



Law of Disasters: Towards a Normative Framework in the Americas

DISCUSSION PAPER PREPARED BY THE DEPARTMENT OF SUSTAINABLE DEVELOPMENT OF THE ORGANIZATION OF AMERICAN STATES FOR REVIEW AND COMMENTS AT THE AMERICAS REGIONAL FORUM ON INTERNATIONAL DISASTER RESPONSE LAWS, RULES AND PRINCIPLES (IDRL)¹

April 23-24 2007
Panama City, Panama

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I. Introduction

The Americas, a wealthy region endowed with approximately 30% of the water resources and the Biodiversity hotspots of the world, among other natural, cultural and heritage patrimony, is also a significantly vulnerable region to natural disasters. From 1996 to 2005, 1,262 of 6,417 global disasters have occurred in the region²; a region where no country has a specific law addressing in a comprehensive manner the issue of natural disasters. However, at the global level countries have addressed the issue in the context of humanitarian law since the 18th century, thus focusing their attention on man made disasters such as War. Practical steps related to emergency management and natural disasters law were not taken until the mid 19th century, but in the 1700's progressive legal scholars such as Vattel and Wolff, authored doctrine addressing international law principles such as solidarity among States in the context of natural disasters.³ These are important precedents of the various multilateral treaties that have been negotiated to date in this area, including the Kyoto convention on customs procedures⁴, the convention on Civil Defense assistance to improve disaster response operations⁵, the Food Aid Convention⁶ and Tampere Convention.⁷ More recently, in 2005, countries endorsed at the multilateral level the Hyogo Framework of Action to Implement the Yokohama Strategy, which has linkages to at least a

¹ Prepared by Claudia S. de Windt, Legal Specialist of the Department of Sustainable Development of the OAS with contributions of Pedro Bastidas, Pablo Gonzalez, Maria del Mar Zavala and Isis Marquez.

² 2006, International Federation of the Red Cross and Red Crescent Society, World Disaster Report. Total Number of Reported Disasters by continent and year 1996-2005. Disasters referred to those with a natural or technological trigger only and does not include wars, conflicts related famines, diseases or epidemics.

³ 2007, Toman, Jiri. International Disaster Response Law, Evolution and Present State of the Legal Regulations of International Disaster Prevention and Relief.

⁴ International Convention on the simplification and harmonization of Customs procedures, Kyoto, 18 May 1973

⁵ Framework Convention on Civil Defense Assistance, 22 May 2000

⁶ Food Aid Convention of 1967, revised in 1999.

⁷ Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations of 1998



dozen agreements related to natural disasters. However at the regional level, in the Americas there is only one binding instrument in force. While the Inter-American Convention to Facilitate Disaster Assistance of 1991, a convention negotiated in the context of the Organization of American States (OAS), provides a basic framework to address key issues of disaster assistance, it has only been ratified by three countries.

Parallel to the increased number of natural disasters in the region, countries have established at the sub-regional level institutions as the Comite Andino para la Prevencion y Atencion de Desastres (CAPRADE), Centro de Coordinacion para la Prevencion de los Desastres Naturales en America Central (CEPREDENAC) and the Caribbean Disaster Emergency Response Agency (CDERA) to support efforts in tackling the issues of disaster mitigation and management. Nonetheless, at the national level, legal provisions are scarce and disperse in most instances and some have not been designed deliberately for their purpose. Most legal provisions or resolutions addressing disaster management have emerged as a response to an impromptu or emergency situation.

During the 2005 hurricane season, losses accounted to approximately US\$80 billion dollars in damages. Approximately a 100,000 houses were destroyed⁸, together with natural resources that are the foundation of economic activity and development to some countries of the region, in particular Small Island Developing States (SIDS). These kind of emerging challenges in core areas of national economies, together with social and environmental impacts to development, make urgent the need for a comprehensive approach to address the legal issues related to disaster mitigation and management.

The objective of this paper is to provide a brief overview of the existing legislation and normative framework at the national and regional level to address natural hazards risk reduction and emergency management in the Americas. The strengths and weaknesses of these frameworks and their structure vis à vis the increased intensity and frequency of disasters in the region will be analyzed in order to provide ideas and next steps to strengthen the capacity of the region to respond to and prepare for emerging challenges in this area. Case studies of applicable principles and norms in specific emergency situations in countries of the region will be taken into account in the analysis, as well as the topics addressed in the International Disaster Response Laws, Rules and Principles (IDRL) initiative led by the International Federation of the Red Cross. The IDRL seeks to address how legal frameworks at the international, regional and national levels, can best address the operational challenges in international disaster relief through a gap analysis and identification of common elements in existing legal frameworks.

II. Emerging challenges:

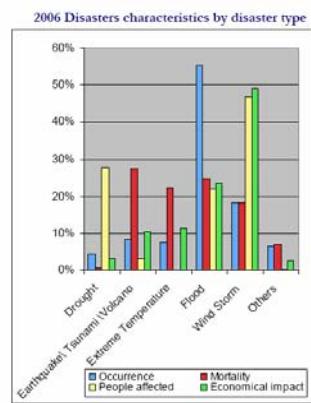
In Latin America and the Caribbean, economies are extremely dependent on natural resources which provide a safety net for the poor. Hence climate variability, and the increased frequency and intensity of disasters have a greater impact in the region. This can be demonstrated through the consistent effects of recurrent phenomena such as the El Nino Southern Oscillation Phenomenon (ENSO). For instance, in Ecuador the 1997-1998 El Nino contributed to a loss of

⁸ August 2005, Organization of American States, Department of Sustainable Development Policy Series #7 "The Economics of Natural Disasters".



harvest and rise in unemployment that together increased poverty incidence by 10 percentage points in the affected municipalities⁹.

The economic cost of natural disasters has also increased dramatically in the recent past. According to the World Bank, at least 16 countries of the region are developing countries¹⁰ and for these countries, the financial cost of extreme weather events represents a greater proportion of GDP loss, even if the absolute costs are higher in developed countries¹¹. Scientific projections show that climate change will exacerbate the pressure and existing vulnerability of developing countries to disasters, causing significantly larger impacts on livelihoods and health¹².



Source: March 2007. United Nations International Strategy for Disaster Reduction (UN/ISDR) and the Centre for Research on the Epidemiology of Disasters (CRED) Universite Catholique de Louvain. Issue No. 8, Disaster Data: A Balanced perspective”.

Some of the impacts are already visible in areas such as sea level rise, disease transmission and water availability, where projections estimate a 70% rise in the number of people with severe difficulties in accessing water.

It is relevant to note that most vulnerable countries to natural disasters such as Small Island Developing States (SIDS) are also the most vulnerable to the impacts of climate change including flooding. Moreover, the impact of disasters stalls economic and social development in all developing countries, while it is understood that the key to reducing vulnerability is development.

These emerging challenges exemplify how countries are subject to pressures in vast areas of human activity and the effectiveness of their legal and institutional regimes are also constantly

⁹ The Economics of Climate Change: The Stern Review, Cambridge University Press 2007

¹⁰July, 2006. Worldbank List of Economies

(<http://siteresources.worldbank.org/DATASTATISTICS/Resources/CLASS.XLS>)

¹¹ World Bank, 2004. Charlotte Benson and Edward Clay. Understanding the Economic and Financial Impacts of Natural Disasters

¹² Paris, February 2007, Intergovernmental Panel on Climate Change (IPCC): Climate Change 2007: The Physical Science Basis. Summary for Policymakers formally approved at the 10th Session of Working Group I of the IPCC.,



being tested in the same wide range of fronts. Planning, mitigation and response to natural disasters are very comprehensive and subject to overlap with other jurisdictions. This also bring us to the point of how the issues related to natural disasters have been addressed from a legal perspective and existing challenges could be minimized through concerted action at all levels.

III. Natural Disasters Related Legal Institutional Frameworks at the National Level: Overview of Trends in the Region

Until recently, countries had worked in the design of strategies that focused exclusively on disaster response and assistance, rather than on prevention and mitigation. As a result, the legislative development focused on response and assistance, has been the most significant. The reason behind this is obvious, as what constitutes prevention and mitigation is not always as clear as what assistance and response entails.

3.1 Trends in Legal approach to Disaster Response

The evolution of law related to disasters is consistent in focusing on three areas that include a) Declaration of State of Emergency and Emergency Powers; b) Establishment and attributions of Civil Protection and Emergency Management Agencies; and c) Health.

a) Declaration of State of Emergency and Emergency Powers

Most countries of the region have constitutional provisions related to the declaration of a state of emergency and these provisions traditionally have granted emergency powers to the Executive. Fewer countries have supplementary legislation in this regard. However, it is not often clear what elements should be present in order to meet the requirements of the law and whether natural disasters trigger these elements as do civil wars or armed conflicts. State of emergency provisions have been a very delicate subject in the region, and questions of accountability usually arise given the constraint emergency powers place on civil liberties and democracy. On the other hand it is publicly recognized that the ability of governments to make expeditious decisions and allocate resources under catastrophic circumstances are crucial aspects in emergency management.

Under state of emergency circumstances the Executive has the authority to decide on issues that are normally under congressional scrutiny. Nonetheless, the scope of these powers is limited by the principle of legality embraced by many constitutions of the region and under which discretionary powers are subject to fundamental values of the law, including the expression of human rights. Decision makers have to justify their decisions. In this regard it is important to take in to account that in the region there are several decrees and resolutions addressing specific disasters and focusing on distribution of water, regulation of communications and media, and acceptance of aid, among other. These normative instruments respond to specific natural events and are considered as important precedent, despite their isolated nature. Hence they should be part of the thought process in decision making under state of emergency circumstances.

b) Establishment and attributions of Civil Protection and Emergency Management agencies.

Most countries in the region have established civil protection or emergency management agencies with programs and, in some cases, even national, regional and decentralized systems, which operate jointly emergency committees. Nonetheless, what is not often clear is the capacity of



these agencies to fulfill their role, as legislation grants them the authority for planning and mitigation of disasters in addition to management. Frequently this results in overlap with jurisdictions of other institutions in areas such as health, environment, housing, communications and planning, among others. A key issue always is the resources and the capacity of these agencies to attend to the wide range of subject matters included in both disaster mitigation and planning. Moreover the greatest challenge remains coordination and coherence among jurisdictions.

c) *Health*¹³

The national health legal framework in most countries of the region provides effective and comprehensive legislation that is usually applicable under disaster situations, in areas such as water management, disposal of bodies, and the practice of medicine and donations of food, drugs and medical supplies. Because in most countries there are no specific norms related to health concerns under disaster situations, the national health framework applicable under normal circumstances to the extent possible should govern these situations. If additional provisions are required, the executive should strive to maintain as much of the general framework as possible. That said, this is not always the norm and often-contradictory decisions are made. The following paragraphs provide a brief overview of what have been consistent trends and some challenges that remain in this area.

Water Management

Issues related to the governance of water in the region are extremely complex in particular as they relate to access to clean and safe water for human consumption because the percentage of the population without access to safe water has been steadily rising over the past decade, despite efforts to meet the Millennium Development Goals.

This is reflected in numerous bodies of laws and regulations with significant overlap as failure to address water governance in a comprehensive manner has led to a legislative gap and charged different ministries and various administrative bodies such as national water authorities with handling the complex issues surrounding water management, at the policy and operational levels. However, under disaster situations the complex structure dealing with water management and the overlaps seem to disappear as civil protection laws designate the authority charged with water supply, usually the Ministry of Health, and in default it is practice for the executive using state of emergency powers to designate this ministry to regulate issues pertaining to access to water and its quality¹⁴. Thus gaps remain in the area of legislation for planning so that the impact of disasters on water quality and availability is less facilitating coordination efforts during and after the disaster.

Disposal of bodies

Several countries in the region have legal instruments that regulate the disposal of bodies that generally include as an objective the need to prevent diseases and epidemics. However, it is not always clear how to act under certain circumstances and in this regard it is illustrative to refer to

¹³ Pan-American Health Organization, 2000, Legislation on Disasters in Latinamerica and the Caribbean.

¹⁴ Pan-American Health Organization, 2000, Legislation on Disasters in Latinamerica and the Caribbean.



cases where victims are unidentified or dismembered. This type of gap is usually addressed in a case-by-case basis, taking into account the human rights of the diseased and avoiding common burials and cremation of unidentified bodies.

Medical Assistance

It is important to note that it is standard for countries to only allow professionals that meet national curricula requirements to obtain a license to practice medicine. These provisions are applicable in disaster and emergency situations, but in most instances the executive under state of emergency powers is allowed to call for international medical assistance waiving the requirement under national law. Some of the laws related to the practice of medicine in the region provide for exceptions as well and include a role for disaster management agencies in supervising because the conduct of international medical personnel. However, the challenge remains as voluntary personnel provides first aid and there is no mechanism to ensure due diligence in provision of assistance in these cases. While addressing this challenge, countries are discussing how to facilitate the practice of medicine under disaster circumstances at the World Trade Organization (WTO).

Donations of Food, Drugs and Medical supplies

In the region, countries have been consistent in their legal frameworks establishing that all drugs and medical supplies should be approved by both donor and recipient country for medical use, they should not be expired and certain traceability requirements should be met. Some countries go so far as to protect intellectual property rights in their laws. In the case of food supplies it is important to note that most laws regulate the quality of food and in some cases require that it is registered and approved both by the donating country and the recipient. Moreover, in the area of health the most important challenge that persists in countries of the region is that under disaster circumstances authorities are not functioning in their normal capacity. Hence verifying that standards of quality, health and safety are met results in difficult and burdensome conditions exacerbated by limited capacity and poor enforcement mechanisms. In this sense, it is important to assess if a system that fosters cash contributions would be a better option.

While these laws and provisions provide a basic framework in most countries, in some general issues related to disasters, many remain broad and lack regulations in support of implementation. It is obvious that provisions are dispersed, conflicts of jurisdiction are frequent and the stakeholders are not clearly defined.

3.2 The shift towards an integrated approach: Overview of Trends in the Legal approach to Disaster Preparedness

The adoption of the Hyogo Framework for Action has changed the perspective of the legal approach to natural disasters, by including a multi-risk integrated approach that enables the inclusion of mitigation and disaster management. The Hyogo approach is consistent with the vision of Heads of State and government in the context of the Summits of the Americas Process, as in the Declaration of Quebec City of April 2001, they committed to "...strengthening hemispheric cooperation and national capacities to develop a more integrated approach to the management of natural disasters. We will continue to implement policies that enhance our ability



to prevent, mitigate and respond to the consequences of natural disasters. We agree to study measures to facilitate timely access to financial resources to address emergency needs".

Previous to Hyogo, many important issues related to prevention and the need to strengthen legal frameworks in this area were addressed in many political forums, including the Summits of the Americas.

Develop the capacity to forecast, prepare for and mitigate the potential impacts of natural and man-made hazards; promote vulnerability reduction; adopt and enforce better building codes and standards; ensure appropriate land-use practices; inventory and evaluate the vulnerability of critical facilities and infrastructure; estimate climate change variability and sea-level rise and assess their possible impacts; and in pursuit of the above, create the requisite legal framework and establish the cooperative mechanisms to access and share advances in science and technology and their application in the early warning, preparedness for and mitigation of these hazards; Quebec City Plan of Action, 2001

We note with concern the increased intensity of natural and man-made disasters and their devastating impact on human lives, infrastructure, and economies in the Hemisphere. We call for action at the national, regional, and international levels to strengthen disaster management programs, including through increased capacity for disaster preparedness, development of early warning systems, risk mitigation and post-disaster recovery, and reconstruction and technical and financial assistance as appropriate, particularly for disaster-prone countries, to reduce the impact of disasters. We also support efforts under way to explore private and public sector involvement in comprehensive approaches to catastrophic risk insurance. Fourth Summit of the Americas Declaration of Mar del Plata, 2005.

While in the region most countries are signatories and have ratified key agreements such as the UN Framework Convention on Climate Change and the Kyoto Protocol, there are very few areas within hazard mitigation planning in which national legislation has evolved significantly. Concerns related to land use planning and equitable access to land are among the greatest unsolved dilemmas of development in the region and one that has a significant impact on human settlements and vulnerability to natural hazards.

Groups of countries such as the Caribbean have worked on model disaster preparedness legislation with no success in implementation. Although, there are two areas in which considerable progress has been made: building codes and insurance and reinsurance.

3.2.1 Strengthening of Building Codes



The development and building regulatory system plays an important role in ensuring the quality of the built environment¹⁵ and the resilience of national infrastructure, the quality of life and development of societies that are vulnerable to natural disasters. Common elements of the regulatory system are land use and development plans, building codes, and monitoring and enforcement mechanisms that ensure adherence to the code and plans. This last element is usually the Achilles heel of most countries of the region, for many reasons, including capacity of institutions and resource availability.

Since the sixties, urban planning has been a concern and most countries of the region developed laws that created municipalities and incorporated a land use planning approach¹⁶. However population growth and globalization have exceeded expectations to the extent that by the year 2000 Latin America was the most urbanized region of the developing world. This scenario, together with the realities of poverty, and inadequate access to land in some countries have resulted in settlements in extremely vulnerable areas.

Building codes and standards are guidelines for construction of buildings to ensure a minimum level of safety for the occupants. An appropriate building code should incorporate a thorough understanding of the forces that natural hazards impose on the regulated area.

Various countries in the region have engaged in efforts to develop adequate building codes that provide for safer infrastructure, others have opted to incorporate specific provisions related to zoning and building requirements into their existing laws. For instance in the Caribbean the Organization of Eastern Caribbean States has designed “The Caribbean Uniform Building Code” and a model emergency shelter management policy and handbook. The abovementioned Caribbean Model Disaster Preparedness Act also includes land planning as a key element. In other countries of the region the International Code Council (ICC), has been working in supporting efforts in this area as has the OAS in strengthening patterns for building places of shelter such as schools and hospitals through retrofit programs.

However to change the culture of building is a long and arduous process that is still in motion in the region together with efforts to strengthen institutions to move towards a culture of monitoring and enforcement of legal frameworks.

3.2.2 Insurance and Reinsurance

Further to the expressions of interest of countries of the region at the policy level to create risk transfer mechanisms, including insurance. In the region, countries have pursued different efforts related to insurance and reinsurance. In this regard, it is fundamental to say that when insurance instruments where in their initial stages they did not include coverage of “Acts of God”. To date in most countries homeowners with mortgages are required to have property insurance, which usually as requirement cover disasters with the exception of flood, earthquakes and acts of terrorism.

¹⁵ 2001, Status of Building Codes in the Caribbean, Alwyn Wason.

¹⁶ 2002, IHS, Florian Steinberg, Strategic Urban Planning in Latin America: Experiences of Building and Managing the Future



The main interest of countries in engaging in insurance related efforts, is that sharing the risk enables a reduction in the cost of risk management¹⁷. However, since premiums depend on actions related to mitigation and planning, countries have been analyzing areas where legal frameworks should be strengthened to ensure mitigation measures are in place, reducing the cost to implement these mechanisms.

In some countries efforts have taken place at the contractual level, through risk transfer agreements with insurance companies, basing the payments on actual losses or on indicators that do not take into account the actual losses, such as the category of a hurricane or Richter scale classification of an earthquake. These types of contracts are a short term solution as countries engage in a process of strengthening the mentioned legal frameworks related to mitigation to reduce the cost premiums and the monitoring and enforcement structure to ensure accountability of insurance companies and competitiveness.

Another innovative advance that comprises several binding instruments is the Caribbean Catastrophe Risk Insurance Facility (CCRIF)¹⁸ recently launched by the World Bank and CARICOM countries.

The purpose of the CCRIF is to provide governments with index-based insurance against government losses caused by natural disasters.

The Facility will allow CARICOM governments to purchase coverage akin to a business continuity insurance that would provide them with an early cash payment after the occurrence of a major hazard event, thus enabling them to overcome the typical liquidity crunch that follows a disaster. The use of indicators as the above mentioned rather than being a function of the damage incurred will allow for very rapid payment of claims to the Treasury of the affected countries. Some of the elements in the legal structure of this instrument include a trust fund, country agreements and the drafting of the facility's charter, operational and investment guidelines. A key factor of success for this facility is for countries to be able to pay their premiums, and although different options have been explored, many face constraints that need to be addressed regarding their legal frameworks for budget planning and resource appropriation.

IV. Natural Disasters Related Legal Challenges at the National Level

The case studies conducted by the International Federation of the Red Cross (IFRC)¹⁹ in the context of the International Disaster Response Laws Project, highlight that this situation results in many challenges in the area of assistance and response. While some are the result of multilateralism and cooperation among states as they are related to the international movement of persons and supplies; others are related to the issue of good governance and accountability as

¹⁷ 2002, Washington DC. Planificacion y Proteccion Financiera para sobrevivir los desastres. Kari Keipi, Justin Tyson

¹⁸ <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/0,,contentMDK:20939758~pagePK:146736~piPK:146830~theSitePK:258554,00.html>

¹⁹ March 2003, International Federation of the Red Cross, International Disaster Response Law Project (IDRL) , Report on the findings from South Asia, Southern Africa and Central America.



they are pertain to quality of aid, qualification of international personnel, or simply to enforcement, access to justice and transparency.

4.1 Legal Challenges derived from international collaboration in disaster response²⁰

The increased number and intensity of natural disasters has called for an increase in international assistance to address the catastrophic impacts of disasters, in human life, health and infrastructure. As a result more organizations have gotten involved, increasing also the international movement of persons for humanitarian disaster assistance. Governments are faced with dealing with new non governmental organizations that enter foreign countries with relief purposes without having mechanisms for proper scrutiny in place. This is not a problem with organizations that have been known to work in this area for decades such as the Red Cross and the Red Crescent Society, as they have codes of conduct and are covered under international agreements such as the Convention on the Privileges and Immunities of the United Nations Specialized Agencies, the Inter-American Convention to Facilitate Disaster Assistance or they have Legal Status Agreements in place.

However this becomes a problem with regards to organizations that have traditionally had other purposes, including religious, and because of the urgent need have broadened the scope of their work. Determining the status of these organizations is always challenging, given that there is usually no time to enter into a legal status agreement resulting in organizations operating de facto and addressing this issue only if a problem occurs.

Another important challenge is the identification of assistance personnel and fulfillment of immigration requirements. For organizations that benefit from privileges and immunities immigration is usually not a problem nor are work permits for assistance personnel. For organizations duly recognized, immigration requirements are sometimes waived in response to the urgency of the situation, granted that they are fulfilled at some point. For other organizations immigration does represent a problem as assisted States can refuse to accept entry of assistance personnel, based on lack of resources to accommodate the large influx of personnel, among other possible reasons. A related issue to the identification of personnel is its relevance in terms of the status of personnel and their qualifications, discussed briefly above, since assistance personnel of international governmental organizations is usually protected and granted judicial immunity under conventions such as the abovementioned Inter-American Convention or the UN Convention on Privileges and Immunities. In particular as it is understood that the personnel is fulfilling a best efforts or performance obligation rather than results based one. Nonetheless, non governmental organizations are exposed to litigious contingencies regarding their performance in a given response operation and this can be both an obstacle to future assistance operations and also a significant burden for the affected country and humanitarian organizations.

²⁰ March 2003, International Federation of the Red Cross, International Disaster Response Law Project (IDRL), Report on the findings from South Asia, Southern Africa and Central America.

March 2007, International Federation of the Red Cross, International Disaster Response Law Project (IDRL), Legal Issues from the International Response to Tropical Storm Stan in Guatemala.



The import of relief goods and equipment is also challenging as most countries on the region have heavy tax burdens on equipment required for assistance. Organizations with privileges and immunities and with recognized status in assisted countries usually don't experience too many inconveniences in this area, though case studies do show that the lack of knowledge of government officials of the international response system overall, limits the implementation of provisions in detriment of international humanitarian organizations.

In the case of telecommunication equipments red tape is a very significant challenge as telecommunications equipment is sensitive to governments for its strategic value and impact on national security. Notwithstanding efforts to improve the situation related to use of telecommunication equipment in disaster cases, such as the Tampere Convention²¹, overcoming barriers and improving communication in these difficult times remains a significant obstacle.

4.2 Legal Challenges in the area of Governance and Accountability

It is important to note how the various legal challenges are strongly related to governance and accountability. In most countries there are general legal frameworks that are applicable in disaster response operations and there are also some existing legal provisions that could be useful in planning. That said, the stress a disaster imposes on the national governance system together with the multiple and broad scope attributions that disaster management or civil protection agencies have provided for a significant number of the challenges already mentioned. Additionally, the cross cutting nature of disaster operations implies that numerous actors should be engaged and often they have limited capacity which makes coordination not an easy task as these weaknesses are aggravated with the urgency of the situation. The abovementioned influx of international personnel and relief goods, also places stress on the system, and on the security affected states have the responsibility to provide under State of Emergency situations. An illustrative example of this is the criminal and looting activities that took place during Hurricane Katrina in New Orleans during the summer of 2005. Some of the described challenges derived from international collaboration can be also aggravated by the so called “media effect”. The use by the media of images of victims and affected sites appeals to compassion, and has a strong impact on the influx of aid to affected countries. In addition to placing stress on the system, this also raises concerns related to governance and accountability, as freedom of expression could potentially be used in detriment of the rights of affected population. In this regard, important steps should be taken towards raising awareness of existing regulations, humanitarian law principles and the need to respect the rights of people affected by disasters. The do no harm principle should be applied in all instances, both in all applicable connotations to disaster situations, in particular that of international law and the Hippocratic Oath.

Under emergency situations, countries should be able to foster coordination in three dimensions. First in assessing the impact and damages; second, in assessing the need for assistance and aid; and third, in assessing their capacity of receiving and absorbing assistance.

Knowledge and capacity building play a key role in all of these dimensions. A way for countries to address these issues is through strengthening legal frameworks for planning and mitigation.

²¹ Tampere Convention on the Provision of Telecommunications Resources for Disaster Mitigation and Relief Operations of 1998.



This is a very complex task, again given the cross cutting nature of the elements that need to come together for mitigation and planning. One of the main requirements in developing countries is availability of resources to build capacity and strengthen the ability of governments to provide assistance and response as the primary responsible stakeholder in this matter. The budget of most countries in the region is ruled by constitutional provisions that grant very limited power for the executive to appropriate resources without congressional scrutiny, which is an important element to maintain accountability, given the examples of corruption in past disaster operations, but the structure of the budget planning processes difficult the availability of resources to attend to impromptu situations. In this regard, it is important for governments to find means to address this issue in a transparent manner, enhancing as mentioned before, the legal framework related to planning, given as it was mentioned before, the most significant legislative development has been focused on response. In order to accomplish this a multi sector and multi stakeholder approach needs to be taken, promoting community participation through specific policies, identifying integrated disaster risk reduction mechanisms and enhancing early warning systems among other areas.

V. Natural Disasters Regional Legal Institutional Frameworks: addressing challenges through common action

As in the global level and other regions, in the Americas while the only binding instrument in force is the Inter-American Convention to Facilitate Disaster Assistance of 1991 (the Inter-American Convention), negotiated in the context of the Organization of American States (OAS), there are several institutional structures that operate at the policy level and soft law principles with a significant influence as precedents to legal developments in the region.

5.1 Regional Structures and Soft Law Principles

In 1999, the OAS General Assembly passed Resolution 1682 (XXIX-O/99), which establishes the Inter-American Committee on Natural Disaster Reduction (IACNDR). The Committee is chaired by the Secretary General of the OAS, and is comprised of the President of the OAS Permanent Council, the Assistant Secretary General and the Heads of key development institutions of the Inter-American and UN systems.

The purpose of the IACNDR is to act as the principal forum of the Inter-American System for analyzing issues related to natural and other disasters, including the prevention and mitigation of their effects, in coordination with the governments of member states; competent national, regional, and international organizations; and non-governmental organizations.

IACNDR is responsible for coordinating the implementation and updating of the *Inter-American Strategic Plan for Policy on Vulnerability Reduction, Risk Management and Disaster Response* (IASP), which since 2003 is being implemented at the regional, sub-regional and national level through collaboration by the different stakeholders the plan identifies. Within the OAS, countries of the region have also established the Inter-American Emergency Fund as a support mechanism for emergency situations.

Moreover, the Department of Sustainable Development of the OAS has developed partnerships and cooperation agreements, over the years, and has recently established the Inter-American



Network for Disaster Mitigation (INDM), with the objective of providing support in the exchange of information and knowledge regarding past disasters, vulnerability reduction, preparedness and response practices and strategies, and natural disaster mitigation – so as to mainstream Natural Hazard Risk Management and Natural Disaster Mitigation into national and regional development plans and public policy; improve coordination of international cooperation and investment plans; and support the implementation of multi-national agreements for transboundary early warning systems and data sharing and exchange.

During the first Inter-American Meeting of Ministers and High-level Authorities on Sustainable Development, countries expressed also their vision of policy in the area of natural disasters for the region, which included supporting the INDM.

All these mechanisms, aim to strengthen sub-regional institutions such as CAPRADE, CEPREDENAC and CDERA and support their respective roles in emergency management.

Moreover, General Assembly resolutions of the organization, have provided principles and guidance with regards to addressing some of the challenges discussed in this paper, by for example establishing the need for ratification of instruments such as the Tampere and the Inter-American Conventions.

21. We reaffirm our commitment to build upon relevant international commitments and frameworks including through the development, implementation and integration of disaster preparedness and management into sustainable development policies, planning and programming at all levels.

35. To continue with the exchange of information and experience regarding the mapping of risk zones, people-centered early-warning systems and other technical aspects of risk reduction through the Inter-American Network for Disaster Mitigation (IANDM), and other mechanisms and other mechanisms and initiatives.
Declaration of Santa Cruz + 10

Even though the nature of these structures and principles warrants only a limited scope, it would be interesting for countries of the region to use them as platforms to move forward instruments such as the Inter-American Convention and make significant progress in this area.

5.2 The Inter-American Convention to Facilitate Disaster Assistance of 1991

The Inter-American convention (annex I) is not a renowned instrument as it is only in force in Panama, Peru and Uruguay. However this convention responds to the need of moving away from soft law and recognizing the potential contribution of international law in the field of disasters. The Convention is applicable whenever a state party furnishes assistance in response to a request from another state party and provides a comprehensive framework to address key issues of disaster assistance by addressing the following relevant topics:

- Requests for and Offers and Acceptance of Assistance
- Mechanisms for national coordination
- Direction and Control of Assistance



- Transport of Vehicles, Equipment and Supplies
- Access and Transit Routes
- Personnel
- Security
- Protection of Assistance Personnel
- Cost
- Claims and indemnity
- Governmental and Nongovernmental Organizations

It is relevant to note that some of the provisions in the Convention address the challenges currently faced by countries in disaster situations. For example in the area of coordination of assistance, it establishes the appointment of a national coordinating authority and it also establishes the channels through which aid must be requested. The Convention also defines the rules of procedure for all assistance personnel and the need for direct supervision from the assisted state.

The convention clearly spells out the expeditious nature and need to provide for identification and fulfillment of immigration requirements for personnel. Additionally it provides for the protection of said personnel and the equipment. The convention also addresses the issue of liability of personnel and assisting states.

In the area of relief equipment and supplies, the convention establishes that these goods shall be exempt from any duties or taxes and that these should be released in an expedite manner.

Ratification of this instrument could provide a solution to the issues related to status of non-governmental organizations as they could benefit from the protection afforded by the convention. This protection could be granted under two circumstances, if they are part of a relief mission led by a State or an International Organization or by agreement with State requesting assistance. The only exception would be that personnel of non-governmental organizations shall not benefit from criminal, civil or administrative jurisdiction immunity in the assisted state for acts connected with the provision of assistance²².

Finally, even though the Principles for the Domestic Facilitation and Regulation of International Disaster Relief and Early Recovery Assistance, currently under discussion within the IDRL are broader in scope, these are reflected in the convention, making them a complementary and useful tool for countries seeking to implement or develop national legislation.

VI. Moving Forward in the Region

To support disaster reduction objectives, the region should continue to work towards a comprehensive multi-disciplinary approach in strengthening legal frameworks.

The existing structures and soft law principles should be considered. The ratification of the Inter-American Convention and adoption of IDRL principles should also be thought thoroughly, as they could address various challenges currently faced by the region. In 2005, the adoption of the Hyogo Framework for Action, included a commitment to further develop legal frameworks for the prevention and preparation for disasters, including the preparation for international assistance

²² Articles XVI and XI a) Inter-American Convention to Facilitate Disaster Assistance of 1991



when it is needed. This is a valuable framework that could serve as a roadmap as the region continues engaging in efforts in this area. In this regard, some ideas for discussion as final thoughts to consider have been included below on how the priorities for Action of the Hyogo Framework could serve as a blueprint for development and strengthening of the legal approach to natural disasters:

1. Ensure that disaster risk reduction is a national and local priority with a strong institutional basis for implementation.
 - Legal frameworks should enable resource allocation for the development and implementation of disaster risk reduction policies.
 - Ratifying of relevant international legal instruments and principles taking measures for implementation.
 - Promoting community participation through specific provisions and measures in access to information laws or other instruments.
2. Identify, assess and monitor disaster risks and enhance early warning.
 - Clear definition of stakeholders and their roles
 - Addressing issues related to preparation from the legal perspective including early warning systems
 - Ensuring access to information within legal provisions that address awareness of risk and community participation
3. Build a culture of safety and resilience at all levels.
 - Ensuring access to information within legal provisions that address awareness of risk and community participation -
 - Providing mechanisms for consultation on issues that could affect vulnerable communities with an emphasis in high-risk areas.
 - Support efforts related to strengthening legal frameworks that will enable establishment of insurance mechanisms in the region.
4. Reduce underlying risk factors.
 - Encourage the sustainable management of ecosystems and enforcement of international commitments and national laws related to their sustainable management and use.
 - Promote the development of legislation addressing climate change mitigation and adaptation.
5. Strengthen disaster preparedness for effective response at all levels.
 - Establish a dialogue regarding the benefits of the Inter-American Convention,
 - Following guidance of soft law principles in this area, including the principles under discussion in the IDRL.
 - Continue supporting existing structures and mechanisms such as the Inter-American Emergency Fund.

Finally, while considering these ideas, countries that have ratified the Interamerican Convention should continue to strengthen their capacity for its implementation and work with other countries, to identify obstacles and build their capacity on the areas covered by the convention.



Annex I

INTER-AMERICAN CONVENTION TO FACILITATE DISASTER ASSISTANCE

Preamble

CONSIDERING the frequency of disasters, catastrophes, and calamities that take and threaten the lives, safety, and property of the inhabitants of the American hemisphere;

MINDFUL of the selfless spirit of cooperation that prompts the states of this region to respond to events of this kind, which are inimical to the peoples of the American hemisphere;

CONVINCED that the human suffering caused by such disasters can be relieved more effectively and swiftly by means of an instrument to facilitate such assistance and to regulate international procedures for providing it in such cases;

AWARE that a genuine spirit of solidarity and good-neighborliness between the American states has been expressed in cases of disaster and that this spirit can be strengthened through a preparedness that makes it possible to act more efficiently,

THE STATES PARTIES agree as follows:

Article I

Applicability

- a. This Convention shall apply whenever a state party furnishes assistance in response to a request from another state party, except as they otherwise agree.
- b. For the purposes of this Convention, acceptance by a state party of an offer of assistance from another state party shall be considered to be a request for such assistance.

Article II

Requests for and Offers and Acceptance of Assistance

- a. Requests for and offers and acceptance of assistance from one state party to another shall be communicated via diplomatic channels or the National Coordinating Authority, as the circumstances may warrant.
- b. Upon the occurrence of a disaster the assisting state shall consult with the assisted state to receive from the latter information on the kind of assistance considered most appropriate to provide to the populations stricken by the disaster.
- c. To facilitate assistance, a state party that accepts it shall promptly notify its competent national authorities and/or its National Coordinating Authority to extend the necessary facilities to the assisting state, in accordance with this Convention.



Article III

National Coordinating Authority

- a. For the purposes set forth in Article II, and pursuant to its domestic legislation, each state party shall designate a National Coordinating Authority, which shall have the following functions, among others:
 - i. To transmit requests for assistance and to receive offers from other states parties, as the case may be.
 - ii. To coordinate assistance within its national jurisdiction, as set forth in Article IV of this Convention.
- b. Each state party shall inform the General Secretariat of the Organization of American States, as promptly as possible, of the designation of its National Coordinating Authority.
- c. The Chairman of the Inter-American Emergency Aid Committee of the Organization of American States shall coordinate cooperation between the National Coordinating Authorities of the states parties and that Committee.
- d. Upon the occurrence of a disaster in a state party, when the first official contacts are being established between that state and the Chairman of the Inter-American Emergency Aid Committee or his representative, the latter will offer the stricken state his services to alert the Office of the United Nations Disaster Relief Coordinator.
- e. The General Secretariat shall notify the states parties of the designation of the National Coordinating Authorities, and of any changes in them that the states parties report to it. The General Secretariat shall also circulate periodically an information bulletin on the structure, functions, procedures, and work methods of the National Coordinating Authorities.

Article IV

Direction and Control of Assistance

- a. Unless otherwise agreed, the overall direction, control, coordination, and supervision of the assistance within its territory shall be the responsibility of the assisted state.
- b. When the assistance includes personnel, the assisting state, in consultation with the assisted state, shall designate the person who shall be responsible for the immediate operational supervision of the personnel and equipment provided. The designated person shall exercise such supervision in coordination with the appropriate authorities of the assisted state.
- c. Unless otherwise agreed, the assisted state shall provide, to the extent of its capabilities, local facilities, and services for the proper and effective administration of the assistance. It shall also make its best efforts to protect personnel, equipment, and materials brought into its territory by or on behalf of the assisting state for such purpose.

Article V

Transport Vehicles Equipment. and Supplies



Transport vehicles, equipment, and supplies fully identified and sent by states parties for assistance purposes may enter, move about in, and leave the territory of the assisted state. They may also move across the territory of other states parties en route to where the assistance is to be provided. In the aforementioned cases, they shall be exempt from the payment of taxes, fees, and other charges. Also in the aforementioned cases, the assisted state or transit state shall make its best efforts to expedite or, if appropriate, dispense with customs formalities, and to facilitate the transit of such transport vehicles, equipment, and supplies. Further, in both cases, the restricted areas so designated by the assisted state or the transit state shall be respected. in accordance with the provisions of Article VIII.

Article VI

Access and Transit Routes

The assisted state shall have the right to designate the access routes and final destination of the transport vehicles, equipment, and supplies. The transit state shall also have the right to designate the routes of the transport vehicles, equipment, and supplies.

Article VII

Personnel

- a. Personnel of the assisting state (hereinafter referred to as assistance personnel") may enter, cross, and leave the territory of the assisted state or of the transit state party to this Convention, as necessary to carry out their mission. To this end, each state party shall provide such personnel with the necessary immigration documents and facilities, in accordance with its laws.
- b. The assisting state and the assisted state shall make every possible effort to provide the assistance personnel with documentation or other means by which to identify them as such.

Article VIII

Restricted Areas

In the application of this Convention, the states parties shall respect any restricted areas so designated by the assisted state.

Article IX

Support from the Assisted State

The assisted state shall endeavor to provide such support as the assistance personnel may require, the appropriate guidance and information, and. if necessary. translation and interpretation services.



Article X

Risk

The states parties furnishing assistance shall make every possible effort to do so skillfully and to prevent negligence. However, this shall not constitute a guarantee against the occurrence of damage.

Article XI

Protection of Assistance Personnel

- a. Assistance personnel whose names have been duly communicated to the assisted state and who have been accepted by the assisted state and the respective National Coordinating Authorities and shall not be subject to the criminal, civil or administrative jurisdiction of the assisted state for acts connected with the provision of assistance.
- b. The provisions of paragraph (a) shall not apply to acts unrelated to the provision of assistance or, in civil or administrative actions, to willful misconduct or gross negligence.
- c. In accordance with its domestic law, the assisted state may extend the treatment stipulated in paragraph (a) of this article to its nationals or permanent residents who are part of the assistance personnel.
- d. Assistance personnel have the obligation to respect the laws and regulations of the assisted state and of states they may cross en route. Assistance personnel shall abstain from political or other activities that are inconsistent with said laws or with the terms of this Convention.
- e. Judicial actions brought against assistance personnel or against the assisting state shall be heard and may be decided in the courts of the assisted state .

Article XII

Claims and Compensation

- a. The assisted state waives any claim for loss or damage that could be brought against the assisting state or the assistance personnel as a result of the provision of assistance.
- b. The assisted state shall substitute for the assisting state and for the assistance personnel with respect to claims for loss or damage that might arise from the provision of assistance and might be brought against the assisting state or the assistance personnel by third parties.
- c. This article shall not apply to acts unrelated to the provision of assistance or to willful misconduct or gross negligence.
- d. The affected assisting and assisted states shall closely cooperate in order to facilitate the resolution of any claims or legal proceedings to which this article applies.



e. The assisted state may take out insurance to cover the damages that the assisting state or the assisting personnel might be expected to cause.

Article XIII

The provisions of articles XI and XII may be amended through the express agreement of the assisting and assisted states.

Article XIV

Costs

Except for the provisions of Articles IX and XII, the assistance shall be provided at the expense of the assisting state, without cost to the assisted state, except where these states agree otherwise.

Article XV

Relation to Existing Agreements

If there is any discrepancy between this Convention and other international agreements on the subject to which the assisting and assisted states are parties, the provision that affords the greatest degree of assistance in the event of disaster and favors support and protection to personnel providing assistance shall take precedence.

Article XVI

Governmental and Nongovernmental Organizations

- a. Governmental international organizations that provide disaster assistance may, with the consent of the assisted state, have recourse, mutatis mutandis, to the provisions of this Convention.
- b. States and governmental international organizations that provide assistance may include private, physical, or juridical persons or nongovernmental international organizations within their relief missions, which persons shall enjoy the protection afforded by this Convention.
- c. A State party requesting assistance may, by agreement with a nongovernmental organization, be it national or international, apply the provisions of this Convention to the personnel of the organization, except that paragraph (a) of Article XI shall not be applicable to such personnel.
- d. The agreements mentioned in paragraphs (a) and 8 of this article shall not apply to third-party states.

Article XVII

Signature

This Convention shall be open for signature by the member states of the Organization of American States.



Article XVIII

Ratification

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article XIX

Accession

This Convention is open to accession by any other state. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article XX

Reservations

The states parties may, at the time of approval, signature, ratification, or accession, make reservations to this Convention, provided that such reservations are not incompatible with the object and purpose of the Convention and concern one or more specific provisions.

Article XXI

Entry into Force

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification. For each state that ratifies the Convention or accedes to it after the second instrument of ratification has been deposited, the Convention shall enter into force on the thirtieth day following the date on which that state has deposited its instrument of ratification or accession.

Article XXII

Duration

This Convention shall remain in force indefinitely, but any of the states parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing state, but shall remain in effect for the other states parties.



Article XXIII

Deposit, Registration, Publication, and Notification

The original instrument of this Convention, the English, French, Portuguese, and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall send an authenticated copy of its text to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of its Charter. The General Secretariat of the Organization of American States shall notify the member states of that Organization and the states that have acceded to the Convention of the signatures and deposits of instruments of ratification, accession, or denunciation, and reservations, if any.