

Humanitarian Assistance: towards a right of access to victims of natural disasters

by **Rohan J. Hardcastle and Adrian T. L. Chua**

If recent estimates are to be believed, more than two million people may have died in the famine that engulfed North Korea in 1997 and 1998.¹ In 1997, the United Nations estimated that 4.7 million North Koreans were in danger of starvation.² In response, the international community pledged food aid. The International Federation of Red Cross and Red Crescent Societies presented an expanded appeal for aid in June 1997. In January 1998, the World Food Programme (WFP) launched its biggest appeal, setting a target of 380 million US dollars in food aid, nearly double the amount requested for 1997.³ Yet, the international community has met resistance in attempting to assist North Koreans suffering from malnutrition and facing starvation.

Other governments, unable to provide aid to victims within their own territories, have also been unwilling to promptly permit humanitarian assistance from outside. When in 1990 a severe earthquake hit the Gilan province in Iran, killing more than 50,000 people and destroying entire villages,⁴ the Iranian government was slow to ask for international

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¹R. McGregor, "Hidden holocaust", *The Australian*, 21 February 1998.

²"Koreans agree on food aid to the North", *The Washington Post*, 27 May 1997.

³"North Korea offers dialogue in rare ouverture", *The Washington Post*, 20 February 1998, p. 1.

⁴"When the world shook", *The Economist*, 30 June 1990, p. 45.

assistance. In fact, Iran appealed to its people to “pass this test with pride through patience, endeavor and cooperation”.⁵ The government forbade direct rescue flights from abroad and initially requested that aid workers stay away. Although Iran eventually sought assistance from the international community, the delay resulted in the otherwise preventable death of a large proportion of the injured.⁶

Six days after the February 1998 earthquake which claimed 4,500 lives in Afghanistan,⁷ there were reports that victims in Ghanj, the worst hit village, had not received any international aid and were in danger of dying from hunger.⁸ Whilst bad weather was partly responsible, the provision of assistance was also hampered by Afghanistan’s purist Islamic Taliban militia, which controls several approaches to the region, and a strict border regime under the command of Russian troops at the border with neighbouring Tajikistan.⁹

Ironically, these recent events have come towards the end of the International Decade for Natural Disaster Reduction,¹⁰ which has seen natural disasters occur with increasing frequency and severity.¹¹ These catastrophes have raised fundamental questions about the adequacy of the current international regime dealing with the provision of humanitarian assistance to victims of natural disasters. Currently, there is no multilateral treaty equivalent to the 1949 Geneva Conventions,¹² which apply to victims of armed conflict, that provides for the right of victims of natural disasters to receive humanitarian aid. As the International Decade draws to a close, it is timely to reconsider the status of humanitarian assistance in times of natural disaster as a human right.

⁵ “The politics of humanitarianism”, *Time*, 9 July 1990, p. 36.

⁶ “Death in the afternoon: Iran’s earthquake”, *The Economist*, 8 March 1997.

⁷ United Nations Office for the Coordination of Humanitarian Affairs, “UN, ICRC seek \$2.5 million for Afghan air drop”, *Reuters*, 12 February 1998.

⁸ “Desperate Afghan quake victims await help”, *Reuters*, 10 February 1998.

⁹ *Ibid.* See also “Politics of the Afghan earthquake”, *The Economist*, 14 March 1998, p. 30.

¹⁰ UNGA resolution 44/236, 22 December 1989.

¹¹ *Agenda for development*, UN doc. A/AC.250, 1996, para. 157. For example, the United Nations Department of Humanitarian Affairs’ Disaster Mitigation Branch coordinated international assistance in 45 natural disasters in 1992, 75 natural disasters in 1994, and 85 disasters in 1995.

¹² In particular, the Fourth Geneva Convention relative to the protection of civilian persons in time of war, of 12 August 1949.

This paper begins by defining the concept of humanitarian assistance in light of the practice of international organizations such as the components of the International Red Cross and Red Crescent Movement. It examines the criteria for the development of new human rights and considers whether the right to humanitarian assistance exists as a principle of customary international law. The uncertainty surrounding the existence and content of such a right in custom has led to procrastination by States and international organizations in delivering aid at a time when the increasing frequency of natural disasters requires decisive action. In light of the inadequacy of the current international regime the paper recommends the adoption of an international agreement on the issue. The proposed principles of international disaster relief discussed are distilled in the Annex to this paper.

I. Humanitarian assistance and the practice of the International Red Cross and Red Crescent Movement

The term "humanitarian assistance" has been used to refer to a wide range of international action including aid to victims of conflict and armed intervention to restore democracy.¹³ It will be confined here to the provision of commodities and materials required during a *natural disaster* relief operation. Natural disasters include epidemics, famines, earthquakes, floods, tornadoes, typhoons, cyclones, avalanches, hurricanes, volcanic eruptions, drought, and fire. Assistance in such circumstances is likely to consist of food, clothing, medicines, temporary shelters and hospital equipment.¹⁴

In the context of armed conflict, the International Court of Justice defined permissible humanitarian aid as "the provision of food, clothing, medicine and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment,

¹³L. Fielding, "Taking the next step in the development of new human rights: the emerging right of humanitarian assistance to restore democracy", *Duke Journal of International and Comparative Law*, No. 5, 1995, p. 329; M. Stopford, "Humanitarian assistance in the wake of the Persian Gulf War", *Virginia Journal of International Law*, No. 3, 1993, p. 491.

¹⁴See the UN Draft Convention on expediting the delivery of emergency assistance, Art. 1, para. 1(c), UN Doc. A/39/267/Add. 2, 1984. See also "Strengthening the coordination of humanitarian emergency assistance of the UN", UNGA resolution 46/182 of 19 December 1991.

vehicles, or material which can be used to inflict serious bodily harm or death".¹⁵

Humanitarian assistance is to be distinguished from foreign aid by its emergency character and use for relieving victims of natural disasters.

The practice of humanitarian assistance to victims of natural disasters is perhaps best illustrated by the work of the International Federation of Red Cross and Red Crescent Societies. Under Article 5 of the Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement,¹⁶ the Federation acts as the lead agency in managing international operational activities in the event of natural disasters occurring in peacetime, while the International Committee of the Red Cross acts as the lead agency in times of armed conflict, which may be concomitant with a natural disaster. Assistance coordinated by the Federation or the ICRC is provided through the National Societies. Two recent natural disasters illustrate the significant and effective measures taken by the Red Cross following natural disasters.

Despite initial difficulties, within two weeks of the February 1998 Afghanistan earthquake, the ICRC provided food and non-food relief supplies to 16 of the 27 villages struck by the earthquake.¹⁷ In this case, as the natural disaster occurred in a conflict situation, where the ICRC was already at work, its delegates took the lead. Acting as the lead agency for the International Red Cross and Red Crescent Movement, the ICRC provided food, blankets, tents, sheets of plastic, stoves and coal. Given the atrocious weather conditions, air drops and distribution by helicopter were the only way that aid could quickly and effectively be delivered to the survivors.¹⁸ Despite the enormity of the task, by early March 1998 everybody injured in the earthquake had received emergency surgical treatment, and essential supplies had reached even the outlying villages.¹⁹

¹⁵ *Military and Paramilitary Activities in and against Nicaragua (Merits), Judgment*, ICJ Rep., 1986, pp. 57 and 125. Although this statement was made in the context of an armed conflict, there is no objection, in principle, to its application in natural disasters.

¹⁶ *IRRC*, No. 322, March 1998, p. 159-176.

¹⁷ "Update No. 98/02 on ICRC activities for victims of the earthquake in Afghanistan", 17 February 1998.

¹⁸ "Update No. 98/03 on ICRC activities for victims of the earthquake in Afghanistan", 25 February 1998.

¹⁹ "Update No. 98/04 on ICRC activities in Afghanistan", 3 March 1998.

Similarly, the Red Cross provided prompt relief after the January 1998 earthquake in China. Following an appeal on 13 January 1998, the Federation was granted exceptional access to the disaster area by the Chinese government, enabling an extensive plan of action to be prepared.²⁰ Consequently, despite harsh winter weather conditions, distributions of food, clothing and emergency shelter by the Red Cross Society of China met the most immediate needs of the victims.²¹ Significantly, the capacity of the Red Cross to respond to the China earthquake was enhanced by the willingness of the Chinese government to seek assistance from international non-governmental organizations.

II. The right to humanitarian assistance in international law

Ascertaining whether victims of natural disasters have a right to receive humanitarian assistance in international law is problematic because it raises fundamental questions relating to the development of international human rights. In recent years, there has been a tendency on the part of United Nations organs and other international organizations to proclaim new "human rights" without giving adequate consideration to their desirability, their scope or the viability of their implementation. Although it has long been recognized that to continue to be relevant, human rights as a concept must respond to the changing needs and perceptions of individuals and the international community,²² the need for dynamism must be balanced against the equally important need to preserve the integrity and credibility of human rights as a "common standard of achievement for all peoples and all nations".²³ Thus, it is incumbent on those who propose new rights to justify their claims to "the highly prized status of

²⁰"Earthquake in Hebei Province, Situation Report No. 1", 16 January 1998, www.reliefweb.int.

²¹"China: Earthquake in Hebei province, Situation Report No. 2", 3 February 1998, www.reliefweb.int.

²²P. Alston, "A third generation of solidarity rights: Progressive development or obfuscation of international human rights law", *Netherlands International Law Review*, No. 29, 1982, pp. 307, 309; P. Alston, "Conjuring up new human rights: A proposal for quality control", *American Journal of International Law*, No. 78, 1984, p. 607; R. Bilder, "Rethinking international human rights: Some basic questions", *Wisconsin Law Review*, 1969, p. 175; Dissenting Opinion of Luis Demetrio Tinoco Castro, Resolution No. 23/81, Case 2141 (United States), 6 March 1981, *Annual Report of the Inter-American Commission on Human Rights 1980-1981*, doc. OEA.Ser.L/V/II.54, doc. 9, 1981, p. 54.

²³Preamble to the Universal Declaration of Human Rights, 10 December 1948.

a human right".²⁴ This task is difficult because fifty years after the adoption of the Universal Declaration of Human Rights, the criteria for determining which claims have attained the status of internationally recognized human rights remain the subject of debate. To pursue this issue is beyond the scope of this paper.

For the purposes of the present discussion, claims are said to attain the status of internationally recognized human rights if they have satisfied the law-creating process of international law. According to the classical sources of international law as codified in Article 38 of the Statute of the International Court of Justice, international law rules are primarily found in treaties, international custom, and general principles of law recognized by civilized nations. Presently, there is no multilateral treaty setting out the right of victims of natural disasters to receive humanitarian assistance. Given that the International Court of Justice has never made express reference to general principles of law, these do not provide an irreproachable basis for the emergence of new human rights. Thus, apart from its inclusion in treaties, the right to humanitarian assistance is more likely to derive from international custom.

Humanitarian assistance as customary international law

The question of whether victims of natural disasters have the right to receive humanitarian assistance in customary international law is not new. Together with the rights to development, peace, and to benefit from the common heritage of mankind, the claim to humanitarian assistance was raised for inclusion as a human right under the rubric of "third generation solidarity rights".²⁵ Similarly, the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief states that "[t]he right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries".²⁶ Despite this, there has been little analysis of

²⁴P. Alston, *op. cit.*, 1984, (note 22), p. 614.

²⁵P. Alston, *op. cit.*, 1982, (note 22), p. 308; S. Marks, "Emerging human rights: A new generation for the 1980s?", *Rutgers Law Review*, No. 33, 1981, pp. 435, 449; K. Vasak, "For the third generation of human rights: The rights of solidarity", Inaugural Lecture to the Tenth Study Session of the International Institute of Human Rights, Strasbourg, July 1979.

²⁶*IRRC*, No. 310, January-February 1996, pp. 119-127, at p.120.

whether the proposed right satisfies the requirements of international custom. Under the classical doctrine of customary international law, for a right to be binding upon a State, there must exist extensive and uniform State practice carried out so as to show a general recognition that a rule of law or legal obligation is involved.²⁷

Practice of the international community in the provision of humanitarian assistance

In 1984, the Office of the United Nations Disaster Relief Co-ordinator (UNDRO) attempted to draft a convention in relation to the delivery of emergency assistance.²⁸ The Preamble to the Draft Convention stated that “the international community has willingly rendered assistance in individual cases of disaster and continues to do so whenever necessary”.²⁹ Such assistance has been provided by various States and international organizations, both intergovernmental and non-governmental. Although customary international law is usually said to derive from State practice, a “modernized view of customary international law” has emerged which would accord the “ability to create custom” to non-State actors, such as international organizations and “certain non-governmental organizations [that] have a distinct, measurable impact on international affairs”.³⁰

International organizations

One such organization is the United Nations, which plays a coordinating role in large-scale relief operations. UNDRO, established in 1971, was created to be the focal point in the United Nations system for disaster-related matters. Further, a multiplicity of specialized United Nations agencies are involved in natural disaster emergency relief. In 1995 the Department of Humanitarian Affairs provided 55 Member States with assistance in combating natural disasters.³¹ In particular, WFP has been

²⁷ Article 38, para. 1(b), of the Statute of the International Court of Justice; *North Sea Continental Shelf Cases*, ICJ Rep., 1969, p. 43, para. 74.

²⁸ *Supra* (note 14).

²⁹ *Ibid.*

³⁰ I. Gunning, “Modernizing customary international law: The challenge of human rights”, *Virginia Journal of International Law*, No. 31, 1991, pp. 212, 221-222; F. Bugnion, “Red Cross law”, *IRRC*, No. 308, September-October 1995, pp. 491, 508-518.

³¹ Press release, ECOSOC/5675, 19 July 1996.

an important source of emergency food aid. It plays a significant role in disaster assistance operations through the supply of basic foodstuffs, "establishing adequate and orderly procedures on a world wide basis for meeting emergency food needs".³² Following the 1998 Afghanistan earthquake WFP contributed 1,215 MT of wheat flour, 55 MT of oil and 55 MT of sugar.³³ Similarly, the World Health Organization (WHO) has taken on an active role in providing humanitarian aid in times of natural disaster. The significant part it played in the wake of the 1998 Afghanistan earthquake was a case in point.³⁴ Recent reforms to the United Nations, such as replacement of the Department of Humanitarian Affairs with an Office for the Coordination of Humanitarian Affairs (OCHA), are aimed at strengthening the United Nations' role in disaster relief by facilitating quicker reactions to crises.³⁵

Intergovernmental organizations

Various intergovernmental organizations are also involved in humanitarian assistance. They include the European Union, the North Atlantic Treaty Organization, the Organization of African Unity and the Association of South East Asian Nations. Of these, the European Union has been playing a major role, through the European Community Humanitarian Office (ECHO), which was established in 1992. For example, the European Commission allocated two million ECU to finance programmes carried out by humanitarian organizations for victims of the February 1998 Afghanistan earthquake.³⁶

Non-governmental organizations on the international level

It is widely acknowledged that non-governmental organizations are instrumental in providing emergency humanitarian assistance.³⁷ Within

³² See UNGA resolution 1714 (XVI), 1961, and the World Food Programme Constitution, para. 10(a).

³³ "Afghanistan — Earthquake", OCHA Situation Report No. 10, 25 February 1998, www.reliefweb.int.

³⁴ *Ibid.*

³⁵ Press release, OCHA, 26 January 1998.

³⁶ "European Commission is ready to mobilize up to ECU 2 million for the victims of the earthquake in Afghanistan", 9 February 1998, www.reliefweb.int.

³⁷ Y. Beigbeder, *The role and status of international humanitarian volunteers and organizations: The right and duty to humanitarian assistance*, Martinus Nijhoff Publishers, London, 1991, Chapters 5-7.

any discussion of non-governmental organizations, particular mention should be made of the Red Cross and Red Crescent, and especially the International Federation of Red Cross and Red Crescent Societies, which renders significant and effective assistance in natural disaster situations.³⁸ In 1995, the 26th International Conference of the Red Cross and Red Crescent adopted two instruments which set out guidelines for relief operations: the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief³⁹, and the Principles and Rules for Red Cross and Red Crescent Disaster Relief.⁴⁰ Based on provisions contained in previous resolutions and taking into account an extensive practice, the two texts lay down the roles of the various components of the Movement and establish the conditions for an effective coordination of assistance to disaster victims.

The Principles and Rules for Red Cross and Red Crescent Disaster Relief, as amended by the 26th International Conference of the Red Cross and Red Crescent, provide that the Red Cross and Red Crescent “has a fundamental duty to provide relief to all disaster victims”.⁴¹ Similarly, the Code of Conduct states that “[a]s members of the international community, [the Red Cross and the NGOs supporting the Code] recognize [the] obligation to provide humanitarian assistance wherever it is needed”.⁴² The Code seeks to maintain the independence and effectiveness of all components of the International Red Cross and Red Crescent Movement in responding to disasters.⁴³

Secondly, mention must be made of *Médecins sans frontières* (MSF), which is recognized as the world’s largest medical assistance organization.⁴⁴ Following natural disasters, MSF sends in medical teams, equipment and supplies.⁴⁵ For example, in the February 1998 Afghanistan

³⁸ D.P. Forsythe, “Human rights and the International Committee of the Red Cross”, *Human Rights Quarterly*, No. 12, 1990, p. 265.

³⁹ *Op. cit.* (note 26), pp. 119-127.

⁴⁰ *Ibid.*, pp. 102-112.

⁴¹ *Ibid.*, para. 2.1, p.102.

⁴² *Ibid.*, para. 1, p. 120.

⁴³ *Ibid.*, Purpose, p. 119.

⁴⁴ *Médecins sans frontières/Suisse*, Annual Report 1991.

⁴⁵ Y. Beigbeder, *op. cit.* (note 37), p. 263.

earthquake it provided immediate medical assistance and emergency surgery.⁴⁶

States

A right of victims of natural disasters to assistance is also supported by domestic legislation in a broad cross-section of States mandating the provision of aid to victims of disasters.⁴⁷ Further, there are a number of regional and sub-regional agreements concerning the coordination of relief efforts in times of natural disaster.⁴⁸ Like international non-governmental organizations, States have responded to recent disasters with prompt humanitarian assistance. For example, the United States, the United Kingdom, Australia, Denmark, France, Germany, Japan and the Netherlands made substantial financial commitments for the provision of humanitarian aid to the victims of the 1998 China earthquake.⁴⁹ Similarly, the United States government has pledged an additional \$75 million worth of food aid for North Korea in 1998.⁵⁰

The problem with customary international law

The willingness of States to render assistance does not necessarily imply the existence of a right under international law for victims of natural

⁴⁶“Afghanistan — Earthquake”, OCHA Situation Report No. 4, 3 March 1998, www.reliefweb.int.

⁴⁷*Directory of National Emergency Response Offices, Disaster Emergency Plans and Legislation, and Regional and Sub-Regional Agreements for Disaster Assistance*, UNDRO, 1992. The directory lists the legislation of 64 countries.

⁴⁸*Ibid.* The relevant agreements include: Agreement for non-aggression and assistance in the field of defence between Member States of the West African Economic Community; Association of South-East Asian Nations — Declaration for mutual assistance on natural disasters; Caribbean Disaster Emergency Response Intergovernmental Agreement; North Atlantic Treaty Organization’s Civil Emergency Planning Department; Permanent Inter-State Committee on Drought Control in the Sahel; Agreement between countries of the European Free Trade Association and those of the European Community concerning collaboration in the field of civil defence and disaster assistance; Horn of Africa Declaration of commitment to the observance and promotion of humanitarian principles and norms; Council of Europe — Open Partial Agreement on the prevention of, protection against, and organization of relief in major natural and technological disasters; Pan-American Health Organization’s Emergency Preparedness and Relief Co-ordination Program.

⁴⁹“China Earthquake”, Situation Report No. 2, 21 January 1998, www.reliefweb.int.

⁵⁰“North Korea says it is running out of food”, *The Washington Post*, 3 March 1998, p. 11.

disasters to receive humanitarian aid. The International Court of Justice in the *North Sea Continental Shelf Cases* stated that the frequency or even habitual character of acts is not in itself enough for a proposed rule to have evolved into a principle of customary international law. For such a right to exist, provision of humanitarian assistance must be evidence of a belief that such assistance is rendered obligatory by a rule of law or a human right requiring it.⁵¹ Whilst the requisite *opinio juris* can arguably be derived from a number of basic human rights, including the rights to life,⁵² food,⁵³ clothing⁵⁴ and shelter,⁵⁵ this argument is not irreproachable.

Even if the requisite *opinio juris* exists, the scope and content of this right in customary international law remains uncertain. For example, are neighbouring States under an obligation to render assistance or is it primarily the obligation of each State to provide humanitarian aid to its nationals? What are the roles and rights of international organizations in a natural disaster? Is there a corresponding obligation on States unable to provide adequate assistance to accept aid given by international organizations? Uncertainty raised by these issues, when natural disasters are occurring with increasing frequency and severity,⁵⁶ has led to procrastination by States and international organizations at a time when urgent assistance is needed.⁵⁷

This situation is untenable. Failure on the part of certain governments to deliver aid or to promptly seek external assistance has clearly resulted in human suffering on a wide scale. An international agreement, in the

⁵¹ *Supra* (note 27), p. 44, para. 77.

⁵² Universal Declaration of Human Rights, Art. 3; International Covenant on civil and political rights, Art. 6, para. 1; Convention on the rights of the child, Art. 1; European Convention for the protection of human rights and fundamental freedoms, Art. 2; African Charter on human and peoples' rights, Art. 4; American Declaration of the rights and duties of man, Art. 1.

⁵³ International Covenant on economic, social and cultural rights, Art. 11; Declaration of the rights of the child, UNGA resolution 1386 (XIV), 1959; Universal Declaration on the eradication of hunger and malnutrition, UNGA resolution 3348 (XXIX), 1974, para. 1; Food and Agricultural Problems, UNGA resolution 39/166, 1984, Principle 6.

⁵⁴ Universal Declaration of Human Rights, Art. 25; International Covenant on economic, social and cultural rights, Art. 11.

⁵⁵ *Ibid.*

⁵⁶ World Health Organization, *The Challenge of African Disasters*, UNITAR, 1991, p. 1.

⁵⁷ See the examples given at the beginning of this paper.

form of a multilateral convention, is therefore necessary to ensure better protection for victims of natural disasters. Such an agreement would help the international community in the provision of relief and provide an incentive for expanding this form of activity. The value of such a convention was already recognized in the Final Report on the Reappraisal of the Role of Red Cross: “[a]n International Relief Convention, while not repudiating the ancient doctrine of national sovereignty and non-interference in the internal affairs of other states, could nevertheless establish a set of reasonable criteria outlining when and through what administrative mechanisms states would be expected to accept humanitarian aid on behalf of their populations.”⁵⁸

In fact, the potential for an international agreement was considered by a Task Force on Ethical and Legal Issues in Humanitarian Assistance set up in 1994 by the Program on Humanitarian Assistance at the World Conference on Religion and Peace.⁵⁹ The outcome was the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies.⁶⁰ On the basis of those criteria the Task Force called upon the UN Member States to:

- recognize the right to humanitarian assistance and the responsibility to provide it, and
- acknowledge and ensure the right of access by humanitarian assistance organizations to endangered populations in complex emergencies.⁶¹

The paper now turns to a proposed agreement.

III. An international agreement

Guidelines for the development of human rights instruments

Concerned about the effect of the proliferation of new human rights on the integrity and credibility of the United Nations’ human rights

⁵⁸ Donald D. Tansley (ed.), *Final Report: An Agenda for Red Cross*, Geneva, 1975, p. 80.

⁵⁹ J. Ebersole, “The Mohonk criteria for humanitarian assistance”, *Human Rights Quarterly*, No. 17, 1995, p. 192.

⁶⁰ For the purposes of that document, a “complex emergency” is a humanitarian crisis, which may involve armed conflict or natural disasters.

⁶¹ J. Ebersole, *loc. cit.* (note 59), p. 195.

tradition, the General Assembly established guidelines for developing international instruments in the field of human rights. Article 4 of the General Assembly resolution on setting international standards in the field of human rights⁶² requires proposed new human rights instruments to:

- “(a) be consistent with the existing body of international human rights law;
- (b) be of fundamental character and derive from the inherent dignity and worth of the human person;
- (c) be sufficiently precise to give rise to identifiable and practicable rights and obligations;
- (d) provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and
- (e) attract broad international support.”

The rest of this paper considers the first three requirements, which represent the most significant obstacles for concluding an international agreement on the right to humanitarian assistance. The proposals made during the course of the discussion are distilled in the Annex to this paper. Once agreement on these principal rights and obligations is reached, consideration can be given to the creation of effective institutional structures and reporting systems for disaster relief.

The right to humanitarian assistance: a necessary implication from fundamental human rights

The right to humanitarian assistance is not only consistent with the existing body of international human rights law, it is necessary to give effect to the fundamental human rights to life, food, clothing and shelter. These rights are well established in customary international law and have arguably achieved the status of *jus cogens*.⁶³ Although it is the primary responsibility of the State concerned to render assistance and satisfy these

⁶² UNGA resolution 41/120, 3 December 1986.

⁶³ Shaw argues that the right to life can be characterized as a principle of *jus cogens*: M.N. Shaw, *International Law*, Grotius Publications, 3rd edition, Cambridge, 1991, p. 240. See also R. Ago, “Droit des traités a la lumière de la Convention de Vienne. Introduction”, *Recueil des Cours*, 1971, No. 3, p. 324.

rights in a natural disaster,⁶⁴ where that State is unable to provide relief and unwilling to promptly permit external humanitarian assistance to the victims, satisfaction of these fundamental rights entails that the victims have a right to receive humanitarian aid from external sources. This in turn imposes on the State the correlative obligation to allow prompt outside access to the victims. This does no more than to fulfil the obligation on every State to secure “universal respect for, and observance of”⁶⁵ the most fundamental of human rights — the right to life. Denial of the right to receive humanitarian assistance from external sources in natural disasters results in widespread death, as exemplified by the recent events in North Korea and Afghanistan, “shocking the conscience of mankind” and contrary to “elementary considerations of humanity”.⁶⁶

State sovereignty objections to the right to humanitarian assistance

The primary objection to the above argument is that requiring States to allow external access to victims is inconsistent with the fundamental principle of State sovereignty in international law.⁶⁷

The Final Report on the Reappraisal of the Role of Red Cross stated: “[c]urrent international law, which is largely based on traditional practice, does not obligate a State in any way to accept emergency aid even when its population is in extremely grave danger”.⁶⁸ Although such an objection might have been persuasive in the past, it is now an anachronism. International law and human rights are inherently dynamic concepts. In its *Advisory Opinion on South-West Africa*, the International Court of Justice

⁶⁴International Decade for Natural Disaster Reduction, UNGA resolution 49/22, 13 December 1994, Preamble; Strengthening the capacity of the United Nations system to respond to natural disasters and other emergency situations, UNGA resolution 36/225, 17 December 1981, Principle 2; Humanitarian assistance to victims of natural disasters and similar emergency situations, UNGA resolution 43/131, 8 December 1988, Principle 2; Humanitarian assistance to victims of natural disasters and similar emergency situations, UNGA resolution 45/100, 14 December 1990, Principle 2; Y. Beigbeder, *op. cit.* (note 37), p. 9.

⁶⁵Art. 55 of the Charter of the United Nations.

⁶⁶*Corfu Channel (UK v. Albania)*, ICJ Rep., 1949, p. 22.

⁶⁷During discussions that took place in the UN General Assembly on the resolution on humanitarian assistance to victims of natural disasters and similar emergency situations (UNGA res. 46/182, 19 December 1991), the principles of national sovereignty and non-interference were continually advanced by the delegations of Brazil, India, Pakistan, Mexico, Chile, Nicaragua, Peru, Ethiopia and Sudan.

⁶⁸*Op. cit.* (note 58), p. 80.

indicated the absurdity of mechanically applying an old norm without reference to fundamental constitutive changes to the international legal system.⁶⁹ The adoption of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and more recently the widespread ratification of the Convention on the Rights of the Child signal a constitutive shift in emphasis from sovereignty to fundamental rights. This shift has been accepted even by governments which traditionally propounded "the rhetoric of statism".⁷⁰ States cannot take shelter behind the legal doctrine that what they do to their citizens is a matter within their exclusive jurisdiction.⁷¹ As Thomas Pickering, the United States Permanent Representative to the United Nations, puts it, "people, not governments, are sovereign".⁷² Thus, norms such as State sovereignty must be reinterpreted in light of this constitutive change, to avoid anachronisms.⁷³

Guiding principles for humanitarian assistance

Article 4(c) of the General Assembly resolution on setting international standards in the field of human rights⁷⁴ requires not only that proposed new human rights be consistent with the existing body of international human rights law, but also that they be defined with sufficient precision so as to give rise to identifiable and practicable rights and obligations. The remainder of this paper outlines a practical solution to State sovereignty objections to the right to humanitarian assistance.

⁶⁹ *South-West Africa — Voting procedure (Advisory Opinion)*, ICJ Rep., 1955, p. 77; M. McDougal, H. Lasswell & J. Miller, *The interpretation of agreements and World Public Order*, Yale University Press, New Haven, 1967, Chapter 4.

⁷⁰ A. D'Amato, "The invasion of Panama was a lawful response to tyranny", *American Journal of International Law*, No. 84, 1990, p. 518.

⁷¹ Tommy Koh, in *The Quest for World Order*, Times Academic Press, Singapore, 1998, pp. 42-43. The author is Singapore's Ambassador-at-Large. Similar sentiments were expressed by Malaysian Deputy Prime Minister Anwar Ibrahim in "Cultural differences or Asian values no excuse", *The Straits Times*, 8 December 1994.

⁷² UN doc. S/PV/2902, 23 December 1989, p. 8.

⁷³ K. Mills, "Reconstructing sovereignty: A human rights perspective", *Netherlands Quarterly of Human Rights*, No. 15, 1997, pp. 267, 278-279; M. Reisman, "Sovereignty and human rights in contemporary international law", *American Journal of International Law*, No. 84, 1990, pp. 866, 873; T. Fleiner-Gerster and M. Meyer, "New developments in humanitarian law: A challenge to the concept of sovereignty", *International and Comparative Law Quarterly*, No. 34, 1985, pp. 267, 277.

⁷⁴ *Supra* (note 62).

1. Overcoming State sovereignty objections: a proposal

It is unrealistic to expect States to agree to a multilateral convention requiring them to provide third States with a right of access to their territories even in times of natural disaster. The creation of such a right impinges on a State's national sovereignty. However, a balance must be struck between the urgency of giving aid to victims and State sovereignty. This point is recognized in the Mohonk Criteria which state that "[t]he principles of non-intervention and sovereignty should not be used as an obstacle to humanitarian assistance. The objective of humanitarian assistance is to save lives and is not intended to challenge the State on whose territory aid is to be delivered".⁷⁵ Primarily, this is because humanitarian aid can be seen as "international efforts to alleviate human suffering".⁷⁶

Objections based on State sovereignty can be circumvented by limiting the obligation to provide access to neutral non-governmental relief organizations only. This could prevent the arousal of nationalistic sentiments and avoid action in aid of victims being perceived as interference by another State. Indeed, this limiting principle is supported by the decision of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua*, where the Court defined humanitarian assistance in terms of the practice of a leading neutral non-governmental relief organization, i.e., the Red Cross: "[I]f the provision of 'humanitarian assistance' is to escape condemnation as an intervention (...) not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering', and 'to protect life and health and to ensure respect for the human being'; it must also, and above all, be given without discrimination to all in need (...)".⁷⁷

Although this statement was made in the context of an armed conflict, there is no objection, in principle, to its application in natural disasters. Thus, Principle 3 of the Annex to this paper imposes an obligation on States which are unable or unwilling to provide humanitarian aid to promptly permit external assistance from neutral relief organizations.

⁷⁵J. Ebersole, *op. cit.* (note 59), p. 198.

⁷⁶P. Macalister-Smith, *International humanitarian assistance*, Martinus Nijhoff Publishers, Boston, 1985, p. 72.

⁷⁷*Ibid.*, p. 125.

2. *Register of qualified non-governmental relief organizations*

The prevention of death and human suffering in disaster situations requires that relief be provided without delay. To reduce the scope for disputes over which relief organizations are neutral and non-governmental, it is proposed that the United Nations Office for the Coordination of Humanitarian Affairs maintain a register of "qualified organizations". OCHA will not register an organization unless it is satisfied of its independence from government control and effectiveness in providing humanitarian assistance. It is expected that only a limited number of relief agencies will fulfil these criteria. Obvious candidates for inclusion in the register include National Red Cross Societies, *Médecins sans frontières*, as well as United Nations agencies such as WFP. The obligation to provide access will apply only to registered organizations. Discretion to allow access to foreign government agencies and officials will remain with the State affected by the disaster.

3. *Coordination and receipt of humanitarian assistance*

Principle 5 of the Annex proposes that the overall coordination of disaster relief remain with the receiving State. However, Principle 4 requires that the provision of assistance be governed by the principles set out by the International Court of Justice in the Nicaragua Case.⁷⁸ That is, humanitarian assistance must be provided without discrimination of any kind and for the sole purpose of preventing and alleviating human suffering.

IV. Conclusion

The present international regime dealing with provision of humanitarian assistance to victims of natural disasters is unacceptable. Although arguably a right to receive humanitarian aid exists in customary international law, uncertainty relating to rights and obligations during natural disasters has led to delays in the provision of emergency relief. Further, governments unable to provide aid to victims of natural disasters have been unwilling to promptly permit external humanitarian assistance.

To address this increasingly significant problem, this paper has argued that an international agreement is required, codifying and elaborating on

⁷⁸ *Op. cit.* (note 15), p. 125.

the principles relating to humanitarian assistance enunciated in *Military and Paramilitary Activities in and against Nicaragua*. In order to ensure that the right to humanitarian aid is respected, neutral non-governmental organizations need a right of access to States whose governments cannot provide relief. Provision for a right of access is essential because natural disasters are increasingly occurring in developing countries, such as China and North Korea, which do not have the economic resources to render the assistance required to secure the survival of their nationals. Limiting such a right of access to neutral non-governmental organizations overcomes traditional objections based on State sovereignty. Once States accept that State sovereignty is not necessarily threatened, it is conceivable that pressure from the international community and non-governmental organizations⁷⁹ will motivate them to become party to a convention on humanitarian assistance.

The proposed international agreement represents an important preliminary step in ensuring that victims of natural disasters receive prompt and effective relief. Once agreement on principle has been reached, practical measures for disaster relief, such as the adequacy of institutional structures providing such aid, can be strengthened and developed.

⁷⁹It has been acknowledged that non-governmental organizations, such as the ICRC, play a significant role in encouraging States to ratify international agreements. See H.P. Gasser, "Persuading States to accept humanitarian treaties", *IRRC*, No. 320, September-October, 1997, p. 529.

Draft

**Principles of international relief
in natural disaster situations**

Definitions

“Humanitarian assistance” means the provision of commodities and materials required to prevent and alleviate human suffering, and does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict bodily harm or death.

“Natural disaster” includes epidemics, famines, earthquakes, floods, tornadoes, typhoons, cyclones, avalanches, hurricanes, volcanic eruptions, drought, fire, and other non-man-made calamitous events resulting in death, human suffering and material damage.

“Qualified organization” means an organization fulfilling the criteria in Article 2.

“Receiving State” means the State on whose territory a natural disaster occurs and in which victims require humanitarian assistance.

1. Right of victims to receive humanitarian assistance

Every person has the right to request and receive the humanitarian aid necessary to sustain life and dignity in natural disasters from governmental organizations or qualified organizations.

2. Qualified organization

A qualified organization is a non-governmental organization which

- (a) is not aligned or associated with any government;
- (b) has a proven record in the effective provision of humanitarian assistance; and
- (c) is registered with the United Nations Office for the Coordination of Humanitarian Affairs as a humanitarian disaster relief organization.

3. Obligations of the receiving State

- (a) The primary responsibility for the protection of civilian populations in times of natural disaster rests with the receiving State.
- (b) Where victims in the receiving State do not receive the humanitarian assistance necessary to sustain life and dignity in natural disasters, the receiving State is obliged to allow qualified organizations to provide such aid.
- (c) Principles of non-interference and sovereignty should not be used as obstacles to humanitarian assistance.

4. Principles for the provision of humanitarian assistance by qualified organizations

- (a) The sole purpose of humanitarian assistance is to prevent and alleviate human suffering, to protect life, and to ensure respect for the human being.
- (b) Humanitarian assistance shall be provided without discrimination as to race, colour, sex, language, religion, birth or other status to all in need.
- (c) Priority in the delivery of humanitarian assistance shall be given to the most urgent cases of distress.
- (d) Humanitarian assistance shall not be used to further a particular political or religious position.
- (e) Humanitarian assistance shall, where possible, respect the culture, structure and customs of communities and countries.
- (f) Reporting mechanisms shall be implemented to ensure appropriate monitoring of aid distribution and regular assessments of the assistance programme carried out.
- (g) Humanitarian assistance shall be free of charge unless otherwise agreed between the assisting qualified organization and the receiving State.

5. Principles for the receipt of humanitarian assistance

- (a) The overall coordination of disaster relief remains within the control of the receiving State. However, in coordinating disaster relief, the receiving State shall give consideration to the advice of the assisting qualified organization.

- (b) Humanitarian assistance rendered by the qualified organization shall be used by the receiving State to prevent and alleviate human suffering, to protect life, and to ensure respect for the human being.
- (c) The receiving State shall ensure that the qualified organization has prompt access to victims of natural disasters by ensuring the expedited processing of entry visas.
- (d) The receiving State shall provide the qualified organization with unrestricted access to the disaster-affected regions for the purpose of providing humanitarian assistance.
- (e) The receiving State shall ensure that goods and equipment brought into its territory for the purpose of providing humanitarian assistance are allowed unrestricted passage and are not subject to import or export requirements.
- (f) Goods or funds remaining after the provision of humanitarian assistance shall be used by the receiving State for subsequent rehabilitation programmes or for any other purpose agreed upon by the qualified organization and the receiving State.