was shipped to the predominately Muslim population of Aceh, Indonesia, after the tsunami.⁵⁸ Also, in the early days of the operation, when clean water was unavailable or severely rationed, dried noodles and sacks of rice were imported.⁵⁹ Several years earlier, in Bam, donated rice was provided that included broken kernels at a rate of twenty-five percent, which is considered suitable for human consumption but was not acceptable to the Iranian population.⁶⁰ In 2001, whole maize was delivered to persons

53. See PATRICK WEBB, WORLD FOOD PROGRAMME, FOOD AS AID: TRENDS, NEEDS AND CHALLENGES IN THE 21ST CENTURY 19 (Occasional Papers No. 14, 2003) (noting that, in 1998, “20 percent of food aid deliveries to the Europe and NIS region comprised high-value, non-cereal commodities,” a “much higher share than anywhere else in the world”); Marchione, *supra* note 44, at 2105S n.4.

54. See, e.g. *infra* notes 58–60.

55 Bam Workshop Report, *supra* note 15, at 14.

56. JOHN TELFORD & JOHN COSGRAVE, TSUNAMI EVALUATION COALITION, JOINT EVALUATION OF THE INTERNATIONAL RESPONSE TO THE INDIAN OCEAN TSUNAMI: SYNTHESIS REPORT 52 (2006) [hereinafter TEC SYNTHESIS REPORT].

57. See INT’L FED’N OF THE RED CROSS & RED CRESCENT SOCIETIES, LEGAL ISSUES FROM THE INTERNATIONAL RESPONSE TO THE TSUNAMI IN SRI LANKA 19 (2006), available at <http://www.ifrc.org/Docs/pubs/idrl/report-srilanka.pdf> [hereinafter IFRC Sri Lanka Report]. This is not only hazardous for the health of disaster-affected persons, but clearly touches an emotional cord in the affected state, as evidenced by the scandals that erupted over accusations that China had donated expired baby food to Indonesia after the tsunami and that Iran had donated expired canned food to Pakistan after the October 2005 earthquake. See *Indonesia Checks Claim China Donated Expired Food to Victims*, ASIAN ECON. NEWS (Kyodo), Jan. 18, 2005; *Earthquake Relief Food Not Expired, Says Iranian Diplomat*, DAILY TIMES (Lahore, Pak.), Jan. 20, 2006. In both cases, the concerned governments asserted that there had been a misreading of the packaging, which was not in locally-understood languages.

58. See TEC SYNTHESIS REPORT, *supra* note 56, at 52.

59. KIRSTEN SCHULZE, LONDON SCH. OF ECON., BETWEEN CONFLICT AND PEACE: TSUNAMI AID AND RECONSTRUCTION IN ACEH 14 (2005), available at <http://www.lse.ac.uk/Depts/global/Publications/HumanSecurityReport/Tsunami/Aceh%20Tsunami%20Response.pdf>.

60. See Bam Workshop Report, *supra* note 15, at 52. Should this appear capricious, it is notable that, in the U.S., broken rice at a rate higher than four percent is generally used only in dog food. See Sage V Foods, The Composition of Rice and the

displaced by flooding along the Zambezi River in Mozambique, notwithstanding their lack of any utensil to grind or prepare it.⁶¹

Similarly, a number of recipient states have begun resisting genetically-modified food as food aid. Though this debate has mainly arisen in the context of drought, as in Southern Africa,⁶² it was also raised in the sudden-impact disaster context after the 1999 hurricane in Orissa, India.⁶³ The United States has argued that genetically-modified food is safe and that speculative concerns about its effects should not interfere with feeding persons in crisis. In any event, since no regulatory attempt has been made in the U.S. to segregate genetically-modified crops, it is reasonable to assume that all U.S. food aid has some genetically-modified component.⁶⁴ However, in addition to health concerns, many states are worried about contamination of their crops and the possibility of losing European markets.⁶⁵

B. *Coordination and Professionalism*

The inherent delays in governmental food aid discussed above are sometimes aggravated when donors fail to adequately coordinate their efforts in a particular disaster.⁶⁶ Implementing agencies are then “faced with a situation in which they must borrow or stretch the available commodity until commitments are filled.”⁶⁷ Both donors and humanitarian actors have also frequently succumbed to the temptation to compete for recognition as the first to respond to a particular disaster. For example, the International Federation of Red

Various Processed Types, <http://www.sagevfoods.com/MainPages/Rice101/Types.htm#> broken (last visited Sept. 4, 2007).

61. ACTIONAID, FOOD AID: AN ACTIONAID BRIEFING PAPER 14 (2003), available at http://www.actionaid.org/docs/food_aid_briefing.pdf.

62. See Nicole Itano, *Even Hungry Africa Wary of Gene-Modified Food*, CHRISTIAN SCI. MONITOR, Aug. 6, 2002, available at <http://www.csmonitor.com/2002/0806/p01s03-woaf.html> (illustrating the official debate over whether to accept gene-modified foods). *But see Sudan's U-Turn on 'GM' Food Aid*, BBC NEWS, Apr. 26, 2007, available at <http://news.bbc.co.uk/2/hi/africa/6594947.stm> (noting that Sudan had resisted in-kind food aid for the conflict situation in Darfur).

63. See Mike Woolridge, *US "Dumped" GM Food in Orissa*, BBC NEWS, June 3, 2000, available at http://news.bbc.co.uk/1/hi/world/south_asia/775326.stm (noting an accusation by an Indian environmental activist accusing “the United States Government of dumping genetically-engineered food on victims of last October’s cyclone in Orissa”).

64. See STEVEN HANSCH ET AL., INST. FOR THE STUDY OF INT’L MIGRATION, GENETICALLY-MODIFIED FOOD IN THE SOUTH AFRICAN FOOD CRISIS OF 2002–2003 8 (2004) (noting that it would be “impossible for anyone to say or know which bag of maize in any market is GM”).

65. Meron Tesda Michael, *Africa Bites the Bullet on Genetically Modified Food Aid*, WORLDPRESS.ORG, Sept. 26, 2002, available at <http://www.worldpress.org/Africa/737.cfm>.

66. See Marchione, *supra* note 44, at 2109S.

67. *Id.*

Cross and Red Crescent Societies' *World Disasters Report* referred to Aceh as an "information black hole" after the tsunami due to the lack of communication among relief providers, their consequent duplication of efforts in some areas, and their failure to serve needy populations in other areas.⁶⁸

In some cases, moreover, humanitarian actors have failed to live up to professional standards. For instance, in Bam, a large number of the international "volunteers" who arrived to assist victims of the earthquake themselves had to be provided shelter and food by the Iranian Red Crescent Society.⁶⁹ In Thailand, after the 2004 tsunami, there were claims that some Christian charities were conditioning aid on religious conversion or participation in religious activities.⁷⁰ In general, there were many new and inexperienced actors responding to the tsunami in the several countries it affected and they were "more commonly associated with inappropriate aid."⁷¹

C. Receiving-State Problems

In contrast to the detailed rules of donor states about their food aid, very few states have comprehensive laws for policies concerning the receipt of international disaster relief. As a result, confusion frequently reigns after a major sudden-impact disaster; the affected state's government finds that it must suddenly create rules and procedures to handle foreign assistance while also trying to organize its own response. In these circumstances, and in light of the multiplicity of international actors and domestic agencies involved, it is no surprise that some important matters fall through the cracks. The following are some examples of common problems.

1. Delayed Requests

Both political and administrative factors can complicate the initiation of international relief. It is often difficult for a government to admit that it requires international assistance for fear of appearing weak and damaging national pride.⁷² However, more often, delay is

68. See WORLD DISASTERS REPORT 2005, *supra* note 38, at ch. 4 (2005).

69. B. CHOMILIER ET AL., OPERATIONS REVIEW OF THE RED CROSS RED CRESCENT MOVEMENT RESPONSE TO THE EARTHQUAKE IN BAM, IRAN 12 (2004) (an internal evaluation on file with author).

70. See INT'L FED'N OF RED CROSS & RED CRESCENT SOCIETIES, LEGAL ISSUES IN THE INTERNATIONAL RESPONSE TO THE TSUNAMI IN THAILAND 21 (2006), available at <http://www.ifrc.org/idrl> (noting "accusations of aid being provided on condition of conversion or participation in religious activities") [hereinafter IFRC Thailand Report].

71. See TEC SYNTHESIS REPORT, *supra* note 56, at 56.

72. Int'l Fed'n of Red Cross & Red Crescent Societies, European Forum on International Disaster Response Laws, Rules and Principles (IRDL), Antalya, Turk.,

due to administrative confusion or slow needs-assessment procedures.⁷³ Most governments and inter-governmental organizations, such as WFP, will refrain from sending relief until a request has been officially transmitted.

2. Barriers to the Entry of Food Aid

Even after the affected state has requested international assistance, food aid and other international disaster relief items are frequently delayed in customs. For example, as of April 2006, there was a backlog of 1,154 containers of tsunami relief in Sri Lanka's customs.⁷⁴ Over a year after the tsunami struck Indonesia, over 400 containers of relief goods were still awaiting customs clearance.⁷⁵ These included shipments of food aid that had expired while in customs custody. In 2002, it was reported that an \$80,000 shipment of relief supplies, including food items, gathered by the Jamaican diaspora community in Atlanta, GA, was still on the docks in Kingston three months after it arrived to assist persons affected by flooding.⁷⁶

The sheer volume and lack of standardization of international relief has an important part to play in blocking the speedy entry of food aid and other critical relief items. For example, after Hurricane Mitch in 1998, it was reported that ports in Honduras became so clogged with private donations of used clothing, bottled water, and canned food that vital machinery and water pipes could not get through.⁷⁷ Moreover, abuses by a few actors with respect to post-disaster relaxation in customs rules can result in abrupt shifts in procedure.⁷⁸ For example, in both Sri Lanka (after the tsunami) and Guatemala (after Tropical Storm Stan), customs officials insisted on individually inspecting relief shipments after discovering instances

May 25, 2006, *Report*, at 3–4, (2006) available at <http://www.ifrc.org/Docs/pubs/idrl/euro-forum-freport.pdf> [hereinafter European IDRL Forum Report].

73. World Food Summit, Nov. 13–17, 1996, *Technical Background Documents for the World Food Summit*, ch. 13, ¶ 3.14 (noting that “the import displacement time for international food aid has usually been long because of the time it takes governments to assess the disaster situation and food aid needs and to find or request from donors the finances or commodities required”).

74. See IFRC Sri Lanka Report, *supra* note 57, at 17.

75. See INT'L FED'N OF RED CROSS & RED CRESCENT SOCIETIES, LEGAL ISSUES IN THE INTERNATIONAL RESPONSE TO THE TSUNAMI IN INDONESIA 21 (2006) [hereinafter IFRC Indonesia Report].

76. *Flood Relief Shipment Stuck on the Docks*, JAMAICA GLEANER, Sept. 27, 2002, available at http://www.jamaica_gleaner.com/gleaner/20020927/lead/lead5.html.

77. See Press Release, Lutheran World Foundation, Relief Experts Call for “Responsible Response” (Jan. 3, 2005), available at <http://www.waveofgiving.org/news/010305.asp>.

78. See INT'L FED'N OF RED CROSS & RED CRESCENT SOCIETIES, LEGAL ISSUES FROM THE INTERNATIONAL RESPONSE TO TROPICAL STORM STAN IN GUATEMALA, at 19 (2007), available at <http://www.ifrc.org/idrl> [hereinafter Tropical Storm Stan].

where contraband items, such as arms and narcotics, were hidden among food shipments.⁷⁹

Moreover, complexities in domestic food importation rules and confusion about their operation (both from the international and domestic side) can cause significant problems. A dramatic example of this occurred in the United States after Hurricane Katrina in 2005, when the United States Department of Agriculture (USDA) belatedly discovered that 500,000 “meals ready to eat” (MREs), donated by the British military and already in distribution, contained British beef, which had been banned in the United States since 1997.⁸⁰ The remaining MREs were thus gathered back up and stored at significant expense until the U.S. government was able to locate foreign recipients willing to take them (including a contingent of border guards in the Republic of Georgia).⁸¹

3. Obstacles to Effective Distribution of Food Aid

Of course, food is not the only item that is required in order to undertake a food relief operation. Non-food items, such as cooking utensils, water containers, and equipment such as vehicles, radios, and satellite telephones, can be indispensable parts of a food aid operation in a sudden-impact disaster setting.⁸² Like food, these items (particularly the latter three) are also often trapped in customs, because their importation is usually highly regulated.⁸³ Likewise, complexities in obtaining exemptions from customs duties and storage charges for such items have proven to be impediments to relief in a number of recent disasters, including the tsunami and the 1999 earthquake in Turkey.⁸⁴

Moreover, such relief operations require personnel, some of whom frequently must enter from outside of the country. Their initial entry is usually not problematic, as affected states are commonly liberal in providing tourist visas or waiving entry visas. However, it can be difficult to maintain visa status long enough to complete a relief operation. After the 2004 tsunami, in both Thailand and Indonesia, international personnel (including not only NGO, but also U.N. and even foreign government personnel) were required to

79. See IFRC Sri Lanka Report, *supra* note 57, at 20; Tropical Storm Stan, *supra* note 81, at 19.

80. See ANNE C. RICHARD, *ROLE REVERSAL: OFFERS OF HELP FROM OTHER COUNTRIES IN RESPONSE TO HURRICANE KATRINA* 17–18 (2006).

81. *Id.* at 18–19.

82. European IDRL Forum Report, *supra* note 75, at 4.

83. *See id.*

84. *See e.g.*, IFRC Sri Lanka Report, *supra* note 57, at 21; Turkish Red Crescent Society, *International Disaster Response Law: 1999 Marmara Earthquake Case Study*, at 35–36 (2006), available at <http://www.ifrc.org/idrl>.

repeatedly leave and re-enter the country in order to maintain their legal status.⁸⁵

Particularly for NGOs, the lack of domestic legal personality of their organizations can also be a substantial problem. For example, in Thailand, registration procedures were so opaque that few international NGOs responding to the 2004 tsunami were able to penetrate them.⁸⁶ As a result, NGOs suffered significant uncertainty about the duration of their permitted stay, obstacles in opening bank accounts, and other administrative problems.⁸⁷

IV. THE EXISTING INTERNATIONAL REGIME⁸⁸

A. *Food Aid-Specific Instruments*

There are several specific global instruments concerning food aid. However, these instruments address only supply-side issues and have seen only limited success in implementation.

The oldest such instrument is the non-binding FAO Principles of Surplus Disposal and Consultative Obligations of 1954 (hereinafter, the “FAO Principles”), which were primarily designed to monitor the disposal of agricultural surpluses as food aid, and to ensure that food aid did not displace commercial imports.⁸⁹ The FAO Consultative Sub-Committee on Surplus Disposals (CSSD) was set up to receive reports on food aid and monitor performance with these Principles. However, in recent years, donors have increasingly ignored the CSSD, such that less than five percent of global food aid flows were reported in 2005.⁹⁰

In 1967, the first version of the Food Aid Convention (FAC) was adopted as a component of the International Grains Agreement. The current version of the FAC was adopted in 1999 with an effective life of three years.⁹¹ It has been renewed several times since then, most

85. See IFRC Thailand Report, *supra* note 70, at 15–16; IFRC Indonesia Report, *supra* note 75.

86. See IFRC Thailand Report, *supra* note 70, at 13–14.

87. See *id.* at 19, 26.

88. For a thorough discussion of existing instruments pertinent to international disaster relief, see Victoria Bannon, *Strengthening Disaster Response Laws, Rules and Principles: Overview of the Current System and a New Way Forward*, in *TSUNAMI AND DISASTER MANAGEMENT: LAW AND GOVERNANCE* (C. Raj Kumar & D.K. Srivastava eds., 2006).

89. See MURPHY, *supra* note 28, at 14.

90. See *id.* at 15.

91. The Food Aid Convention is one of two components of the International Grains Agreement of 1995. International Grains Agreement, July 1, 1995, 1882 U.N.T.S. 195, 195, 327 available at <http://www.igc.org.uk/en/downloads/brochure/iga1995.pdf>.

recently in 2007, and is valid though June 30, 2008.⁹² The FAC has twenty-three parties, all of whom are donors, including twenty-two states and the European Community.⁹³

The FAC sets out minimum commitments of annual food aid of certain types⁹⁴ to be provided by each member to certain recipient states,⁹⁵ covering both emergency and non-emergency situations. “Eligible” food aid (i.e., aid that may be counted toward the agreed quotas) may include both bilateral assistance as well as aid provided through multilateral organizations and NGOs.⁹⁶ It also has a number of provisions on how aid should be provided. Among these provisions are requirements (added for the first time in the 1999 version) that food aid must:

- respect “basic humanitarian principles”;⁹⁷
- be provided “only when it is the most effective and appropriate means of assistance”;⁹⁸
- “meet international quality standards [and] be consistent with the dietary habits and nutritional needs of recipients”;⁹⁹
- be based on needs assessments by both the recipient and donor states;¹⁰⁰
- take particular account of the needs of women, children and vulnerable groups,¹⁰¹ and ensure the participation of women in decision-making on operations;¹⁰²
- avoid harmful effects on local harvests, production and trade;¹⁰³ and

92. See United Nations Treaty Collection website, <http://untreaty.un.org> (available by subscription only).

93. *Id.* By its terms, ratification or access to the treaty is limited to a prescribed list, or those approved by the Food Aid Committee. See Food Aid Convention arts. XXII–XXIII, July 1, 1995, 1882 U.N.T.S. 327.

94. The “eligible products”—those that a member state can report toward its agreed annual quota—are grains, grain and rice products of primary or secondary processing, pulses, edible oil, root crops, skimmed milk powder, sugar, seed for eligible products, micronutrients and, to a limited extent, other products “which are a component of the traditional diet of vulnerable groups or . . . of supplementary feeding programs.” Food Aid Convention, *supra* note 96, art. IV(a). The Convention does not limit contributions of other types of foods, but they cannot be counted toward the member’s quota. *Id.* art. V(b). The Convention also includes grants of “cash to be used to purchase food for or by the recipient country.” *Id.* art. IX(a)(i).

95. See *id.* art. VIII & Annex B.

96. See *id.* art. XI(a). Member states are urged to give “full consideration to the advantages of directing food aid through multilateral channels, in particular the World Food Programme.” *Id.* art. XI(b).

97. *Id.* art. VIII(d).

98. *Id.* art. VIII(a).

99. *Id.* art. III(j).

100. *Id.* art. VIII(b).

101. *Id.* art. VII(b)–(c).

102. *Id.* art. XIII(a)(iii).

103. *Id.* arts. XIII(a)(i), IX (d).

- take into account, even in emergency situations, “longer-term rehabilitation and development objectives.”¹⁰⁴

The FAC also sets up a governing body of representatives of all members called the Food Aid Committee, and tasked with monitoring progress and addressing problems arising under the FAC on the basis of consensus.¹⁰⁵

The detailed quality standards highlighted above, particularly with regard to the “do-no-harm” approach and the involvement of beneficiaries, are the most progressive of any existing binding instrument related to disasters.¹⁰⁶ Even so, the FAC has come under severe criticism for underperformance.¹⁰⁷ The quota system has been of negligible value because the amounts have been set significantly lower than the usual food aid commitments of nearly all of the signatories.¹⁰⁸ Non-donor states are specifically excluded from membership and thus from discussions on implementation.¹⁰⁹ The types of food covered remain limited (although greatly expanded as of 1999). Moreover, much of the FAC’s operative language is quite weak. For instance, Article XII, on local purchases and triangular transactions, merely calls on members to “give consideration” to these options.¹¹⁰ Finally, the Food Aid Committee has extremely limited powers of enforcement,¹¹¹ and it is unclear if it has had much effect on compliance.

As of the writing of this Article, the future of the Convention remains in some doubt. A planned renegotiation of its provisions was postponed pending satisfactory resolution of the trade issues raised in the Doha Round of the WTO (as discussed above), and this has not yet been accomplished. Currently, the main reference to food aid in the WTO legal structure is in Article 10(4) of the Agreement on

104. *Id.* art. VII(d).

105. *Id.* arts. XV–XVI.

106. *But see* Agreement on Agriculture, art. 10.4(a)–(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 81 (1994) (stating that the Agreement on Agriculture only permits food aid that is “not tied directly or indirectly to commercial exports” and stipulates that food aid transactions must be “carried out in accordance with the FAO ‘Principles of Surplus Disposal and Consultative Obligations.’”).

107. *See, e.g.,* ACTIONAID, *supra* note 61 at 9–10; H. Bruce Huff & Michelle Jimenez, *The Food Aid Convention: Past Performance and Future Role within the New Global Trade and Development Environment* (presented to the International Conference on Agricultural Policy Reform and the WTO: Where are We Heading?, Capri, Italy, June 23–26, 2003).

108. *See Food Aid for Food Security, supra* note 1, at 19.

109. *See* Food Aid Convention, *supra* note 96, art. XII.

110. *Id.* art. XII(a) (FAC requirements use non-obligatory “should” standards).

111. Oxfam Int’l, *Food Aid or Hidden Dumping?: Separating Wheat from Chaff*, at 7, 15 (2005) (noting that these rules are not enforced and are considered to have had little impact in limiting the distortions of the market).

Agriculture, which calls on members to (1) ensure that food aid is not “tied directly or indirectly to commercial exports of agricultural products to recipient countries,” (2) comply with the FAO Principles, and (3) ensure that aid is no less concessional (i.e., no more like a commercial sale) than what would be covered under the FAC.

Though not solely directed at food aid, it is pertinent in this context also to mention the OECD’s Development Assistance Committee, which also had food-aid issues very much in mind when it adopted its 2001 “Recommendation on Untying Official Development Assistance to the Least Developed Countries.”¹¹² The recommendation calls on OECD members to progressively “untie” their bilateral aid to certain countries, in particular the least-developed countries. Similarly, it is noteworthy that the Cartagena Protocol on Biosafety of 2000 (which now has 141 parties, not including the United States) requires exporting states to provide advance notification that they are exporting genetically-modified organisms, including food, in order to provide the receiving state an opportunity to refuse them.¹¹³

B. *The Right to Food*

Article 25(1) of the Universal Declaration of Human Rights¹¹⁴ and Article 11(1) of the International Covenant on Economic Social and Cultural Rights (CESCR),¹¹⁵ among other instruments,¹¹⁶ provide for a human right to food as an element of the right to an adequate standard of living. Though not specifically articulated with regard to food aid, this right to food has been interpreted to be relevant both to supply-side and receiving-end issues in its food delivery.¹¹⁷

112. See OECD, RECOMMENDATION ON UNTYING OFFICIAL DEVELOPMENT ASSISTANCE TO THE LEAST DEVELOPED Countries, OECD Doc. DCD/DAC(2001)12/FINAL (Apr. 25, 2001), *amended by* DCD/DAC(2006)25 & DCD/DAC/M(2006)3 (Mar. 15, 2006).

113. See Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027, 1030–31.

114. Universal Declaration of Human Rights, G.A. Res. 217A, at 76, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

115. International Covenant on Economic, Social and Cultural Rights, art. 11(1), Dec. 16, 1966, 993 U.N.T.S. 3.

116. See also Convention on the Rights of the Child, art. 11(1), Sept. 2, 1990, 1577 U.N.T.S. 3; African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 12, Nov. 17, 1988, O.A.S. Treaty Series No. 69, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, at 67, OEA/Ser.L.V/II.82 doc.6 rev.1(1992); Convention on the Elimination of All Forms of Discrimination Against Women, art. 12(2), Dec. 18, 1979, 1249 U.N.T.S. 513.

117. See Comm. on Social, Econ. and Cultural Rights, Gen. Cmt. No. 12, ¶¶ 9, 16, U.N. Doc. E/C.12/1999/5 (May 12, 1999) (giving examples where a right to adequate

The Committee on Economic Social and Cultural Rights' General Comment No. 12 on "the right to adequate food" asserted that the right to food in the CESCRC includes a core right to be free of hunger.¹¹⁸ That right is violated if hunger exists in a member state's territory and it cannot show that it has made "every effort" to address it immediately, including seeking international assistance.¹¹⁹ Arguably, therefore, failures to adequately facilitate international relief (in areas such as customs, taxation and visas) would impinge on this right. Moreover, the Committee asserted that the right to food implied certain duties with regard to international assistance, stating that "[s]tates parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required," and that

food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries. Such aid should be based on the needs of the intended beneficiaries. Products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population.¹²⁰

In 2004, FAO's Committee on World Food Security and its governing council adopted the Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security.¹²¹ The Guidelines provide that states "should provide food assistance to those in need, may request international assistance if their own resources do not suffice, and should facilitate safe and unimpeded access for international assistance in accordance with international law and universally recognized humanitarian principles, bearing in mind local circumstances, dietary traditions and cultures."¹²² Specifically with regard to food aid, the Guidelines call on donors to (1) "examine their relevant policies and, if necessary, review them to support national efforts by recipient States to progressively realize the right to adequate food in the context of national food security," (2) undertake

food would have been violated by the prevention of access to humanitarian food aid in internal conflicts or other emergency situations).

118. *Id.* ¶ 8.

119. *Id.* ¶ 17.

120. *Id.* ¶ 36.

121. See generally Isabelle Rae et al, *The Right to Food as a Fundamental Human Right: FAO's Experience* (2005), <http://www.wider.unu.edu/research/2004-2005/2004-2005-4/papers/rae-thomas-vidar.pdf>.

122. See FAO, Intergovernmental Working Group, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, Annex 1, ¶ 16.6, FAO Doc. No. CL 127/10-Sup.1 (Sept. 23, 2004).

joint needs assessments with affected states, and (3) provide assistance that “takes into account the importance of food safety, local and regional food production capacity and benefits, and the nutritional needs, as well as culture of recipient populations.”¹²³

Though both are very useful in their own way, the contrast between the Committee’s aggressive interpretation of the right to food and the much milder duties foreseen by states in the Voluntary Guidelines illustrates some of the difficulty of relying on human-rights principles to tackle operational problems in food aid operations.

C. Disaster Treaties

There are also a number of treaties in sectors other than food aid that have provisions on facilitation and cooperation in disaster relief that may be pertinent to a particular food aid operation. These include treaties in the areas of nuclear accidents,¹²⁴ weapons control¹²⁵ sea and air transport,¹²⁶ telecommunications,¹²⁷ health emergencies,¹²⁸ civil defense,¹²⁹ and customs,¹³⁰ as well as mutual assistance treaties at the regional level.¹³¹ For the most part,

123. *Id.* Annex 2, ¶ 13.

124. *See, e.g.*, Convention on the Transboundary Effects of Industrial Accidents, Mar. 17, 1992, 2105 U.N.T.S. 460; Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, Sept. 26, 1986, 1457 U.N.T.S. 134.

125. *See, e.g.*, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, art. 8, Jan. 13, 1993, 32 I.L.M. 804; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, art. 7, Apr. 10, 1972, 26 U.S.T. 583.

126. *See, e.g.*, Convention on Facilitation of International Maritime Traffic, Annex 1, §§ 5.11-5.12, Apr. 9, 1965, 591 U.N.T.S. 265; Convention on International Civil Aviation of 1944, Annex 9, § 8.8, Dec. 7, 1944, *reprinted in* INTERNATIONAL CIVIL AVIATION ORGANIZATION, INTERNATIONAL STANDARDS AND RECOMMENDED PRACTICES: FACILITATION—ANNEX 9 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION (12th ed. 2005).

127. *See* Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998, art. 3, June 18, 1998, *available at* <http://www.ifrc.org/what/disasters/idrl/publication.asp> [hereinafter Tampere Convention].

128. *See* World Health Org., World Health Assembly, *Revision of the International Health Regulations: Agenda Item 13.1*, Res. No. WHA58.3 (May 23, 2005).

129. *See* Framework Convention on Civil Defense Assistance, May 22, 2000, *available at* <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

130. *See* International Convention on the Simplification and Harmonization of Customs Procedures, May 18, 1973, T.I.A.S. 6633; Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures, Annex J.5, June 26, 1999, *available at* <http://www.ifrc.org/what/disasters/idrl/publication.asp>.

131. *See, e.g.*, ASEAN Agreement on Disaster Management and Emergency Response, July 26, 2005, *available at* <http://www.aseansec.org>; Agreement among the

however, these treaties either have few parties, vague language, or do not address non-state actors.

D. *Privileges and Immunities*

In contrast, while not specific to disasters, the law of privileges and immunities provides very specific rights for facilitation—in the areas of customs, visas, and domestic legal personality, among others¹³²—that are clearly relevant to the types of receiving-end problems identified in this article. Whereas diplomatic and consular staff benefit from privileges and immunities as a matter of customary law, under the Vienna Convention on Diplomatic Relations of 1961,¹³³ and the Vienna Convention on Consular Relations of 1963,¹³⁴ governmental food relief personnel are extremely unlikely to fall under these categories. For this reason, a number of donors have entered into bilateral treaties with affected states to guarantee equivalent protections and rights.¹³⁵

In contrast, WFP, as a joint programme of the United Nations and the Food and Agricultural Organization (FAO),¹³⁶ enjoys privileges and immunities under both the Convention on Privileges and Immunities of the United Nations of 1946,¹³⁷ and the Convention on Privileges and Immunities of the Specialized Agencies of 1947.¹³⁸ In addition, in every country in which it maintains a presence, WFP enters into specific headquarters agreements reiterating its rights under the aforementioned treaties and providing more specific detail as to operating privileges. Thus, to the extent that WFP has suffered from the kinds of receiving-end problems described in this Article

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, Apr. 15, 1998, *available at* <http://www.bsec-organization.org>; Inter-American Convention to Facilitate Assistance in Cases of Disaster, June 7, 1991, *available at* <http://www.oas.org/legal/intro.htm>.

132. See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* ch.17 (6th ed. 2003); JEAN SALMON, *MANUEL DE DROIT DIPLOMATIQUE* ch. 5 (Bruylant 1994).

133. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95.

134. Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261.

135. See Horst Fischer, *International Disaster Response Law Treaties: Trends, Patterns and Lacunae*, in *INTERNATIONAL DISASTER RESPONSE LAWS, PRINCIPLES AND PRACTICE: REFLECTIONS, PROSPECTS AND CHALLENGES* 29–39 (Victoria Bannon ed., Int'l Fed'n of Red Cross & Red Crescent Societies 2003).

136. See World Food Programme, G.A. Res. 1714 (XVI), 16th Sess., 1084th plen. mtg. (Dec. 19, 1961); Continuation of the World Food Programme, G.A. Res. 2095 (XX), 20th Sess., 1404th plen. mtg. (Dec. 20, 1965).

137. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15.

138. Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 261.

(and it has on numerous occasions),¹³⁹ it is not for lack of rights under international law. Likewise, due to their unique status in international law, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross have entered into numerous headquarters agreements with host states guaranteeing them similar privileges and immunities.¹⁴⁰

However, while many of the large development-oriented NGOs have agreements with states where they work, these agreements rarely provide the same range of privileges and immunities guaranteed to the above actors. Moreover, with the striking exception of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations of 1998,¹⁴¹ no treaty provides diplomatic-style privileges and immunities to NGOs.

E. Recommendations, Resolutions, and Codes

One document that would be of use to both governmental and non-governmental actors, and one of the most specific existing instruments on the “receiving end” issues of disaster relief described in this is the non-binding “Measures to Expedite International Relief,”¹⁴² which was adopted by resolutions of both the International Conference of the Red Cross and the UN General Assembly in 1977.¹⁴³ Measures provide specific recommendations in the area of customs, visas for relief personnel, transport, and access to communication facilities. Specifically with regard to food aid, Recommendation D calls on states to “waive—to the extent compatible with minimum standards of hygiene[—] . . . restrictions on food imports.” The Measures also called on “all donors” to avoid sending “irrelevant goods,” to provide adequate notification to

139. See, e.g., *Angola: Relief food held at ports, WFP concerned*, IRINNEWS, Oct. 17, 2002, available at <http://www.irinnews.org>.

140. See Elise Baudot-Quéguiner, *The Laws and Principles Governing Preparedness, Relief and Rehabilitation Operations: the Unique Case of the International Federation of Red Cross and Red Crescent Societies*, in INTERNATIONAL DISASTER RESPONSE LAWS, PRINCIPLES AND PRACTICE: REFLECTIONS, PROSPECTS AND CHALLENGES, *supra* note 135, at 131–34.

141. See Tampere Convention, *supra* note 127, art V. See generally Int’l Fed’n of Red Cross and Red Crescent Societies, Research and Publications: The Tampere Convention, <http://www.ifrc.org/what/disasters/idrl/research/tampere.asp> (last visited Oct. 9, 2007).

142. The Secretary-General, *Report of the Secretary-General to the United Nations General Assembly*, Annex II, UN Doc. No. A/32/61 (May 12, 1977).

143. See Office of the U.N. Disaster Relief Co-ordinator, G.A. Res 32/56, 32nd Sess., 98th plen. mtg., U.N. Doc. No. A/RES/32/56 (Dec. 8, 1977); U.N. Econ. & Social Council, Res. 2012 (LXIII) (Aug. 3, 1977); Measures to Expedite International Disaster Relief, res. VI, 23rd Int’l Conference of the Red Cross, *reprinted in* INT’L FED’N OF THE RED CROSS & RED CRESCENT SOCIETIES, HANDBOOK OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT 811–15 (3d ed. 1994).

consignees of impending relief shipments, and to educate private donors to avoid sending unnecessary relief items.

Unfortunately, the Measures to Expedite have mainly been forgotten in practice. However, some of its themes can be discerned in U.N. General Assembly Resolution 46/182 of 1991, considered the cornerstone of the current U.N. system of humanitarian relief.¹⁴⁴ That resolution includes a set of “Guiding Principles” concerning the initiation and conduct of disaster relief operations as well as novel coordination and institutional mechanisms to improve international cooperation.¹⁴⁵ It also calls on states, unfortunately rather vaguely, to “facilitate the work of [humanitarian] organizations in implementing humanitarian assistance, in particular the supply of food, medicines, shelter and health care, for which access to victims is essential.”¹⁴⁶

The international humanitarian community has also developed a number of its own voluntary codes and standards. In 1994, the Code of Conduct for International Red Cross and Red Crescent Movement and NGOs in Disaster Relief (the “Code”) was developed with the goal of setting basic standards of behavior.¹⁴⁷ By its terms, the Code is “not about operational details, such as how one should calculate food rations or set up a refugee camp,” but rather an attempt to “maintain . . . high standards of independence, effectiveness and impact.”¹⁴⁸

In 1995, a group of NGOs took a step further down the “operational detail” path, developing a specific NGO Code of Conduct on Food Aid and Food Security (Food Aid Code).¹⁴⁹ The Food Aid Code commits signatories to strive to fulfil the right to food, *inter alia* by acting rapidly to import food (if needed) and distribute it, implementing comprehensive programs aimed at the root causes of food insecurity, ensuring that beneficiaries actively participate in program planning, coordinating adequately with other stakeholders, and providing high-quality, well-balanced food items.¹⁵⁰

In 1998, an even larger stride was taken with the publication of the first trial edition of the Sphere Project Humanitarian Charter and

144. Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, G.A. Res. 46/182, 46th Sess., 78th plen. mtg., U.N. Doc. No. A/RES/46/182 (Dec. 19, 1991).

145. *Id.* Annex 1.

146. *Id.* ¶6.

147. Int’l Fed’n of Red Cross & Red Crescent Societies, The Code of Conduct for International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, 1995, <http://www.ifrc.org/Docs/idrl/I259EN.pdf> (last visited Sept. 22, 2007).

148. *Id.* at pmb1.

149. The text of the Food Aid Code is available on the website of *Dochás* (the Irish Association of Non-Governmental Organizations), <http://www.dochas.ie/resources10a.htm> (last visited Sept. 22, 2007).

150. *Id.*

Minimum Standards in Disaster Response (Sphere Handbook).¹⁵¹ Now in its second final edition, the Sphere Handbook (1) provides a grounding in human rights as well as humanitarian and refugee law for humanitarian relief actions, and (2) sets out detailed minimal operational standards for a number of sectors, including food security, nutrition and food aid.¹⁵²

V. ONE WAY FORWARD

With the debate in the Doha round and the approaching termination date for the FAC, a number of proposals have been made for transforming and strengthening global governance of food aid. The FAO, for example, devoted its annual “State of Food and Agriculture” report to this issue in 2006, and persuasively called, among other things, for the untying of food aid and a substantial reduction in the reliance on imported, in-kind food in favor of cash-based interventions and a more comprehensive food security approach.¹⁵³ Other analysts have made powerful arguments for stronger monitoring and oversight of food aid, particularly in a humanitarian forum such as the FAO or a new body, rather than in the weak Food Aid Committee or the trade-dominated atmosphere of the WTO.¹⁵⁴ Quite understandably, given the overall numbers, these recommendations focus in substantial part on improving the food aid provided by governments in response to the slow-onset disasters that cause such massive famines.¹⁵⁵

However, as this Article has tried to point out, food aid is an important phenomenon in sudden impact disasters as well. Moreover, somewhat different dynamics are at play in the sudden-impact context, including the greater need for an immediate response, the stronger case for the use of in-kind food, and particularly, the relatively larger impact of non-governmental actors on the food aid arena, in light of the higher “CNN-effect” and the delays in moving governmental food aid.¹⁵⁶ While there is much that is positive in this larger disaster-relief community, it also increases the potential for poor coordination, inappropriate aid, and gridlock at key regulatory entry points.

Existing food-aid-specific instruments do not pay attention to these non-state actors or adequately address the role of the affected state. If these instruments are reformed, these issues should be given

151. SPHERE PROJECT, *supra* note 22.

152. *Id.* at 16–19.

153. See *Food Aid for Food Security*, *supra* note 1, at 8–9.

154. See, e.g., MURPHY, *supra*, note 28, at 33; Christopher Barrett & David Maxwell, *Towards a Global Food Aid Compact*, 31 FOOD POLICY 105 (2006).

155. *Food Aid for Food Security*, *supra* note 1, at 52–56.

156. Martin, *supra* note 41, at 234.

greater consideration. Moreover, as the sudden-impact disaster context particularly illustrates, food aid is only part of a successful disaster-relief and recovery operation. Yet existing instruments and sectoral norms about international disaster relief are scattered and disparate. Greater cohesion between these various regimes would likely lead to more effective operations.

It is possible that law along these lines will someday be developed at the international level. It is notable in this regard that the International Law Commission (a U.N. body whose object is the “promotion of the progressive development of international law and its codification”)¹⁵⁷ recently decided to place the broad issue of the “protection of persons in natural disasters” on its program of work.¹⁵⁸ However, the political obstacles opposing such a path remain significant.¹⁵⁹ In the meantime, promotion of legal development at the national level in key disaster-prone states would seem to be a viable short-term means to bring these disparate issues together and to face up to the receiving-end issues in disaster relief.

The International Federation of Red Cross and Red Crescent Societies is currently developing a set of “Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance” with this idea in mind.¹⁶⁰ The purpose of the guidelines is to compile the existing international norms to assist states in developing and enhancing national laws that pertain to receiving international disaster assistance (including both slow- and sudden-impact disasters).¹⁶¹ They would seek to address the most common receiving-end problems in disaster relief interventions, including food aid. They would also incorporate internationally accepted humanitarian quality standards (such as those so powerfully articulated but insufficiently enforced in FAC) as a measure for which international actors should be provided legal facilities.¹⁶² The Guidelines would thus encourage states to prepare themselves to play a more deliberate and principled role in the regulation of the full range of international relief actors.

It is hoped that these Guidelines will be adopted by states and the components of the International Red Cross and Red Crescent Movement at the International Conference of the Red Cross and Red

157. Statute of the International Law Commission, G.A. Res. 174(II), art. 1(Nov. 21, 1947), available at <http://www.un.org/law/ilc>.

158. See Int'l Law Comm., *Report on the Work of its 58th Session*, at 464, U.N. Doc. A/61/10 (May 1–June 9, 2006 and July 3–Aug. 11, 2006).

159. See David Fidler, *Disaster Relief and Governance after the Indian Ocean Tsunami: What Role for International Law?*, 6 MELBOURNE J. OF INT'L L. 458 (2005).

160. For a description of the Guidelines and their development process, see Int'l Fed'n of Red Cross & Red Crescent Societies, *International Disaster Response Laws, Rules and Principles programme (IDRL)*, <http://www.ifrc.org/idrl>.

161. *Id.*

162. *Id.*

Crescent in November 2007.¹⁶³ If so, they should be a helpful tool for addressing some of the neglected issues in food aid raised in this article.

163. Int'l Fed'n of Red Cross & Red Crescent Societies, Events and Meetings, <http://www.ifrc.org/meetings/index.asp?navid=07> (last visited Sept. 22, 2007). [Editor's note: The Guidelines were in fact adopted at the International Conference on Friday, Nov. 30, 2007. See Press Release, Int'l Fed'n of Red Cross & Red Crescent Societies, Red Cross and Red Crescent Conference rallies international community to tackle humanitarian challenges (Nov. 30, 2007), available at <http://www.ifrc.org/Docs/News/pr07/7907.asp>.]