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

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TABLE OF CONTENTS

I. INTRODUCTION .............................................................. 1128
II. BACKGROUND ................................................................ 1129
    A. Food Aid for Sudden-Impact Disasters in Context .................. 1129
    B. Food Aid Requirements in Sudden-Impact Disasters .................. 1130
    C. Providers of Food Aid in Sudden-Impact Disasters .................. 1132
III. REGULATORY PROBLEMS FOR FOOD AID IN SUDDEN-Impact DISASTERS ........................................................ 1133
    A. Supply-Side Problems ........................................ 1134
       1. Tied Aid ........................................................ 1134
       2. Food Quality ................................................. 1136
    B. Coordination and Professionalism .................... 1138
    C. Receiving-State Problems ................................... 1139
       1. Delayed Requests ......................................... 1139
       2. Barriers to the Entry of Food Aid ....................... 1140
       3. Obstacles to Effective Distribution of Food Aid .................. 1141
IV. THE EXISTING INTERNATIONAL REGIME ....................... 1142
    A. Food Aid-Specific Instruments .................................. 1142
    B. The Right to Food .......................................... 1145
    C. Disaster Treaties ............................................. 1147
    D. Privileges and Immunities .................................. 1148
    E. Recommendations, Resolutions, and Codes ............... 1149
V. ONE WAY FORWARD ...................................................... 1151

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I. INTRODUCTION

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

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

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

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

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

II. BACKGROUND

A. Food Aid for Sudden-Impact Disasters in Context

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

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

Similarly, according to the Office for the Coordination of Humanitarian Affairs’ (OCHA) Financial Tracking Service (FTS), of the $15.7 billion donated for food-sector assistance in humanitarian relief operations from 1999 to 2007, $3.8 billion, or twenty-four percent, were for natural disasters (of both slow- and sudden-onset varieties). Thus, the large majority of donations were devoted to...
situations of armed conflict, which are considered to be “the most severe emergencies in terms of widespread food insecurity, starvation and excess mortality.”

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

B. Food Aid Requirements in Sudden-Impact Disasters

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

7. See SUSAN JASPERS & HELEN YOUNG, GENERAL FOOD DISTRIBUTION IN EMERGENCIES: FROM NUTRITIONAL NEEDS TO POLITICAL PRIORITIES 8 (Relief and Rehabilitation Network 1995).
12. See id. Note that flooding is not always rapid, and this type of disaster can thus straddle the divide between sudden- and slow-onset.
13. INT’L FED’N OF RED CROSS & RED CRESCENT SOCIETIES, DISASTER EMERGENCY NEEDS ASSESSMENT 24 (2000). This is significant in light of the fact that
eruptions can also result in food needs due to widespread destruction of crops. Earthquakes occasionally cause significant food shortages, as they did in Pakistan in 2005 and Bam, Iran in 2003. This is particularly true when the earthquake destroys food distribution systems and markets. However, this is not commonly the case. For example, notwithstanding the significant devastation of the 2001 earthquake in Gujarat, India, food supplies were not greatly disrupted.

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

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

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

C. Providers of Food Aid in Sudden-Impact Disasters

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

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

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27. See id. at 23.
29. See Food Aid Monitor, supra note 23, at 29.
31. See Food Aid Monitor, supra note 23, at 23.
Accordingly, although WFP is by far the largest single humanitarian actor in this field, it is certainly not alone. The foregoing highlights an overall trend of expansion in the size, number, and diversity of actors involved in international disaster relief. More “non-traditional” government donors, more national Red Cross and Red Crescent societies, and more U.N. agencies are becoming involved. The increased participation of the NGO sector has been particularly dramatic. It is estimated that there are currently between 3,000 and 4,000 international NGOs in Western countries, approximately 260 of which are regularly involved in humanitarian relief.

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

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

Notwithstanding this increasing diversity of food aid channels, recent debates about food aid have mainly focused on legal restrictions by donor states on the type, origin, and delivery methods.
of the aid they provide. This debate is critical for both slow-onset and sudden-impact disasters because the costs and particularly the delay associated with these restrictions are substantial. However, less attention has been paid to important quality and coordination issues in food aid, particularly in sudden-impact disaster settings.

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

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

A. Supply-Side Problems

1. Tied Aid

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


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

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

39. DEV. ASSISTANCE COMM., OECD, Guiding Principles for Associated Financing and Tied and Partially Untied Official Development Assistance, in DIRECTIVES FOR REPORTING TO THE CREDITOR REPORTING SYSTEM AID ACTIVITY
generally refers to restrictions as to where food aid may be purchased and how it may be transported.\textsuperscript{40} In the United States, nearly all official food aid is required by national law to be provided in-kind from domestic sources, and seventy-five percent of it must be transported by American shipping.\textsuperscript{41} These requirements have been associated with heightened costs and substantial delays. For example, a 2007 report by the United States Government Accountability Office (GAO) found that domestic shipping requirements generated an average of $134 million in additional costs from 2001 to 2005.\textsuperscript{42} Similarly, a multi-donor study by the Organization for Economic Cooperation and Development (OECD) in 2006 concluded that “[t]he actual cost of tied direct food aid transfers was, on average, approximately 50% more than local food purchases, and 33% more costly than procurement of food in third countries.”\textsuperscript{43} Moreover, it has been reported that “[f]ood aid shipments from the U.S. take an average of five months to reach their destination—making them pointless for rapid response.”\textsuperscript{44}

Other large donors, such as Australia, Canada, and Denmark, also provide the large majority of their food aid as in-kind shipments.\textsuperscript{45} In contrast, the European Union (E.U.) has changed its rules to privilege local purchases (i.e., purchasing food aid within the database Annex 2, § 2, ¶ 5 (1987). Under these guidelines, aid is considered “partially tied” if sourcing options are limited but include “substantially all developing countries.” Id.\textsuperscript{40} See OECD, THE DEVELOPMENT EFFECTIVENESS OF FOOD AID: DOES TYING MATTER? 40–42 (2005) [hereinafter DOES TYING MATTER?].\textsuperscript{41} See MURPHY, supra note 28, at 14.\textsuperscript{42} U.S. GOV’T ACCOUNTABILITY OFFICE, No. GAO-07-98T, FOREIGN ASSISTANCE: VARIOUS CHALLENGES LIMIT THE EFFICIENCY AND EFFECTIVENESS OF U.S. FOOD AID 9 (2007).\textsuperscript{43} Id. at 12.\textsuperscript{44} MURPHY, supra note 28, at 30. To a limited extent, these problems have been offset in emergency situations through diversion of foods in the pipeline destined for development purposes, pre-positioning of food stocks, and small-scale local purchases permitted through a separate fund administered by the United States Agency for International Development (USAID). See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 45, at 9–10; Thomas Marchione, Foods Provided through the U.S. Government Emergency Food Aid Programs: Policies and Customs Governing their Formulation, Selection and Distribution, 132 J. NUTRITION 2107S (2002). USAID also has statutory authority to waive certain rules when providing emergency assistance for natural disasters. However, the agency has interpreted this authority (known as “notwithstanding authority” because of the wording of the relevant provision) as disallowing it to depart from domestic sourcing requirements. See Andrew S. Natsios, Administrator, U.S. Agency for Int’l Dev., Remarks at the Kansas City Export Food Aid Conference (May 3, 2005), available at www.usaid.gov/press/speeches/2005/sp050503.html (“I have been told in no uncertain terms by our USAID lawyers that we cannot use our notwithstanding authority for local purchases.”).\textsuperscript{45} See DOES TYING MATTER?, supra note 43, at 58 (table showing that the three countries each send the vast majority of their aid in the form of “Direct Transfers”).
affected state) and “triangular purchases” (i.e., purchasing food aid outside of the donor and affected state, usually in a nearby developing state). Still, even cash-only transactions can be slow if accompanied by significant bureaucracy. It has been asserted that “[t]he E.U. disbursement of food aid funds is so slow that the timing of their assistance . . . can make it less useful than in-kind donations.”

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

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

2. Food Quality

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

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46. Id. at 26.
47. MURPHY, supra note 28, at 30.
48. See Food Aid for Food Security, supra note 1, at 32–46.
49. See id. at 48–49. Cf. Oxfam, Making the Case for Cash: Humanitarian Food Aid Under Scrutiny, Oxfam Briefing Note, at 3 (Apr. 8, 2005) (arguing that the long delivery delay of US food aid pledged to Sri Lanka and Indonesia after the tsunami would lead to its arrival just as local harvests were occurring and act to depress prices).
50. See DOES TYING MATTER?, supra note 45, at 36.
51. See Press Release, U.S. Dept. of State, U.S. Disagrees with EU’s “Cash Only” Food Assistance Policy (Jan. 6, 2006), available at http://usinfo.state.gov/ei/Archive/2006/Jan/09-13090.html (noting that “[c]urrently, the European Union provides less than 1.5 million tons a year of overall food assistance while the United States has remained consistent at 4 million tons of food a year”).
provided in response to disasters. Most disturbing is the evidence of differing standards of quality of aid provided to European and non-European countries.\[53\] In other cases, it has seemed that certain types of food were "dumped" on disaster-affected countries.\[54\]

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

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


54. See, e.g. infra notes 58–60.


57. See Int’l Fed’n of the Red Cross & Red Crescent Societies, Legal Issues from the International Response to the Tsunami in Sri Lanka 19 (2006), available at http://www.ifrc.org/Docs/pubs/idrl/report-srilanka.pdf [hereinafter IFRC Sri Lanka Report]. This is not only hazardous for the health of disaster-affected persons, but clearly touches an emotional cord in the affected state, as evidenced by the scandals that erupted over accusations that China had donated expired baby food to Indonesia after the tsunami and that Iran had donated expired canned food to Pakistan after the October 2005 earthquake. See Indonesia Checks Claim China Donated Expired Food to Victims, Asian Econ. News (Kyodo), Jan. 18, 2005; Earthquake Relief Food Not Expired, Says Iranian Diplomat, Daily Times (Lahore, Pak.), Jan. 20, 2006. In both cases, the concerned governments asserted that there had been a misreading of the packaging, which was not in locally-understood languages.

58. See TEC Synthesis Report, supra note 56, at 52.


60. See Bam Workshop Report, supra note 15, at 52. Should this appear capricious, it is notable that, in the U.S., broken rice at a rate higher than four percent is generally used only in dog food. See Sage V Foods, The Composition of Rice and the
displaced by flooding along the Zambezi River in Mozambique, notwithstanding their lack of any utensil to grind or prepare it.61

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

B. Coordination and Professionalism

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

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


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

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

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

C. Receiving-State Problems

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

1. Delayed Requests

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

71. See Tec Synthesis Report, supra note 56, at 56.
72. Int’l Fed’n of Red Cross & Red Crescent Societies, European Forum on International Disaster Response Laws, Rules and Principles (IRDL), Antalya, Turk,
due to administrative confusion or slow needs-assessment procedures. Most governments and inter-governmental organizations, such as WFP, will refrain from sending relief until a request has been officially transmitted.

2. Barriers to the Entry of Food Aid

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

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

Moreover, complexities in domestic food importation rules and confusion about their operation (both from the international and domestic side) can cause significant problems. A dramatic example of this occurred in the United States after Hurricane Katrina in 2005, when the United States Department of Agriculture (USDA) belatedly discovered that 500,000 “meals ready to eat” (MREs), donated by the British military and already in distribution, contained British beef, which had been banned in the United States since 1997. The remaining MREs were thus gathered back up and stored at significant expense until the U.S. government was able to locate foreign recipients willing to take them (including a contingent of border guards in the Republic of Georgia).

3. Obstacles to Effective Distribution of Food Aid

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

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

79. See IFRC Sri Lanka Report, supra note 57, at 20; Tropical Storm Stan, supra note 81, at 19.
81. Id. at 18–19.
83. See id.
repeatedly leave and re-enter the country in order to maintain their legal status.\textsuperscript{85}

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

IV. THE EXISTING INTERNATIONAL REGIME\textsuperscript{88}

A. Food Aid-Specific Instruments

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

The oldest such instrument is the non-binding FAO Principles of Surplus Disposal and Consultative Obligations of 1954 (hereinafter, the “FAO Principles”), which were primarily designed to monitor the disposal of agricultural surpluses as food aid, and to ensure that food aid did not displace commercial imports.\textsuperscript{89} The FAO Consultative Sub-Committee on Surplus Disposals (CSSD) was set up to receive reports on food aid and monitor performance with these Principles. However, in recent years, donors have increasingly ignored the CSSD, such that less than five percent of global food aid flows were reported in 2005.\textsuperscript{90}

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

\textsuperscript{85}. See IFRC Thailand Report, \textit{supra} note 70, at 15–16; IFRC Indonesia Report, \textit{supra} note 75.

\textsuperscript{86}. See IFRC Thailand Report, \textit{supra} note 70, at 13–14.

\textsuperscript{87}. \textit{See id.} at 19, 26.


\textsuperscript{89}. \textit{See MURPHY, supra} note 28, at 14.

\textsuperscript{90}. \textit{See id.} at 15.

recently in 2007, and is valid through June 30, 2008. The FAC has twenty-three parties, all of whom are donors, including twenty-two states and the European Community.

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

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

93. Id. By its terms, ratification or access to the treaty is limited to a prescribed list, or those approved by the Food Aid Committee. See Food Aid Convention arts. XXII–XXIII, July 1, 1995, 1882 U.N.T.S. 327.
94. The “eligible products”—those that a member state can report toward its agreed annual quota—are grains, grain and rice products of primary or secondary processing, pulses, edible oil, root crops, skimmed milk powder, sugar, seed for eligible products, micronutrients and, to a limited extent, other products “which are a component of the traditional diet of vulnerable groups or . . . of supplementary feeding programs.” Food Aid Convention, supra note 96, art. IV(a). The Convention does not limit contributions of other types of foods, but they cannot be counted toward the member’s quota. Id. art. V(b). The Convention also includes grants of “cash to be used to purchase food for or by the recipient country.” Id. art. IX(a)(i).
95. See id. art. VIII & Annex B.
96. See id. art. XI(a). Member states are urged to give “full consideration to the advantages of directing food aid through multilateral channels, in particular the World Food Programme.” Id. art. XI(b).
97. Id. art. VIII(d).
98. Id. art. VIII(a).
99. Id. art. III(j).
100. Id. art. VIII(b).
101. Id. art. VII(b)–(c).
102. Id. art. XIII(a)(iii).
103. Id. arts. XIII(a)(i), IX (d).
take into account, even in emergency situations, “longer-term rehabilitation and development objectives.”

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

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

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

104. Id. art. VII(d).
105. Id. arts. XV–XVI.
106. But see Agreement on Agriculture, art. 10.4(a)—(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 81 (1994) (stating that the Agreement on Agriculture only permits food aid that is “not tied directly or indirectly to commercial exports” and stipulates that food aid transactions must be “carried out in accordance with the FAO ‘Principles of Surplus Disposal and Consultative Obligations.’”).
108. See Food Aid for Food Security, supra note 1, at 19.
109. See Food Aid Convention, supra note 96, art. XII.
110. Id. art. XII(a) (FAC requirements use non-obligatory “should” standards).
111. Oxfam Int’l, Food Aid or Hidden Dumping?: Separating Wheat from Chaff, at 7, 15 (2005) (noting that these rules are not enforced and are considered to have had little impact in limiting the distortions of the market).
Agriculture, which calls on members to (1) ensure that food aid is not “tied directly or indirectly to commercial exports of agricultural products to recipient countries,” (2) comply with the FAO Principles, and (3) ensure that aid is no less concessional (i.e., no more like a commercial sale) than what would be covered under the FAC.

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

B. The Right to Food

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

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

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

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

\(^{118}\) Id. ¶ 8.

\(^{119}\) Id. ¶ 17.

\(^{120}\) Id. ¶ 36.


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

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

C. Disaster Treaties

There are also a number of treaties in sectors other than food aid that have provisions on facilitation and cooperation in disaster relief that may be pertinent to a particular food aid operation. These include treaties in the areas of nuclear accidents,124 weapons control125 sea and air transport,126 telecommunications,127 health emergencies,128 civil defense,129 and customs,130 as well as mutual assistance treaties at the regional level.131 For the most part,
however, these treaties either have few parties, vague language, or do not address non-state actors.

D. Privileges and Immunities

In contrast, while not specific to disasters, the law of privileges and immunities provides very specific rights for facilitation—in the areas of customs, visas, and domestic legal personality, among others\textsuperscript{132}\,—that are clearly relevant to the types of receiving-end problems identified in this article. Whereas diplomatic and consular staff benefit from privileges and immunities as a matter of customary law, under the Vienna Convention on Diplomatic Relations of 1961,\textsuperscript{133} and the Vienna Convention on Consular Relations of 1963,\textsuperscript{134} governmental food relief personnel are extremely unlikely to fall under these categories. For this reason, a number of donors have entered into bilateral treaties with affected states to guarantee equivalent protections and rights.\textsuperscript{135}

In contrast, WFP, as a joint programme of the United Nations and the Food and Agricultural Organization (FAO),\textsuperscript{136} enjoys privileges and immunities under both the Convention on Privileges and Immunities of the United Nations of 1946,\textsuperscript{137} and the Convention on Privileges and Immunities of the Specialized Agencies of 1947.\textsuperscript{138} In addition, in every country in which it maintains a presence, WFP enters into specific headquarters agreements reiterating its rights under the aforementioned treaties and providing more specific detail as to operating privileges. Thus, to the extent that WFP has suffered from the kinds of receiving-end problems described in this Article

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

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


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

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

E. Recommendations, Resolutions, and Codes

One document that would be of use to both governmental and non-governmental actors, and one of the most specific existing instruments on the “receiving end” issues of disaster relief described in this is the non-binding “Measures to Expedite International Relief,”\textsuperscript{142} which was adopted by resolutions of both the International Conference of the Red Cross and the UN General Assembly in 1977.\textsuperscript{143} Measures provide specific recommendations in the area of customs, visas for relief personnel, transport, and access to communication facilities. Specifically with regard to food aid, Recommendation D calls on states to “waive—to the extent compatible with minimum standards of hygiene[—] . . . restrictions on food imports.” The Measures also called on “all donors” to avoid sending “irrelevant goods,” to provide adequate notification to


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


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

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

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

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

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

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

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145. Id. Annex 1.
146. Id. ¶6.
148. Id. at pmbl.
150. Id.
Minimum Standards in Disaster Response (Sphere Handbook).\textsuperscript{151} Now in its second final edition, the Sphere Handbook (1) provides a grounding in human rights as well as humanitarian and refugee law for humanitarian relief actions, and (2) sets out detailed minimal operational standards for a number of sectors, including food security, nutrition and food aid.\textsuperscript{152}

V. ONE WAY FORWARD

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

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

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

\begin{itemize}
\item \textsuperscript{151} Sphere Project, supra note 22.
\item \textsuperscript{152} Id. at 16–19.
\item \textsuperscript{153} See Food Aid for Food Security, supra note 1, at 8–9.
\item \textsuperscript{154} See, e.g., Murphy, supra, note 28, at 33; Christopher Barrett & David Maxwell, Towards a Global Food Aid Compact, 31 Food Policy 105 (2006).
\item \textsuperscript{155} Food Aid for Food Security, supra note 1, at 52–56.
\item \textsuperscript{156} Martin, supra note 41, at 234.
\end{itemize}
greater consideration. Moreover, as the sudden-impact disaster context particularly illustrates, food aid is only part of a successful disaster-relief and recovery operation. Yet existing instruments and sectoral norms about international disaster relief are scattered and disparate. Greater cohesion between these various regimes would likely lead to more effective operations.

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

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

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

161. Id.
162. Id.
Crescent in November 2007. If so, they should be a helpful tool for addressing some of the neglected issues in food aid raised in this article.