

INTERNATIONAL LAW AND DISASTER RESPONSE

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I INTRODUCTION

Natural disasters regularly impact upon communities with devastating results, and the international community regularly and willingly provides assistance to people affected by floods, fires, earthquakes, tsunami and every other natural disaster. Affected countries usually recognise the need for international assistance and request, or at least accept the delivery of aid when the impact of a disaster over reaches the capacity of the domestic resources, but this is not always the case. Following the destruction of Burma by Cyclone Nargis in 2008, the Burmese government, at least initially, refused international assistance for the disaster affected population and there were calls for states to intervene, by force if necessary, to deliver assistance to those that had been affected by the cyclone. The development of International Guidelines on how domestic law should facilitate international disaster response has also focussed discussion on the rights and duties of states to offer and accept international disaster assistance.¹

This paper will consider whether there is an obligation on states to offer and accept international disaster assistance and whether or not states may, consistently with international law, provide disaster assistance to an affected community without the consent of the government of the affected state.

The discussion is limited to the question of whether or not assistance must be sought, or can be provided, when a disaster occurs in the absence of armed conflict or to use the phrase adopted by the International Red Cross International Disaster Response Law ('IDRL') project, during a 'non-conflict related disaster'.²

Where there is an armed conflict, international humanitarian law applies. International humanitarian law has, as its fundamental source, the Geneva

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1 International Federation of Red Cross and Red Crescent Societies, 'Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance' (Guidelines, International Federation of Red Cross and Red Crescent Societies, 2007).

2 International Federation of Red Cross and Red Crescent Societies, *IDRL — What's in a Name?* (5 April 2006) <http://www.ifrc.org/cgi/pdf_disasters.pl?FactSheet8Eng.pdf>.

Conventions of 1949 and their Additional Protocols of 1977.³ Provisions in *Convention (IV)*⁴ and *Additional Protocol F*⁵ provide that parties to an armed conflict must allow international organisations to provide relief to the civilian population. Other obligations under international law provide that: states must accept offers of international assistance where they are unable to adequately provide for the population in an occupied territory;⁶ they must allow the free entry of relief goods and facilitate the distribution of those goods;⁷ they must allow the Red Cross and other humanitarian organisations to perform their work with the affected populations.⁸ Finally, they must respect civil defence organisations not only from the occupied country but also from other countries and allow them to perform their civil defence tasks.⁹ All these obligations have been accepted by

- 3 *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 32 (entered into force 21 October 1950); *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 86 (entered into force 21 October 1950); *Convention (III) Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 136 (entered into force 21 October 1950); *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288 (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 4 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 610 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, opened for signature 8 December 2005, 2404 UNTS 261 (entered into force 14 January 2007).
- 4 *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288 (entered into force 21 October 1950).
- 5 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 4 (entered into force 7 December 1978) art 70(1).
- 6 *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288 (entered into force 21 October 1950) art 59; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 4 (entered into force 7 December 1978) art 70(1).
- 7 *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288 (entered into force 21 October 1950) arts 59–61; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 4 (entered into force 7 December 1978) art 70(2).
- 8 *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288 (entered into force 21 October 1950) art 63; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 4 (entered into force 7 December 1978) art 81.
- 9 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 4 (entered into force 7 December 1978) arts 62–4.

the majority of countries in the world as there has been universal acceptance of the Geneva Conventions and near universal acceptance of *Additional Protocol I*.¹⁰

However, where there is a disaster but no armed conflict, neither the Geneva Conventions nor the Additional Protocols apply. In those circumstances, and absent a specific convention, the questions of who can provide relief, what is the role of international organisations, and what is the status to be afforded to relief personnel and consignments are unsettled. It is because the law is unsettled in this area that this paper will consider the legality of international disaster responses in the absence of armed conflict.

It is argued that there is no binding legal obligation to offer or accept aid. It is also argued that in some extreme circumstances, the delivery of aid without the consent of the affected state could be consistent with international law but the circumstances where that conclusion would apply are so extreme as to be almost fanciful. The conclusion is, therefore, that notwithstanding an increased international interest in how states respond to natural disasters, there is no obligation upon states to seek international disaster assistance and no practical right or power to provide assistance to a disaster affected community without the consent of the government of the affected state.

II IS THERE AN INTERNATIONAL OBLIGATION TO SEND OR RECEIVE AID?

The question of international disaster assistance has been of interest to international lawyers for many years. de Vattel believed that natural law bound both on 'men' and on states, and that the rules of which could be determined from observing the nature of men.¹¹ He observed that

every man realizes that he could not live happily or improve his condition without the help and intercourse with other men. Therefore, since nature has constituted men thus, it is clear that it means them to live together and mutually aid and assist one another.¹²

Applying his analogy, that 'men' and states live in a morally equivalent world, he argued that it followed that states, like 'men', have an imperfect obligation to assist other states in times of need. The obligation is imperfect as it is up to each state to determine what aid it can afford to give and no state is required to sacrifice its own self-preservation or needs for those of another. Although an affected state may ask for assistance, it is up to the potential donor to determine

10 Jean-Philippe Lavoyer, *A Milestone for International Humanitarian Law* (22 September 2006) International Committee of the Red Cross <<http://icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-statement-220906?opendocument>>; International Committee of the Red Cross, *International Humanitarian Law — Treaties & Documents* (6 March 2009) <<http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>>.

11 Emerich de Vattel, *The Law of Nations or the Principles of Natural Law; Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Carnegie Institution of Washington, first published 1758, 1916 ed) 5.

12 Ibid.

what if any assistance it can or should give.¹³ He believed there was no binding obligation to force nations to assist one another but '[t]o give assistance in such dire straits is so instinctive an act of humanity that hardly any civilized Nation is to be found which would refuse absolutely to do so'.¹⁴

In the 19th century de Vattel's 'natural law' theory gave way to positivism, the view that international law is created by the will of the states,¹⁵ and then to subsequent modern theories of international law.¹⁶ Although de Vattel's theory of law is no longer accepted, his writings demonstrate that the issue of international disaster response has been a matter of continuing interest to international lawyers.

A International Conventions

Between the period of de Vattel and the establishment of the League of Nations in the aftermath of World War I, states made no attempt to identify or formalise the laws that would govern the delivery of international aid. Without a binding legal obligation, states were free to ask for, and to give, aid as they saw fit.¹⁷

1 The International Relief Union

In 1921, following the 1908 Messina earthquake, the President of the Italian Red Cross, Senator Giovanni Ciruolo, suggested that the international community establish an 'International Federation for Mutual Relief to Peoples Overtaken by Disaster'.¹⁸ The proposal was adopted by the League of Nations in 1927, and on 27 December 1932, the Convention and Statute Establishing the International Relief Union¹⁹ ('the Union') entered into force. 'This was the first, and so far, only instance of States establishing a treaty-based system for responding to natural disasters'.²⁰

13 Ibid 114–16.

14 Ibid 115.

15 Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2006) 12. See also *The Case of the S. 'Lotus': France v Turkey* (1927) 10 PCIJ Reports 4, in Eric Heinze and Malgosia Fitzmaurice, *Landmark Cases in Public International Law* (Kluwer Law International, 1998) 33.

16 Triggs, above n 15, 13–17; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007) 10–19.

17 Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff Publishers, 1985); John Hutchinson, 'Disasters and the International Order: Earthquakes, Humanitarians and the Ciruolo Project' (2000) 22 *International History Review* 1; David P Fidler, 'Disaster Relief and Governance after the Indian Ocean Tsunami: What Role for International Law?' (2005) 6 *Melbourne Journal of International Law* 458; Alejandra de Urioste, 'When Will Help Be on the Way? The Status of International Disaster Response Law' (2006) 15 *Tulane Journal of International and Comparative Law* 182.

18 'Question of the Establishment of an International Union for the Relief of Peoples Overtaken by Disaster' (1925) 6 *League of Nations Official Journal* 1257, 1259.

19 *Convention and Statute Establishing an International Relief Union*, opened for signature 12 July 1927, CXXXV (1932–33) LNTS 247 (entered into force 27 December 1932).

20 de Urioste, above n 17, 184.

The Union was intended to serve as a clearing house for international aid. Member states were required to make an initial contribution to the Union in the same share as their contribution to the League,²¹ but thereafter the Union was to be funded by voluntary donations.²² States seeking assistance could apply to the Union and relief would be provided in accordance with the Convention, thereby establishing that assistance was given ‘as an act not of charity but of justice’.²³ Aid would be given by the international community, acting through the Union, rather than by direct state-to-state aid to ensure that the delivery of aid was seen as humanitarian only, and did not create any bonds of obligation.

Article 3 of the Convention provided that the Union was to operate for the benefit of all stricken people, irrespective of nationality or any other distinctions, while also limiting the Union’s actions to disasters occurring in the territory of the parties. Article 4 of the Convention provided that the Union’s operations were to be undertaken only with the consent of the state concerned. These two articles embodied the two main principles of the Union; namely, respect for the territorial sovereignty of parties and non-discrimination in assistance.²⁴ The Convention did not, however, ‘expressly formulate the right of relief’.²⁵

The International Relief Union provided operational assistance in only two disasters: in 1934, following an earthquake in Orissa and in 1935, following an earthquake in Baluchistan.²⁶ The Union continued, at least in theory, following the establishment of the United Nations but efforts to revive it were unsuccessful and the Union’s assets and functions were finally transferred to the United Nations Economic and Social Council in 1967.²⁷ Despite the lack of practical success, Macalister-Smith argues that:

the IRU’s activities are of significance not for their achievements in the field, but rather as evidence of the early recognition by States of the need for collaboration in matters of humanitarian assistance through international organization, on the foundations of international law.²⁸

2 1984 Draft Convention

In 1984 there was a proposed draft convention to deal with the delivery of international aid, but it was not adopted. This draft convention²⁹ noted that ‘the international community has willingly rendered assistance’ during disasters but recalled

21 *Convention and Statute Establishing an International Relief Union*, opened for signature 12 July 1927, CXXXV (1932–33) LNTS 247, art 8 (entered into force 27 December 1932).

22 *Ibid* art 12.

23 ‘Question of the Establishment of an International Union’, above n 18, 1260.

24 Macalister-Smith, *International Humanitarian Assistance*, above n 17, 19.

25 *Ibid* 20.

26 Peter Macalister-Smith, ‘The International Relief Union: Reflections on the Convention Establishing an International Relief Union of July 12, 1927’ (1986) 54 *Tijdschrift voor Rechtsgeschiedenis* 363, 370.

27 *Ibid* 371–2.

28 Macalister-Smith, *International Humanitarian Assistance*, above n 17, 21.

29 *Draft Convention on Expediting the Delivery of Emergency Assistance* (1984) in *ibid* 222–30.

the principle duty of States to cooperate with one another in accordance with the Charter [of the United Nations] and the principles of sovereign equality of States and non-intervention with the domestic jurisdiction of any State.³⁰

The draft convention in no way suggested that assisting affected states, or accepting assistance, was a legal obligation. An offer of assistance was to be made voluntarily, and reference to the principles of sovereign equality and non-intervention confirmed that acceptance of aid was a matter for the affected state.

Today there are no binding international conventions in the area of disaster relief in the absence of armed conflict. In cases of armed conflict, the Geneva Conventions of 1949 and the Protocols of 1977³¹ apply but there is no equivalent convention to establish similar obligations during a natural disaster.

B Customary International Law

Having identified that there are no binding international conventions in the area it is appropriate to look to 'international custom, as evidence of a general practice accepted as law'.³² There are significant difficulties in determining the existence of a principle of customary international law.³³ The requirement to show that states subjectively accept that action is required by law, rather than rules of custom, courtesy or convenience, is 'implicit in the very notion of *opinio juris sive necessitatis*'.³⁴ It is not practical to consider all examples of state practice or to establish whether or not there is the necessary *opinio juris* to show that states accept or deliver aid because they believe that such action is required by law. This discussion will, therefore, review statements made by the international community in the forum of the United Nations, and academic commentary, to determine if there is any evidence of customary international law requiring states to send or accept international disaster relief.

30 Ibid 222.

31 *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 32 (entered into force 21 October 1950); *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 86 (entered into force 21 October 1950); *Convention (III) Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 136 (entered into force 21 October 1950); *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 288 (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 4 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 610 (entered into force 7 December 1978).

32 *Statute of the International Court of Justice* art 38(1)(b).

33 Ibid.

34 *North Sea Continental Shelf Cases (FRG v Denmark; FRG v The Netherlands)* (1969) 41 ILR 29 in Eric Heinze and Malgosia Fitzmaurice, *Landmark Cases in Public International Law* (Kluwer Law International, 1998) 77. See also Triggs, above n 15, 48.

Since its creation, the United Nations has played a role in international disaster relief. Various resolutions of the General Assembly have recognised the value of the United Nations' role and directed the Secretary-General to develop and improve the organisation's ability to respond to a disaster. The discussion that follows considers whether United Nations resolutions have identified, or created, a legal obligation upon states to assist each other following a natural disaster.

In 1981, the General Assembly of the United Nations passed a detailed resolution intended to improve the United Nations' capacity to respond to disasters.³⁵ This Resolution made clear that sovereignty remained a key feature of international disaster assistance.³⁶ The Resolution:

Reaffirms the sovereignty of individual Member States, recognizes the primary role of each State in caring for the victims of disasters occurring in its territory and stresses that all relief operations should be carried out and co-ordinated in a manner consistent with the priorities and needs of the countries concerned.³⁷

United Nations General Assembly Resolution 43/131 (8 December 1988)³⁸ was significant as, for the first time, the General Assembly made reference to the aims of the United Nations in solving international humanitarian crises and began to tie disaster response to human rights issues by stating that 'the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and an offence to human dignity'.³⁹ This Resolution also gave voice to the principles espoused by the Red Cross Movement and other humanitarian organisations by affirming that 'in the event of natural disasters and similar emergency situations, the principles of humanity, neutrality and impartiality must be given utmost consideration by all those involved in providing humanitarian assistance'.⁴⁰

The Resolution gave specific recognition to the 'important contribution' made by humanitarian non-government and inter-governmental organisations.⁴¹ It:

Invites all States in need of such assistance to facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines and health care, for which access to victims is essential [and] *Appeals* ... to all States to give their support to these organizations working to provide humanitarian assistance, where needed, to the victims of natural disasters and similar emergency situations.⁴²

35 *Strengthening the Capacity of the United Nations System to Respond to Natural Disasters and Other Disaster Situations*, GA Res 36/225, UN GAOR, 36th sess, 103rd plen mtg, UN Doc A/RES/36/225 (17 December 1981).

36 *Ibid* Preamble.

37 *Ibid* art 2.

38 *Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations*, GA Res 43/131, UN GAOR, 43rd sess, 75th plen mtg, UN Doc A/RES/43/131 (8 December 1988).

39 *Ibid* Preamble.

40 *Ibid*.

41 *Ibid* art 3.

42 *Ibid* arts 4–5.

The Resolution tied the provision of disaster relief to the aims of the United Nations and human rights, establishing the basis for a finding that how a country responds to a disaster is a matter of international concern.

The Resolution also referred to other states, in particular states that neighbour the affected state and the part that they may play in facilitating disaster relief. Resolution 43/131:

Urges States in proximity to areas of natural disasters and similar emergency situations, particularly in the case of regions that are difficult to reach, to participate closely with the affected countries in international efforts with a view to facilitating, to the extent possible, the transit of humanitarian assistance.⁴³

Such a provision does not suggest that there is a binding legal obligation on one state to go to the aid of others. At best it urges international cooperation but such cooperation is still on a voluntary basis.

In December 1991, the United Nations General Assembly adopted Resolution 46/182. This Resolution set out guiding principles for the coordination and provision of humanitarian assistance, putting particular emphasis on prevention and preparedness. The Resolution restated that the principles of humanity, neutrality and impartiality were fundamental principles governing the delivery of international aid.⁴⁴ The General Assembly reaffirmed the paramount issue of sovereignty and that aid should only be delivered at the request of the affected government.⁴⁵ It called upon states to work with inter-government and non-government organisations and to facilitate their access to affected populations⁴⁶ and called upon neighbouring states to facilitate the transshipment of relief supplies.⁴⁷ The international community was ‘urged’ to provide the resources to allow the United Nations to meet the goals set out in the Resolution.⁴⁸

Resolution 46/182 reaffirmed the primary role of the affected state, but recognised the vital need, based on human rights and the Charter of the United Nations, for the international community to respond to disasters. The Resolution reiterated the need for resources and rapid response and provided a detailed list of responsibilities to the Emergency Relief Coordinator, established emergency funding procedures and established the Inter-Agency Standing Committee to try and improve United Nations/non-United Nations coordination. This Resolution represented the single most dramatic move by the United Nations to improve its response to calls for assistance, and remains the primary governing instrument for the United Nations’ disaster response.

43 Ibid art 6.

44 *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res 46/182, UN GAOR, 46th sess, 78th plen mtg, UN Doc A/RES/46/182 (19 December 1991) Annex para 2.

45 Ibid Annex paras 3–4.

46 Ibid Annex paras 5–6.

47 Ibid Annex para 7.

48 Ibid Annex para 17.

Notwithstanding the United Nations' continued work in this area and developments in the way the United Nations approaches its task in disaster relief, nothing in the United Nations' resolutions suggests that the law has moved to impose an obligation upon states to come to the aid of their neighbours. The United Nations has moved away from attempts to develop international law that governs state responsibilities (those attempts at best being the International Relief Union and the 1984 Draft Convention), and has instead moved to enhance its own ability to respond and to manage the response by non-government organisations and states that choose to respond through the United Nations process.

There is nothing in the United Nations' resolutions which suggests that the members of the United Nations are of the view that providing assistance to another state is a requirement of international law. Macalister-Smith states:

it should be apparent that the individual nature of at least some disaster situations, the uncertainty as to the general character of humanitarian practices and, above all, the influence of political factors in relief, work firmly against the crystallization of particular customary international rules in this area.⁴⁹

United Nations' resolutions and attempts to establish binding international law have all reiterated that the key principle in disaster relief is national sovereignty.⁵⁰ The view of states, expressed via United Nations resolutions, has consistently been that the delivery and receipt of aid is a matter for the donor and affected states alone. Academic commentators have generally agreed that there is no obligation in international law to offer or accept assistance.⁵¹ The evidence fails to establish that customary international law requires states to either offer or accept humanitarian aid, following a natural disaster in the absence of armed conflict.⁵²

C The General Principles of Law Recognised by Civilised Nations

Another source of international law is 'the general principles of law recognized by civilized nations'.⁵³ That is not to say that the International Court of Justice will simply adopt domestic law; rather, Brownlie argues it allows the Court to borrow from domestic law those principles and reasoning that would assist the

49 Macalister-Smith, *International Humanitarian Assistance*, above n 17, 54.

50 Fidler shows that an 'analysis of General Assembly resolutions on disasters from 1981 until 2002 reveals an increasingly explicit emphasis on sovereignty': see Fidler, above n 17, 472.

51 Ibid 458 but cf Rohan J Hardcastle and Adrian T Chua, 'Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters' (1998) 325 *International Review of the Red Cross* 589.

52 See also Victoria Bannon, *Rethinking Legal Mechanisms for Access and Facilitation of International Disaster Response in Cases of Natural Disaster* (Master of Laws Thesis, The University of Melbourne, 2004) 43–73; Boniface Okere and Ernest M Makawa, 'Global Solidarity and the International Response to Disasters' in David D Caron and Charles Leben (eds), *The International Aspects of Natural and Industrial Catastrophes* (Martinus Nijhoff, 2001) 429, 436–41.

53 *Statute of the International Court of Justice* art 38(1)(c).

development of interstate relations.⁵⁴ If the national laws of ‘civilized nations’⁵⁵ impose a widely recognised legal duty to rescue, then that duty could, if it ‘would assist the development of interstate relations’,⁵⁶ be borrowed and applied to states as part of international law.

A duty to come to the aid of other people is not a principle universally recognised in domestic law. It is traditionally said that common law countries, such as Australia, the United Kingdom, the United States and Canada, do not have a legal duty to rescue,⁵⁷ whereas the civil law countries, such as most European countries, do.⁵⁸ That analysis may be too simplistic, as there are examples where the common law⁵⁹ or legislative provisions in common law countries⁶⁰ do impose a duty, but it can be accepted as a statement of general principle.

In international law there are examples where a duty to assist others is imposed. Under the law of the sea there is a duty on seafarers and coastal states to go to the aid of people in distress at sea. This duty is well-established both by convention⁶¹ and by customary international law.⁶²

Conventions have also imposed a duty on countries to assist their neighbours when they are aware of environmental or industrial hazards that are likely to have cross-border implications.⁶³ For example, a state is obligated to warn its neighbour

54 Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6th ed, 2003) 16.

55 *Statute of the International Court of Justice* art 38(1)(c).

56 Brownlie, *Principles of Public International Law*, above n 54, 16.

57 Alexander McCall-Smith, ‘The Duty to Rescue and the Common Law’ in Michael A Menlowe and Alexander McCall-Smith (eds), *The Duty to Rescue: The Jurisprudence of Aid* (Dartmouth Publishing, 1993) 55.

58 Alberto Cadoppi, ‘Failure to Rescue and the Continental Criminal Law’ in Michael A Menlowe and Alexander McCall-Smith (eds), *The Duty to Rescue: The Jurisprudence of Aid* (Dartmouth Publishing, 1993) 93.

59 See, eg, *Woods v Lowms* (1995) 36 NSWLR 344 (NSWSC); *Lowms v Woods* [1996] Aust Torts Reports 81_376 (NSWCA).

60 See, eg, *Criminal Code Act 1983* (NT) s 155.

61 Relevant conventions are: *International Convention for the Safety of Life at Sea*, opened for signature 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980); *International Convention on Salvage*, opened for signature 28 April 1989, 1953 UNTS 165 (entered into force 14 July 1996); *International Convention on Maritime Search and Rescue*, opened for signature 27 April 1979, 1405 UNTS 97 (entered into force 22 June 1985).

62 Jessica E Tauman, ‘Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis’ (2002) 11 *Pacific Rim Law and Policy Journal* 461, 463; Martin Davies, ‘Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea’ (2003) 12 *Pacific Rim Law and Policy Journal* 109, 109; Craig H Allen, ‘The Maritime Law Forum: Australia’s Tampa Incident: The Convergence of International and Domestic Refugee and Maritime Law in the Pacific Rim — The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea’ (2003) 12 *Pacific Rim Law and Policy Journal* 143, 148; Richard Barnes, ‘Refugee Law at Sea’ (2004) 53 *International and Comparative Law Quarterly* 47.

63 Nina Nordstrom, ‘Managing Transboundary Environmental Accidents: The State Duty to Inform’ in David D Caron and Charles Leben (eds), *The International Aspects of Natural and Industrial Catastrophes* (Martinus Nijhoff, 2001) 291.

of a nuclear accident that may threaten the neighbouring state's environment,⁶⁴ but that does not extend to an obligation to actually assist the affected population.

The fact that these international duties exist does not, however, establish a general rule that one state must provide aid to another. In fact it may be argued that the various treaties establishing such a duty 'could be seen as a reflection of a lack in general international law of an equivalent norm'.⁶⁵ The fact that treaties create a duty on limited parties (for example coastal states), and in limited circumstances, certainly does not support an argument that the international community has accepted a universal, legal obligation to go to another state's aid.

Looking at 'general principles of law recognized by civilized nations'⁶⁶ it cannot be said that there is a general legal obligation upon one state to go to the aid of another. Where such duties do exist, they are established by specific treaties with limited and reasonably specific obligations.

D Conclusion on the Obligation to Send or Receive Aid

An analysis of international legal sources including treaties, customary international law to the extent that it can be identified, general principles of law and the writing of academics, has not shown any basis to conclude that there is a legal duty on one state to go to the aid of another following a natural disaster. States do of course provide aid for reasons of humanity, solidarity and to advance their own national interests, but none of that suggests that they are legally required to provide that aid.

Recognition that sovereignty is a key factor in disaster relief suggests that it is a matter solely for the affected state to decide if and when international assistance should be accepted. Sovereignty is however undergoing a change, a change from the right of the sovereign authority to govern as it sees fit to a responsibility to protect the sovereign authority's population. The international community is increasingly interested in watching how sovereign governments exercise this responsibility, and this will have implications, discussed in the next section, on the question as to whether or not the international community can provide aid when required.

III IS THERE A RIGHT TO PROVIDE AID?

Assuming there is no obligation to seek or provide aid, is there a right to provide aid when that aid is required? As indicated, the view of the United Nations General Assembly as well as various international conventions is that state sovereignty is

64 Evan R Seamone, 'When Wishing on a Star Just Won't Do: The Legal Basis for International Cooperation in the Mitigation of Asteroid Impacts and Similar Transboundary Disasters' (2002) 87 *Iowa Law Review* 1091, 1132.

65 Nordstrom, above n 63, 376–7.

66 *Statute of the International Court of Justice* art 38.

the primary consideration, so that aid may only be given at the request of, and with the permission of, the government of the affected state.

This section will consider whether, consistently with international law, a state might in fact take uninvited action in the territory of another state following a natural disaster. There are four scenarios where a state may conceivably seek to deploy disaster relief into another state without the consent of the government of that state. The first scenario is where an assisting state wants to provide humanitarian relief to the victims of the disaster and the government of the affected state is unable or unwilling to provide that relief. The second scenario is where an assisting state wants to provide humanitarian relief to the victims of the disaster and, as a result of the disaster, there is no effective government of the affected state or that government cannot be contacted. Third is the case where action is taken to protect the assisting state from the spread of the hazard into its own territory. The fourth is action taken under the auspices of the United Nations in order to deal with a threat to international peace and security.

It will be argued that the deployment of disaster assistance without the prior permission of the affected state may be justified, and therefore not a breach of international law, in some very limited circumstances. The argument for intervention in the first scenario will be based on an analogy with the arguments for armed intervention to protect human rights during conflict.⁶⁷ The argument for the second and third scenarios will be based on the doctrine of necessity while the argument in the fourth scenario will be based on Chapter VII of the Charter of the United Nations.

A The Deployment of State Resources Can Only Be Effected by Consent

The starting point of any discussion on the deployment of international assistance to an affected state has to be the recognition that, generally speaking, such deployment may only occur at the request of, or at least with the consent of, the government of the affected state. As noted above, the international community has consistently reaffirmed the principle of state sovereignty and that aid should only be provided with the consent of, and at the request of, the affected state.⁶⁸

The Charter of the United Nations relevantly provides that the organisation is based on the principle of the sovereign equality of all member states⁶⁹ and

67 The International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (Report, International Development Research Centre, 2001).

68 See, eg, *Strengthening the Effectiveness and Coordination of International Urban Search and Rescue Assistance*, GA Res 57/150, UN GAOR, 57th sess., 75th plen mtg, UN Doc A/RES/57/150 (27 February 2003); *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res 46/182, UN GAOR, 46th sess., 78th plen mtg, UN Doc A/RES/46/182 (19 December 1991); *International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, From Relief to Development*, GA Res 56/103 UN GAOR, 56th sess., 87th plen mtg, UN Doc A/Res/56/103 (5 February 2002); International Federation of Red Cross and Red Crescent Societies, *Guidelines*, above n 1.

69 *Charter of the United Nations* art 2(1).

member states must refrain from using force or the threat of force ‘against the territorial integrity or political independence of another state, or in any other manner inconsistent with the Purposes of the United Nations’.⁷⁰ The Charter of the United Nations does not authorise ‘the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state’.⁷¹

It follows that the delivery of aid or the deployment of relief workers into the territory of an affected state will only be contrary to these principles of international law if the delivery of assistance represents a refutation of the principle of sovereign equality,⁷² a use of force,⁷³ or intervention in a matter that is ‘essentially within the domestic jurisdiction’ of the affected state.⁷⁴

1 Sovereign Equality

The fundamental building block of international law is that all states are sovereign and equal. Brownlie says that the state is the basic player in international law and that ‘[t]he sovereignty and equality of States represents the basic constitutional doctrine of the law of nations’.⁷⁵ The key principle of international law is the independent and equal status of states, regardless of geographical size, economic strength or population.⁷⁶

Sovereignty can be, and is, limited by international obligations, including obligations freely entered into as treaties. Obligations arise from membership of the United Nations which, in turn, ‘elevates the solution of economic, social, cultural, and humanitarian problems, as well as human rights, to the international sphere’.⁷⁷ From this it can be concluded that ‘sovereignty ... carries with it primary responsibilities for states to protect persons and property’⁷⁸ but equally, carrying out these responsibilities has an international, not purely domestic, sphere. ‘By definition, these matters cannot be said to be exclusively domestic, and solutions cannot be located exclusively within the sovereignty of states.’⁷⁹

70 Ibid art 2(4).

71 Ibid art 2(7).

72 Ibid.

73 *Strengthening the Effectiveness and Coordination of International Urban Search and Rescue Assistance*, GA Res 57/150, UN GAOR, 57th sess, 75th plen mtg, UN Doc A/RES/57/150 (27 February 2003); *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res 46/182, UN GAOR, 46th sess, 78th plen mtg, UN Doc A/RES/46/182 (19 December 1991).

74 *International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, From Relief to Development*, GA Res 56/103 UN GAOR, 56th sess, 87th plen mtg, UN Doc A/Res/56/103 (5 February 2002).

75 Brownlie, *Principles of Public International Law*, above n 54, 287.

76 The International Commission on Intervention and State Sovereignty, ‘The Responsibility to Protect’, above n 67, 12.

77 The International Commission on Intervention and State Sovereignty, ‘The Responsibility to Protect Supplementary Volume: Part I Research Essays’ (Research Essays, International Development Research Centre, 2001) 8.

78 Ibid.

79 Ibid.

2 Prohibited Use of Force

Under international law, there is a prohibition on the use, or threat, of force in international relations.⁸⁰ In the context of responding to a natural disaster, the relevant question is whether the deployment of disaster assistance is a use of force. It is a use of force to deploy armed forces to engage in battle, but what of unarmed forces to deliver food aid? What of unarmed search and rescue teams to rescue people from earthquake devastated towns? If this type of response is not ‘force’, then it is not contrary to the prohibition contained in art 2(4) of the Charter of the United Nations to deploy them. The critical preliminary question is therefore, what does ‘force’ mean in terms of the United Nations Charter?

The *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* (*Declaration Concerning Friendly Relations*)⁸¹ defines aggression as ‘the most serious and dangerous form of the illegal use of force’,⁸² and goes on to list examples of actions that ‘qualify as an act of aggression’.⁸³ The actions listed are clearly linked to the use of armed or military services by one state against another. The list, however, is not exhaustive.⁸⁴ Other actions may also be an act of aggression. Moreover, if aggression is the ‘most serious and dangerous form of the illegal use of force’, then it is not the only ‘form of the illegal use of force’. Other conduct by a state may be an illegal use of force, even if it is not an act of aggression. It follows that the definition of ‘aggression’ in the *Declaration Concerning Friendly Relations*⁸⁵ does not fully identify what is, or is not, an illegal use of force.

Brownlie says ‘[t]here can be little doubt that “use of force” is commonly understood to imply a military attack, an “armed attack”’,⁸⁶ Randalzhofer argues the term ‘force’ in art 2(4) ‘does not cover any possible kind of force, but is, according to the correct and prevailing view, limited to armed force’.⁸⁷ Simma uses the phrase ‘armed force’ synonymously with the phrase ‘force’ as used in the Charter.⁸⁸

80 *Charter of the United Nations* art 2(4).

81 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, GA Res 2625(XXV), UN GAOR, 25th sess, 1883rd plen mtg, UN Doc A/8018 (24 October 1970) (*Declaration Concerning Friendly Relations*).

82 *Definition of Aggression*, GA Res 3314(XXIX), UN GAOR, 29th sess, 2319th plen mtg, UN Doc A/Res/3314(XXIX) (14 December 1974) 143.

83 *Ibid* 143.

84 *Ibid* 143, art 4.

85 *Declaration Concerning Friendly Relations*, UN Doc A/8018.

86 Ian Brownlie, *International Law and the Use of Force* (Oxford University Press, first published 1963, 2002 ed) 361.

87 Albrecht Randalzhofer, ‘Commentary on art 2(4)’ in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2nd ed, 2002) 112, 117.

88 Bruno Simma, ‘NATO, the UN and the Use of Force; Legal Aspects’ (1999) 10 *European Journal of International Law* 1, 5.

If this analysis is correct, and ‘force’ in art 2(4) means ‘armed force’ or ‘armed attack’, then the use of unarmed responders to provide assistance after a disaster would not be an example of an unlawful use of force.

3 *Prohibited Intervention*

Another relevant prohibition is the prohibition on intervention ‘in matters which are essentially within the domestic jurisdiction of any State’.⁸⁹ The prohibition is breached, for example, by ‘armed intervention and all other forms of interference ... against the personality of the State or against its political, economic and cultural elements’.⁹⁰ States must not use ‘economic, political or any other types of measures’ to obtain an advantage from another state or encourage the violent overthrow of another government.⁹¹ Essentially, ‘[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State’.⁹²

What is inherently within the domestic jurisdiction of a state must be subject to change as the reach of international law expands.⁹³ The international community is concerned with how states respond to an emergency; apart from the humanitarian impulse, there is a legitimate concern with internationally recognised human rights. Key rights that can be affected by disasters include the right to life,⁹⁴ economic, social and cultural rights,⁹⁵ and the ‘right to a standard of living adequate for ... health and well-being ... including food, clothing, housing and medical care’.⁹⁶

What follows is that how a state responds to a catastrophic natural disaster, or otherwise deals with its own population, may not be a matter that is ‘essentially within the domestic jurisdiction of any state’.⁹⁷

B *Scenario 1 — Humanitarian Assistance*

Having set the background, it is now possible to consider the scenarios identified at the start of this discussion. The first scenario is an assisting state seeking to deliver aid to a disaster-affected community without the consent of the affected state. This might occur if a government is aware that a community in the affected state is suffering from the effects of a disaster, but where the government of that

89 *Charter of the United Nations* art 2(7). See also *Declaration Concerning Friendly Relations*, UN Doc A/8018.

90 *Declaration Concerning Friendly Relations*, UN Doc A/8018.

91 *Ibid.*

92 *Ibid.*

93 Georg Nolte, ‘Commentary on art 2(7)’ in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2nd ed, 2002) 148, 157.

94 *Universal Declaration of Human Rights*, GA Res 217(III), 3rd sess, 183rd plen mtg, UN Doc A/RES/217(III) (10 December 1948) art 3.

95 *Ibid* art 22.

96 *Ibid* art 25.

97 *Ibid* art 2(7).

affected state has refused to allow aid or aid workers to assist. This situation arose in 2008 when Cyclone Nargis devastated Burma leaving at least 130 000 people dead and many in desperate need.⁹⁸ The Burmese government was subject to criticism for refusing access to the affected population by states and non-government organisations that were ready and willing to assist, of being generally slow to respond and finally only allowing a limited number of agencies to assist.⁹⁹ There was, at the time, significant public demand that the countries of the world act to force humanitarian assistance into Burma.¹⁰⁰

Putting aside the practical difficulties that would be involved in responding, uninvited, to a disaster, it is possible to consider whether such action would be a breach of international law. This scenario has parallels with claims that states should be able to respond, with force, to protect people in other countries from human rights abuses.¹⁰¹ In the scenario considered here, the threat to human rights comes not from internal acts of aggression, but from a failure to assist the affected community, whether or not that failure arises from a lack of competence, resources or a conscious decision to leave the disaster-affected community to its fate. What distinguishes this discussion from arguments for or against forcible humanitarian intervention is that this discussion, as noted above, is restricted to intervention in the absence of armed conflict, that is, necessarily, intervention without the use of armed force.

As noted above, the prohibition on the use of force contained in the UN Charter is a prohibition on the use of armed or military forces. The use of unarmed responders to deliver post disaster relief would not be a use of force and would not, therefore, be contrary to the prohibition on the use of armed force set out in art 2(4) of the UN Charter.

98 Alex Bellamy, 'Should Nations Force Aid on Others? A Cyclone is Not Enough' (2010) XXXIV(3) *Natural Hazards Observer* 1, 9–15, 1.

99 Ibid.

100 Gareth Evans, *Facing Up to Our Responsibilities* (12 May 2008) The Guardian <<http://www.guardian.co.uk/comments/free/2008/may/12/facinguptoourresponsibilities>>; M Bernard Kouchner, *Burma — Article by M. Bernard Kouchner, Minister of Foreign and European Affairs* (20 May 2008) Le Monde <<http://www.ambafrance-uk.org/Bernard-Kouchner-on-Burma-disaster.html>>. See also Bellamy, above n 98; Dan Whipple, 'Wrestling with Generals: Pinning Down the "Responsibility to Protect"' (2010) XXXIV(3) *Natural Hazards Observer* 15; George Kent, 'Rights and Obligations' (2010) XXXIV(3) *Natural Hazards Observer* 18.

101 See, eg, Alexander Ruck Keene, 'Humanitarian Intervention' (2001) 151 *New Law Journal* 1096; Gary Klintworth, "'The Right to Intervene" in the Domestic Affairs of States' (Strategic and Defence Studies Centre, 1991); Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press, 2001); Mohammad Taghi Karoubi, *Just or Unjust War? International Law and Unilateral Use of Armed Force by States at the Turn of the 20th Century* (Ashgate Aldershot, 2004); Fernando R Téson, *Humanitarian Intervention: An Inquiry into Law and Morality* (Transnational Publishers, 3rd ed, 2005); Vladimir-Djuro Degan, 'Humanitarian Intervention (NATO Action against the Federal Republic of Yugoslavia in 1999)' in Lal Chand Vohrah et al (eds), *Man's Inhumanity to Man: Essays in International Law in Honour of Antonio Cassese* (Kluwer Law International, 2003) 233; Randelzhofer, above n 87. See also The International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect', above n 67 (but note that the Responsibility to Protect doctrine is formulated to protect people from specific international crimes — genocide, crimes against humanity, war crimes and ethnic cleansing — rather than the broader objective of preventing human rights abuses, per se).

With respect to the prohibition on intervention into ‘matters which are essentially within the domestic jurisdiction of any State’¹⁰² the International Court of Justice has said:

There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives cannot be regarded as unlawful intervention, or as in any other way contrary to international law ...

An essential feature of truly humanitarian aid is that it is given ‘without discrimination’ of any kind. In the view of the Court, if the provision of ‘humanitarian assistance’ is to escape condemnation as an intervention in the internal affairs of [a state] ... 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 ...¹⁰³

It follows from this proposition that sending humanitarian workers into a country with the express mandate of providing aid to all comers would not breach the prohibition on intervention in the domestic affairs of the affected state. It would have to be clear, however, that the mandate was to provide care to everyone simply on the basis of need. Any mission that was intended to privilege the assisting state’s citizens, for example to evacuate its own citizens from the disaster area, would not meet this criterion and could be an unlawful interference.

Even if there is no use of prohibited force¹⁰⁴ and no intervention into ‘matters that are essentially within the domestic jurisdiction of the affected State’,¹⁰⁵ it would remain the case that deploying disaster relief teams would infringe the sovereign rights of the affected state. Still, *prima facie* illegal intervention in appropriately dire circumstances can be justified by reference to the principle of necessity. The International Law Commission’s *Articles on State Responsibility* say:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.¹⁰⁶

102 *Charter of the United Nations* art 2(7). See also *Declaration Concerning Friendly Relations*, UN Doc A/8018.

103 *Nicaragua v United States of America* [1986] ICJ Reports 14, 124–5.

104 *Charter of the United Nations* art 2(4).

105 *Ibid* art 2(7).

106 James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) 178.

Where a state sought to rely on necessity to justify providing post-disaster assistance without the consent of the affected government, it would need to identify what essential interest it was seeking to protect. Crawford, in his commentary to the International Law Commission's articles, states:

The extent to which a given interest is 'essential' depends on all the circumstances, and cannot be prejudged. *It extends to particular interests of the State and its people, as well as of the international community as a whole.*¹⁰⁷

The community as a whole has an interest in the preservation of the human rights of a disaster-affected population, and ensuring the peaceful continuity of a disaster-affected state. Human rights obligations are obligations *erga omnes*; that is, owed to all, and all states have the right to seek to protect the human rights of all people.¹⁰⁸ It must follow that the preservation of the human rights of people affected by a disaster is a matter of essential interest to the international community.

This needs to be balanced against the threat to the affected state's essential interests.¹⁰⁹ A state that has aid delivered to its population without its consent, even aid that is delivered without force and on a purely humanitarian basis, would have various interests compromised. These are its interest in determining who is to enter the country, its interest in protecting its territory from incursion by foreign aircraft, ships and land transport and its interest in asserting its own sovereignty.

In these limited circumstances, acting contrary to regulatory instruments, even international ones such as the *Convention on International Civil Aviation*¹¹⁰ which recognises the need for permission before flying over the airspace of a state, may infringe the state's sovereign interests, but when balanced against the need to provide humanitarian aid, could be justified in sufficiently extreme circumstances.

This section started with the proposition, generally accepted in the international community, that where a natural disaster occurs, international assistance may only be delivered at the request of, or with the consent of, the government of the affected state. It has been argued that in limited extreme circumstances, where a population is affected by the event and there is severe loss of life or threat to life, then another state may be justified, or at least not in breach of international law, if it deploys unarmed emergency relief workers into the affected state to provide humanitarian assistance. That this discussion is limited to the delivery of aid by unarmed responders is critical. If the delivery of aid was supported by armed

107 Ibid 183 (emphasis added).

108 Giorgio Gaja, 'Is a State Specially Affected When its Nationals' Human Rights are Infringed?' in Lal Chand Vahrah et al (eds), *Man's Inhumanity to Man: Essays in International Law in Honour of Antonio Cassese* (Kluwer Law International, 2003) 372, 375.

109 Crawford, above n 106, 178.

110 *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947).

forces then the law surrounding armed humanitarian intervention would apply. The use of force to deliver humanitarian relief is, at best controversial, and at worst illegal.¹¹¹ Further, the use of armed responders would trigger international obligations under international humanitarian law that would define the rights of international organisations, and the obligations of combatants, to assist and protect the non-combatant population. Discussion on the delivery of humanitarian relief by armed forces is outside the scope of this paper.

With that limitation in mind it has been argued that delivery of post disaster relief by unarmed responders, without the consent of the affected state, would not be an infringement of the prohibition on the use of armed force and would not be a prohibited intervention in the domestic affairs of the affected state. It may infringe the sovereign rights of the affected state but if the circumstances were sufficiently dire, that could be justified by reference to the principle of necessity. Even so the argument is largely hypothetical. If the government of the affected state really does not want international disaster relief to enter their national territory, they may well choose to resist with normal border protection forces. It is unlikely that an assisting state would actually want to deploy unarmed resources if that level of resistance was to be encountered. Persons entering the affected state without permission may well find themselves in breach of that state's domestic laws and subject to arrest and prosecution for unlawful entry into the affected state's territory. If the assisting state's actions are truly consistent with international law, then there would be diplomatic pressure to protect the aid personnel but that is still exposing those individuals to a serious risk to their liberty and well-being. It is unlikely that an assisting state would want to provide disaster assistance to an affected population in the face of serious objections by the affected state.

The discussion above leads to the conclusion that in some, albeit hard to imagine circumstances, the provision of relief to a population that is seriously affected by a natural disaster may be justified even when aid is expressly refused by the government of the affected state. Even if such an extreme situation occurred or could be envisaged, for practical purposes delivering aid without consent is unlikely to occur. Any intervening state would need to be prepared to risk exposing its humanitarian workforce to possible violence, legal action and arrest in the affected state. The only time delivering aid without consent would be workable is if it is clear that the affected state's objections are in form only, and that the affected state neither can, nor intends to, enforce its objections.

The issue of whether aid can be delivered in the absence of consent, but also in the absence of objections, is the subject of the next scenario.

111 See Alain Pellet, 'The Charter of the United Nations: A Commentary of Bruno Simma's Commentary' (2003–04) 25 *Michigan Journal of International Law* 135; Randelzhofer, above n 87; Keene, above n 101; Simma, above n 88; Tesson, above n 101; Klintworth, above n 101; Brownlie, *Use of Force*, above n 86; Karoubi, above n 101, 230; Ronald C Santopadre, 'Deterioration of Limits on the Use of Force and its Perils: A Rejection of the Kosovo Precedent' (2003) 18 *St John's Journal of Legal Commentary* 369; Thomas M Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press, 2002); Degan, above n 101; Yves Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance* (Marinus Nijhoff, 1991).

C Scenario 2 — Intervention by Necessity

The second hypothetical scenario is similar to the first. In this scenario the assisting state seeks to deploy aid and aid workers into the affected state where, as a result of the disaster, there is no effective government of the affected state or that government cannot be contacted. Such an event may arise in the South Pacific region.

In 2002, a cyclone in the Solomon Islands left the island of Tikopia without external contact.¹¹² The Royal Australian Air Force (with the consent of the government of the Solomon Islands) flew over the island to determine whether or not there were survivors.¹¹³ Had that cyclone impacted upon the capital, Honiara, it may have been impossible to contact what was left of the government to gain permission to enter the territory to provide relief assistance. If that were the case, a neighbouring state may want to respond by sending its navy, police or air force to determine whether there were survivors and to provide urgent assistance.

Again the scenario may be largely hypothetical as countries have international missions that could represent the state and that could be approached for permission to enter the sovereign territory of the affected state. It follows that a situation where an assisting state would seek to provide assistance to the affected state, but cannot contact any official from the affected state to obtain permission is extremely unlikely. Notwithstanding this, an argument can be made that *if* that situation arose, entering the territory of the affected state to deliver humanitarian assistance would not be a breach of international law.

The argument, based on necessity, has an analogy with domestic laws. Under Anglo-Australian law, a person's body is inviolate and a person cannot be subject to medical treatment, even where that treatment is in the person's best interests, unless he or she has consented. There is, however, an exception to that rule based on the doctrine of necessity. This exception is required to ensure that people who need medical treatment but who cannot give consent, because they are too young, not mentally competent or too badly injured, can still receive the treatment they require.

The principle of necessity is also part of international law¹¹⁴ and the essential elements of the principle were discussed in the previous section. Necessity can be relied upon to justify an action where that action is the only way for the state to safeguard an essential interest against a grave and imminent peril and the action does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.¹¹⁵

112 *No Word from Pacific Island Hit by Cyclone* (29 December 2002) ABC News Online <<http://www.abc.net.au/news/newsitems/200212/s755052.htm>>.

113 *Solomons to Ask Australia to Survey Cyclone-Hit Island* (30 December 2002) ABC News Online <<http://www.abc.net.au/news/newsitems/200212/s755252.htm>>.

114 Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004); Crawford, above n 106, 178–86.

115 Crawford, above n 106, 178.

Staying with the example of the Solomon Islands, a report prepared by the Australian Strategic Policy Institute identified a number of key Australian interests that would be affected if the Solomon Islands were allowed to 'fail' as a result of military instability and civil unrest.¹¹⁶ Similar interests would also be exposed if the Solomon Islands were left devastated by a natural disaster. The interests involved would include Australia's interest in preventing the Solomon Islands from becoming lawless state that may encourage 'drug smuggling, gun-running, identity fraud and people smuggling'.¹¹⁷ International criminal activities would be even more attractive for a population if they were left devastated and forgotten after a disaster and needed to undertake some economic activity to survive. Devastation by a natural hazard event would lead to social and economic collapse that in turn could lead to violence and crime and 'there would be a high likelihood that such problems would prove contagious to other countries in the region'.¹¹⁸ The collapse of a state, such as the Solomon Islands, would deprive Australia of 'business and investment opportunities which ... are potentially valuable'.¹¹⁹ Finally failing to go to the aid of a Pacific Island state, such as the Solomon Islands, would affect Australia's international standing.¹²⁰

The essential interests of Australia as the assisting state have been identified. Where there is no way to communicate with the affected population or the government of the affected state, due to the disruption caused by the disaster, responding with emergency personnel to conduct a search and rescue mission would be the only way to protect those interests.

Where the objective is to save the affected population and restore working government there is no significant risk to the essential interest of the affected state. Deploying defence and emergency services to help a government get re-established and to provide aid to the community is not a significant threat to the interests that the state may have in protecting its territorial and sovereign integrity, and may even enhance that state's interest.

It follows that a country could rely on the principle of necessity to justify sending a ship into a foreign port or an aircraft over foreign airspace to provide humanitarian assistance to an affected population and to establish communications with whatever government there may be following a natural disaster.

In conclusion, despite the assertion that post-disaster humanitarian aid can only be delivered with the consent of, or at the request of, the government of the affected state, it is argued here that where the government has ceased to function or cannot be contacted, it would be consistent with international law for a friendly nation to deploy humanitarian aid provided the aid is delivered in accordance with humanitarian principles and the actions are limited to acting in the best

116 Elsina Wainwright, 'Our Failing Neighbour: Australia and the Future of Solomon Islands' (Report, Australian Strategic Policy Institute, 2003).

117 *Ibid* 14.

118 *Ibid*.

119 *Ibid*.

120 *Ibid* 14–15.

interests of the state and its affected population. Once a working government could be re-established, the responsibility for managing the disaster response would again revert to that government.

D Scenario 3 — Intervention to Protect One's Own State from the Effects of the Disaster

In this scenario the assisting state wants to deploy assets to protect itself from the effects of the disaster. This situation may arise if a state wants to provide relief to an affected community to stop refugee flows into its own territory.¹²¹ A similar argument would arise where two countries share a land border and a wild fire may be threatening to burn from one country to another. In that case the assisting state may reasonably think that if it can fight the fire on the affected state's territory it will be able to stop it before it spreads onto its own territory where fire-fighting operations will be more complex.

The difference between this scenario and the first hypothetical scenario of intervention to provide humanitarian relief is motivation. In the first scenario, the assisting state claims to be acting out of purely humanitarian concern for the affected population, whereas in this scenario the concern is to protect the assisting state's interests. Notwithstanding this difference, assuming that the aid that is delivered is appropriate and delivered in accordance with humanitarian principles of neutrality, impartiality and humanity, then there should be no significant difference in legal conclusion. If the intention of the assisting state is to provide genuine assistance to the affected community (and not just ensure the affected population does not cross a national border) then its motive is not relevant.¹²²

If the assisting state were to deploy resources into the affected state to control a flood or to fight a fire that was threatening the population or vital assets in the affected state, the same principles should apply. The International Law Commission's articles on necessity¹²³ in essence provide that an action by a state is justified if it is the only way to safeguard an essential interest of the state, and does not impair another state's essential interest.¹²⁴ Provided the intervention is reasonable and limited to doing only that which is necessary to control the spread of the hazard, this would also be justified by necessity.

Brownlie refers to the principle that a state can take action within the territory of another state as a 'special case of necessity'. He states:

Some instances may be considered in which serious danger to the territory of a state arises otherwise than as a result of a use of armed force. Thus if state B controls the upper, and state A the lower reaches of a river, and

121 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008, 12549–61 (Kevin Rudd, Prime Minister).

122 See also Tésou, above n 101.

123 Crawford, above n 106, 178.

124 Ibid.

reservoirs on the territory of state B are threatened by natural forces, or the territorial authorities negligently or wantonly loose quantities of water, causing a threat of floods to state A, the latter would seem to be justified in taking preventive action on the territory of state B. Such action should be immediately reported to the Security Council, its particular purpose made known to the government of state B, and the situation must be such that previous complaint to the local authorities would not have provided an adequate or timely remedy.¹²⁵

Seamone argues that there is a rule of customary international law that requires states to at least inform their neighbours of potential transboundary threats; that is, to warn their neighbour if they are aware of a hazard in their territory that may flow across the boundary and impact upon their neighbour.¹²⁶ Further, he argues, governments have established standards to deal with some transboundary hazards such as fires, oil spills and nuclear accidents,¹²⁷ and that there is at least an argument that states have an obligation to cooperate to prevent or mitigate catastrophic transboundary events.¹²⁸ If this is correct, that is, if there is a duty to cooperate over significant transboundary hazards, then it follows that where an assisting state moves into an affected state to contain a hazard, the fact that the affected state is at least under a duty to cooperate means that any infringement of the affected state's sovereign rights by the unauthorised crossing is justified. If, in effect, the affected state refuses to do what the state is required to do, then it is easier to argue that there is no serious threat to any that state's essential interests and so the requirements of necessity are met and the intervention is justified.

To conclude this discussion, it is at least arguable that sending personnel into an affected state to deal with a hazard before its effects have an impact upon the assisting state can be justified, again by reference to the notion of necessity. Here again, in avoiding the prohibition on the use of armed force the assumption must be that the resources to be deployed are unarmed; that is, there is no use of 'force' as defined in the Charter of the United Nations¹²⁹ and discussed in detail above.

Once again, political reality also needs to be addressed. If the affected state really does not want the assisting state's help, and is prepared to resist by force, or to arrest any incoming aid workers, then the issue of deployment is unlikely to arise.

125 Brownlie, *Use of Force*, above n 86, 376.

126 Seamone, 'Wishing on a Star', above n 64, 1132.

127 Evan R Seamone, 'The Duty to "Expect the Unexpected": Mitigating Extreme Natural Threats to the Global Commons such as Asteroid and Comet Impacts with the Earth' (2003) 41 *Columbia Journal of Transnational Law* 735, 774.

128 Seamone, 'Wishing on a Star', above n 64, 1126.

129 *Charter of the United Nations* art 2(4).

E Scenario 4 — Intervention under the Auspices of the United Nations

Intervention in matters that fall essentially within the domestic jurisdiction of a state is prohibited,¹³⁰ as is the use, or threat, of force,¹³¹ unless such actions are authorised by the Security Council.¹³² The Security Council can, however, authorise intervention up to and including the use of force, if that intervention is required in order to deal with a threat to international peace and security.¹³³ Provisions authorising the application of sanctions or the ‘complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations’¹³⁴ and the use of armed force¹³⁵ would not appear to be relevant to the delivery of humanitarian assistance. As the International Court of Justice stated:

the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*.¹³⁶

The United Nations did, however, endorse military action to facilitate the delivery of humanitarian aid in Somalia in 1992. In that instance, conflict in Somalia was providing a substantial barrier to the delivery of aid. The objective of this resolution was to ensure that humanitarian aid could be delivered to the people suffering in Somalia. At that time, the international community was already in Somalia attempting to deliver aid but was being frustrated by violence directed toward United Nations and non-government organisation personnel, and the theft of aid supplies. Somalia had no government and was the subject of great internal violence. To call upon Chapter VII, however, there had to be a threat to international peace and security.

Only two speakers on the motion to authorise Chapter VII action specifically addressed the question of how the situation in Somalia represented a threat to *international* peace and security. The representative from Cape Verde argued that the situation in Somalia had

an international dimension — in view of the fact that, because of its repercussions on neighbouring States, it is imperilling the stability and security of the whole region.¹³⁷

The representative from Morocco submitted that the situation posed:

130 *Ibid* art 2(7).

131 *Ibid* art 2(4).

132 *Ibid* Chapter VII.

133 *Ibid* arts 39, 41, 42.

134 *Ibid* art 41.

135 *Ibid* art 42.

136 *Nicaragua v United States of America* [1986] ICJ Reports 14 [268].

137 *Provisional Verbatim Record of the Three Thousand One Hundred and Forty Fifth-Meeting*, UN SCOR, UN Doc S/PV.3145 (2 December 1992) 19.

a real threat for the Horn of Africa, a region already suffering from famine, civil wars and massive refugee flows. Hence it is also a threat to international peace and security.¹³⁸

The Security Council determined that:

the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.¹³⁹

The Security Council authorised ‘the Secretary-General and Member States ... to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations’.¹⁴⁰

The situation in Somalia was described as ‘unique’,¹⁴¹ ‘exceptional’,¹⁴² ‘unprecedented’¹⁴³ and ‘extraordinary’.¹⁴⁴ It was a situation not only of extreme human suffering, but also violent action by warlords frustrating international efforts to deliver aid as well as threatening international aid workers and United Nations staff. The armed forces were not deployed to deliver aid, but to provide a secure environment so that humanitarian workers could deliver the aid.

It is possible that a situation similar to that in Somalia could again arise following a natural disaster. If the impact of the disaster was so significant that effective government was lost, and people were subject to violence either by opportunistic ‘warlords’ or just by fellow humans forced to resort to violence to secure what they need to survive, then there could again be a threat to international peace and security. In that case the Security Council could again take action under Chapter VII to secure a response to the humanitarian crises.

As with the other scenarios considered here, there is legal power to deliver aid without the consent of the affected state, but again the circumstances where that could be justified will be rare. In 2008, there were calls for the Security Council to authorise intervention to allow the international community to deliver humanitarian aid to Burma following Cyclone Nargis.¹⁴⁵ Notwithstanding the death toll and the difficulties in getting aid to the affected population, the matter was not put before the Security Council for a decision under Chapter VII.

138 Ibid 44.

139 *Security Council Resolution 794 (1992) [On Measures to Establish a Secure Environment for Humanitarian Relief Operations in Somalia]*, SC Res 794, UN SCOR, 3145th mtg, UN Doc S/RES/794 (3 December 1992).

140 Ibid para 10.

141 *Provisional Verbatim Record of the Three Thousand One Hundred and Forty Fifth Meeting*, UN SCOR, UN Doc S/PV.3145 (2 December 1992) 7.

142 Ibid 12, 46.

143 Ibid 30, 44.

144 Ibid 40.

145 Evans, above n 100; Kouchner, above n 100.

F Conclusion on the Right to Provide Aid

In this paper, the starting proposition was that the international community cannot deliver aid to an affected state, except with the consent of the government of the affected state. This is a generally accepted proposition that gives effect to the principle that international law is based on the sovereign equality of states and the primary responsibility for managing a crisis rests with the government of the affected state. It would be an affront to sovereign and territorial integrity to provide assistance without a request, or at least consent, for that action.

That proposition has been tested here. It was noted that under international law there are two key provisions that have an impact upon the delivery of aid; one is the prohibition on the use of force, and the second is the prohibition on intervention in matters that are essentially within the domestic jurisdiction of states.¹⁴⁶ In considering whether it is accurate to say that aid can *never* be given without consent, four scenarios were suggested.

It is argued that, in law, uninvited aid to a disaster-affected community could be given where there is a compelling humanitarian need — ‘force’ in art 2(4) of the United Nations Charter means ‘armed force’ or ‘armed attack’, so the use of unarmed responders, whether civilian aid workers or even unarmed soldiers, to provide assistance after a disaster would not be an example of an unlawful use of force. In these circumstances it was argued that the delivery of truly needed, urgent humanitarian aid would not be an unlawful interference in the domestic affairs of the state, but would be a breach of territorial sovereignty that could, however, be justified if the need was great enough.

Uninvited aid could also be justified as being consistent with international law where there is a humanitarian need and no effective government or no way to contact the government to get consent — this scenario identified that necessity is part of international law. Under these provisions it must be lawful to provide aid that is required, and in the best interests of the recipients.

A neighbouring state may be justified in providing disaster relief to a neighbouring state where there is a need to protect the intervening state from the effect of the disaster — again necessity suggests such a right and this is supported by commentators and developing international obligations on countries to cooperate to deal with transborder disasters.

Finally disaster relief could be provided if there was action by the Security Council under Chapter VII — the action of the Security Council in responding to the humanitarian crisis in Somalia in 1992 shows that a humanitarian crisis *can* be a threat to international peace and security, but there the crisis was coupled with lawlessness and violence. While it may be that such a situation could arise again, it is unlikely from a sudden onset natural disaster.

146 *Charter of the United Nations* arts 2(4), 2(7).

It is argued, therefore, that in some extreme circumstances, an assisting state could deliver aid to an affected population without the consent of the affected state, but the circumstances where this might happen are rare to the point of being almost unimaginable. Although the delivery of aid or an emergency response without the consent of the affected state is theoretically justifiable, it is unlikely to happen.

The most likely situation where aid might be delivered without the consent of the affected government will arise in the South Pacific, where a small island state may well be overcome by a disaster (a tsunami or a cyclone) and resources from a neighbour such as Australia may be despatched to fly over, or sail into, the territory to commence assistance and to deliver aid to the affected population and restore the capacity of the local government to re-establish itself. Even this situation will be unlikely, because even if the government located in the affected state cannot be contacted, they are likely to have foreign missions that can give the necessary permission.

The result is that for all practical purposes international law requires that post-disaster aid can only be delivered with the consent of, or at the request of, the government of the affected state.

IV CONCLUSION

At the end of this paper, the first conclusion that may be drawn is that international law does not require states to come to the aid of other states. States do assist disaster-affected states for reasons of humanity and for political reasons, but not because such a response is required as a matter of international law.

It follows that a state is not required to offer disaster assistance to an affected state but may do so. The question of what aid to offer, and whether to offer aid directly or indirectly through funding relief organisation, is a matter for the donor state. Whether to accept assistance is a matter for the affected state.

Second, for all practical purposes, post-disaster assistance may only be given with the consent of the government of the affected state. There are arguments that could be used to justify the delivery of humanitarian aid in the absence of permission of the affected states,¹⁴⁷ but it has to be conceded that the circumstances in which this could be justified are so unlikely that it is appropriate to consider that disaster relief can only be provided at the request, or with the consent, of the affected state.

What follows from these conclusions is that the welfare of disaster victims depends on the good will of states and their willingness to respond rather than any edicts or compulsion in international law. Developing the capacity of regional organisations, such as the Association of Southeast Asian Nations ('ASEAN'),

147 These were: the delivery of humanitarian assistance to meet a dire and unmet need; intervention by necessity when the affected state could not be contacted; intervention to protect one's own state from the effects of the disaster; and intervention under the auspices of the United Nations Security Council.

and the United Nations to respond to disasters and facilitating the delivery of international assistance through appropriate domestic legal frameworks will be of more help to disaster victims than asserting a legal right or obligation on states to assist. As Fidler has noted, ‘the direct role of international law with respect to policy on natural disasters will not grow significantly’.¹⁴⁸

Although there are arguments to justify the delivery of aid without consent, they are unlikely to be of practical assistance to disaster-affected states. To ensure that the communities affected by inevitable natural disaster receive the international assistance they require, states should have regard to the International Red Cross’ *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*¹⁴⁹ to assist them to develop, in conjunction with their neighbours, appropriate legal frameworks to facilitate the delivery of aid when it is required.

148 Fidler, above n 17.

149 International Federation of Red Cross and Red Crescent Societies, *Guidelines*, above n 1.