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## Natural Disasters and the Responsibility to Protect: From Chaos to Clarity

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# NATURAL DISASTERS AND THE RESPONSIBILITY TO PROTECT: FROM CHAOS TO CLARITY

## I. INTRODUCTION

*“The devastation was overwhelming.” . . . There were severely injured people everywhere, dead bodies wedged under fallen houses, people with deep cuts from the sheets of glass and metal that had churned through the rushing water like sharks’ teeth. Dive boats, under which the tsunami had passed as an unremarkable two-foot swell on the open water, came back piled high with bodies that had been swept out to sea. It was chaos, and there was no authority, no rescue agency, [and] no civil structure to deal with a catastrophe of this scale.<sup>1</sup>*

Natural disasters, either resulting from or exacerbated by natural phenomena,<sup>2</sup> such as earthquakes, volcanoes, tsunamis, hurricanes, and famines, are of increasing worldwide concern.<sup>3</sup> Affecting nearly two-hundred million people per year over the past two decades<sup>4</sup>

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1. Matthew Power, *Special Report: The Tsunami Volunteers*, NAT’L GEOGRAPHIC: ADVENTURE, Apr. 2005, at 41, 44.

2. A United Nations (U.N.) study on disaster-preparedness classified disasters into two categories: man-made and natural. Man-made disasters, which are attributable to accidental, negligent, or deliberate human activity include: (1) civil disturbances, such as riots or demonstrations; (2) situations involving conventional, nuclear, biological, chemical, or guerilla warfare; (3) refugee situations; and (4) accidents involving transportation, collapse of buildings and dams, mine disasters, or technological failures, such as pollution, chemical leaks, or nuclear accidents. Natural disasters result from the effects of natural phenomena, which are characterized as: (1) meteorological, such as storms (cyclones, hailstorms, hurricanes, tornadoes, typhoons, and snowstorms), cold spells, heat waves, droughts, and famine; (2) topological, which include earthquakes, avalanches, landslides, and floods; and (3) biological, such as insect swarms and epidemics of communicable diseases. RUTH M. STRATTON, *DISASTER RELIEF: THE POLITICS OF INTERGOVERNMENTAL RELATIONS* 22–23 (1989). The categorical distinction between man-made and natural disasters is not rigid, since allegedly “natural” disasters are not purely “natural,” but result from multiple causes, in part affected by “mankind’s relationship with the environment.” PETER MACALISTER-SMITH, *INTERNATIONAL HUMANITARIAN ASSISTANCE: DISASTER RELIEF ACTIONS IN INTERNATIONAL LAW AND ORGANIZATION* 3 (1985); Jacqueline P. Hand, *Disaster Prevention Presentation, From SCJIL Symposium 2003*, 1 SANTA CLARA J. INT’L L. 147 (2003). This Note focuses on purportedly natural disasters, either caused or exacerbated by natural phenomenon, which generate emergency situations of grave human suffering and physical destruction.

3. INT’L STRATEGY FOR DISASTER REDUCTION [ISDR], *Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters*, World Conference on Disaster Reduction (Jan. 18–22, 2005), at 1, available at <http://www.unisdr.org/wcdr/intergover/official-doc/L-docs/Hyogo-framework-for-action->

and causing billions of dollars in property damage worldwide,<sup>5</sup> natural disasters “know no country, [no] region, no boundaries.”<sup>6</sup> All over the world, people have endured their devastating consequences, such as loss of life and livelihoods, damaged infrastructure, and economic costs.<sup>7</sup>

Such devastation occurred on December 24, 2004 when the Indian Ocean tsunami killed nearly 240,000 people, displaced more than one-million people, and devastated the infrastructure of twelve countries in South Asia and East Africa.<sup>8</sup> This transnational natural disaster devastated developing and vulnerable countries<sup>9</sup> and demonstrated the need for humanitarian assistance<sup>10</sup> from non-affected States<sup>11</sup> (the interna-

english.pdf [hereinafter *Hyogo Framework for Action*] (noting the increasing international concern for disasters due to worldwide vulnerability from environmental degradation, climate change, and geological hazards).

4. *Id.* at 1.

5. U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFF. [OCHA], *IRIN Web Special: Disaster Reduction and the Human Cost of Disaster*, June 2005, at 3, available at <http://www.irinnews.org/webspecials/DR/default.asp> (noting that the U.N. Bureau for Crisis Prevention and Recovery asserted that from 1980 to 2000, approximately seventy-five percent of the world's population have suffered at least once from natural disasters. In 2003 alone, there were about 700 natural disasters, which resulted in nearly 75,000 deaths and caused \$65 billion in damage.). The U.N. established the OCHA to strengthen the response and effectiveness of the U.N.'s humanitarian operations in complex emergencies and natural disasters. OCHA On-Line: About OCHA, [http://ochaonline.un.org/webpage.asp?Nav=\\_about\\_en&Site=\\_about](http://ochaonline.un.org/webpage.asp?Nav=_about_en&Site=_about) (last visited Nov. 24, 2005).

6. *Tampere Gives Birth to a New Convention*, ITU NEWS, July 1998, at 43, available at <http://www.reliefweb.int/telecoms/tampere/n7eb2.pdf> (quoting Pekka Tarjanne, International Telecommunications Union Secretary-General, in *Intergovernmental Conference on Emergency Telecommunications (ICET-98) Guide*, June 1998, at 16–18).

7. G.A. Res. 59/279, U.N. Doc. A/RES/59/279 (Jan. 28, 2005).

8. The Secretary-General, *Report of the Secretary-General on Strengthening Emergency Relief, Rehabilitation, Reconstruction, Recovery and Prevention in the Aftermath of the Indian Ocean Tsunami Disaster*, ¶¶ 2–3, delivered to the Economic and Social Council and the General Assembly, U.N. Doc. A/60/86–E/2005/77 (June 21, 2005) [hereinafter *Strengthening Emergency Relief*].

9. In the context of natural disasters, vulnerability refers to “[t]he conditions determined by physical, social, economic, and environmental factors or processes that increase the susceptibility of a community to the impact of hazards.” *Hyogo Framework for Action*, *supra* note 3, at n.1; see also *Strengthening Emergency Relief*, *supra* note 8, ¶ 5 (noting that the December 26th tsunami struck vulnerable countries, such as Indonesia, Somalia, and Sri Lanka, which were already undergoing long-standing complex crises).

10. For the purposes of this Note, the term “humanitarian assistance” is used interchangeably with “humanitarian relief” and “disaster relief.” These terms refer to the provision of relief for suffering natural disaster victims. Disaster relief consists of three categories: (1) assistance in kind, which refers to commodities and materials, such as food, clothing, medicine, and hospital equipment; (2) financial contributions, which refer to cash expenses; and (3) services of trained personnel, which refer to the operational, ad-

tional community of States). Another notable disaster is Hurricane Katrina, which killed hundreds of people and ruined the lives of thousands more throughout the southern United States.<sup>12</sup> Although Hurricane Katrina's physical impact was confined within U.S. borders, its aftermath attracted global concern because the United States needed disaster assistance from the international community of States.<sup>13</sup> These natural disasters have demonstrated the international community of States' vital role in facilitating humanitarian assistance to disaster-affected States for catastrophic transnational and national disasters.<sup>14</sup>

Generally, past natural disasters have demonstrated the international community of States' willingness and generosity in providing relief to disaster-affected States. However, the provision of humanitarian assistance to disaster-affected States can be problematic.<sup>15</sup> Since there are no international legal obligations on States regarding disaster relief,<sup>16</sup> it could potentially follow that neither the international community of States nor disaster-affected States have any responsibilities concerning humanitarian assistance for natural disasters. The lack of international legal obligations pertaining to disaster response is troubling, particularly when disaster-affected States delay or prevent the provision of relief or when the international community of States inadequately or improperly provides humanitarian assistance.<sup>17</sup> Such situations have arisen in past disaster relief operations<sup>18</sup> due to international law's disregard for the

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ministrative, or support roles of governments, intergovernmental organizations, and non-governmental organizations. MACALISTER-SMITH, *supra* note 2, at 3–4; *see also* ROBERT F. GORMAN, HISTORICAL DICTIONARY OF REFUGEE AND DISASTER RELIEF ORGANIZATIONS 48 (1994) (defining the term “humanitarian assistance” as “incorporating all forms of aid given to people in distress, without discrimination with regard to political origin, race, religion, or national origin”).

11. For the purposes of this Note, “States” refer to Nation-states.

12. *See* discussion *infra* Part III.A.2.ii.

13. Charles M. Wolfson, *Katrina's Impact on Foreign Policy*, CBSNEWS.COM, Sept. 9, 2005, <http://www.cbsnews.com/stories/2005/09/09/opinion/diplomatic/main830306.shtml>.

14. *See* discussion *infra* Part III.A.2.ii.

15. *See* discussion *infra* Part III.A.

16. MACALISTER-SMITH, *supra* note 2, at 56.

17. LYNN H. STEPHENS & STEPHEN J. GREEN, *Conclusion: Progress, Problems and Predictions*, in DISASTER ASSISTANCE: APPRAISAL, REFORM AND NEW APPROACHES 293, 295 (Lynn H. Stephens & Stephen J. Green eds., 1979) (noting that a common theme among reports and studies on natural disasters concerned “the problems created in effectively providing relief in natural disasters, when affected governments consciously delay or prevent the delivery of assistance”); *see, e.g.*, discussion *infra* Part III.A.

18. *See* discussion *infra* Part III.A.2.

responsibilities of all States concerning humanitarian assistance for natural disasters.<sup>19</sup>

The Indian Ocean tsunami and Hurricane Katrina are perfect examples of catastrophic natural disasters that have exposed the imperfect state of international disaster relief. In particular, these disasters have revealed concerns pertaining to the provision of humanitarian assistance. They have raised issues concerning the general responsibilities of disaster-affected States and the international community of States regarding natural disasters, such as: (1) whether all States have a responsibility to warn of impending disasters; (2) whether the international community of States has a responsibility to unconditionally provide humanitarian assistance and whether disaster-affected States have a responsibility to accept needed disaster relief; and (3) whether all States have a responsibility to rebuild disaster-stricken communities.<sup>20</sup> Issues relating to these responsibilities are important because of the severity of natural disasters worldwide<sup>21</sup> and criticism regarding the inadequacy of disaster relief responses.<sup>22</sup> International consensus on the legal responsibilities of all

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19. MACALISTER-SMITH, *supra* note 2, at 56.

20. STEPHEN GREEN, INTERNATIONAL DISASTER RELIEF: TOWARD A RESPONSIVE SYSTEM 29–30 (Thomas Quinn & Michael Hennelly eds., 1977) (explaining the current international disaster relief system as consisting of four major elements: (1) the U.N.; (2) private organizations; (3) donor governments; and (4) the international media. These elements comprise a complex and chaotic disaster relief system that responds ad hoc to a multitude of natural disasters differing in geographical locations and circumstances.); *see* discussion *infra* Part III.

21. *See* OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS. [OCHR], *Fact Sheet No. 2 (Rev. 1): The International Bill of Human Rights* (June 1996), available at <http://www.unhchr.ch/html/menu6/2/fs2.htm> [hereinafter *The International Bill of Human Rights*]; GREEN, *supra* note 20, at 20–21 (expressing concern over the geographical distribution of natural disasters that occurred in the 1970s, which primarily hit developing regions of the world, such as poor countries with significant political, social, and economic problems that are the least capable of single-handedly dealing with natural disasters).

22. *See, e.g.*, discussion *infra* Part III.A.2; *see also* David P. Forsythe, *Diplomatic Approaches to the Political Problems of International Relief in Natural Disasters*, in DISASTER ASSISTANCE: APPRAISAL, REFORM AND NEW APPROACHES, *supra* note 17, at 267, 268 (highlighting some problems of international disaster relief and recognizing the need for its improvement). Forsythe quotes a 1977 U.S. Department of State Action Memo:

The international “system” for disaster [relief] needs to be improved. It now suffers from bad coordination among national governments, voluntary agencies, and UN bodies, as well as from political resistance within some countries to admit disaster or to distribute relief fast and equitably.

*Id.*

States would help clarify the conceptual problems relating to State responsibilities with respect to disaster relief.<sup>23</sup> International law should impose on all States certain responsibilities to foster international cooperation during relief operations and to ensure the effective provision of humanitarian assistance to disaster victims.<sup>24</sup>

Part II of this Note resolves doctrinal issues concerning State sovereignty and international human rights, which are relevant to disaster relief operations. It describes the doctrine of State sovereignty and its evolution as a result of the emerging recognition of international human rights. It further explains two theories that have surfaced in the context of humanitarian intervention:<sup>25</sup> “the forfeiture of sovereignty” and “the responsibility to protect.” These theories attempt to resolve the tension between sovereignty and international human rights. Part III addresses how the doctrine of “the responsibility to protect” can be applied to natural disasters. It highlights criticisms of prior disaster relief efforts and demonstrates instances where disaster-affected States and the international community of States embraced certain responsibilities—before, during, and after natural disasters occurred—despite the lack of any imposed legal obligations.<sup>26</sup> It exemplifies how the responsibility to protect applies to natural disasters, but recognizes the difficulty in finding legal authority for this assertion. Part IV argues that recognizing the human rights of disaster victims within international human rights law is essential to promoting the responsibility to protect doctrine, and justifying its

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23. J.W. Samuels, *The Relevance of International Law in the Prevention and Mitigation of Natural Disasters*, in *DISASTER ASSISTANCE: APPRAISAL, REFORM AND NEW APPROACHES*, *supra* note 17, at 247–48 (stating that the approach by the U.N. Disaster Relief Organization and the International Red Cross Movement to establish a regulatory system for disaster relief neglects to mention the State’s obligation to provide and accept relief).

24. *Id.* at 250 (recognizing the need to establish the general principles of disaster relief before developing detailed law concerning its operational aspects).

25. While this Note focuses on humanitarian assistance for natural disasters, it is necessary to assess theories that attempt to assimilate sovereignty and human rights under the doctrine of humanitarian intervention because they are relevant to the discourse regarding humanitarian assistance during natural disasters.

26. MACALISTER-SMITH, *supra* note 2, at 6 (noting that legal instruments, in the form of multilateral and bilateral declarations, resolutions, and treaties, have had an insufficient impact on international relief operations, and recognizing the necessity of evaluating the international humanitarian activities of States, government organizations, private agencies, and other international actors during disaster relief operations to assess the developing standards regarding the international community’s responsibility towards disaster victims).

applicability to natural disasters.<sup>27</sup> It proposes codifying the rights of natural disaster victims to create legal obligations on all States with respect to disaster relief. Part V posits that an international disaster relief treaty, premised on the responsibility of all States to protect the rights of natural disaster victims, would foster international cooperation during disaster relief operations. This agreement would promote a more effective system of international disaster relief.<sup>28</sup>

## II. SOVEREIGNTY AND HUMAN RIGHTS: RESOLVING THE TENSION

### A. *The Evolving Doctrine of State Sovereignty*

The doctrine of State sovereignty is “an almost sacred principle”<sup>29</sup> that is a fundamental concept of international law.<sup>30</sup> According to the doctrine of sovereignty, States are independent entities that can exercise supreme political authority over their territory. States can control movement across their borders, independently make foreign policy choices, and reject unwanted intrusion by other States.<sup>31</sup> Under the traditional view of sovereignty, States may shape and determine their own policies with respect to the treatment of their citizens and control over their domestic affairs without interference from other States.<sup>32</sup>

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27. Richard H. Ullman, *Introduction to INTERNATIONAL DISASTER RELIEF: TOWARD A RESPONSIVE SYSTEM*, *supra* note 20, at 1, 3 (recognizing the viability of regarding the provision of disaster relief as a human right by focusing on the right of all people to receive satisfaction of their basic survival needs).

28. GREEN, *supra* note 20, at 12–14 (noting that the problem with international disaster relief operations is that they do not always adequately respond to the needs and interests of disaster victims, and suggesting that laws, such as international treaties, may improve the protection of disaster victims because such laws could address fundamental management problems during relief operations).

29. Nancy D. Arnison, *International Law and Non-Intervention: When Do Humanitarian Concerns Supersede Sovereignty?*, 17 FLETCHER F. WORLD AFF. 199, 200 (1993).

30. Richard N. Haass, Director, Policy Planning Staff, Remarks to the School of Foreign Service and the Mortara Center for International Studies: Sovereignty: Existing Rights, Evolving Responsibilities (June 14, 2003), *available at* <http://www.state.gov/s/p/rem/2003/16648.htm> (arguing that for over two centuries, the doctrine of sovereignty has fostered the emergence of representative governments, “the formation of international organizations, and the development of international law”).

31. *Id.*; David J. Scheffer, *Toward a Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 259–60 (1992); GORMAN, *supra* note 10, at 58 (defining “sovereignty” as a basic principle that “confers on recognized [S]tates the right to conduct their domestic and foreign policies without interference from the outside. It calls for [S]tates to recognize their mutual territorial integrity and independence. It allows [S]tates to limit themselves, but not to be limited against their will by other [S]tates.”).

32. Arnison, *supra* note 29, at 202.

This traditional understanding of sovereignty has changed considerably due to decolonization following World War II, the establishment of the United Nations (U.N.), and the U.N. Charter's introduction of the right to self-determination in 1951.<sup>33</sup> These events have transformed the traditional view of sovereignty into a more modern view of sovereignty that acknowledges the sovereign status of States as conditional upon those States recognizing obligations to their people.<sup>34</sup> Currently, international law recognizes the more modern view of sovereignty as "the people's sovereignty rather than the sovereign's sovereignty."<sup>35</sup>

### *B. The Development of International Human Rights*

The U.N. Charter obligates U.N. Member States (Member States) "to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55," which promotes respect for human rights and fundamental freedoms.<sup>36</sup> Although the U.N. Charter has not expounded upon what these rights and freedoms entail, it has compelled Member States to promote the concept of human rights for all people.<sup>37</sup>

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33. Michael J. Struett, *The Transformation of State Sovereign Rights and Responsibilities Under the Rome Statute for the International Criminal Court*, 8 CHAP. L. REV. 179, 182 (2005); see also Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33, 49 (2006).

34. Duruigbo, *supra* note 33, at 49; see also INT'L COMMISSION ON INTERVENTION & STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT 7, ¶ 1.33 (Int'l Dev. Res. Centre) (2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf> [hereinafter THE RESPONSIBILITY TO PROTECT].

35. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 869 (1990); see also Scheffer, *supra* note 31, at 260 (explaining how the concept of sovereignty has evolved into one that is not solely premised on the power of States, but considers sovereignty powers in other international actors such as ethnic groups, refugees, displaced people, and regional and international organizations. The evolution of sovereignty has occurred, in part, as a result of the emergence of a multitude of international treaties and conventions fostering the protection of human rights at the expense of limiting national sovereignty.). Furthermore, the emergence of the U.N. as an international diplomatic authority has played a huge part in fueling the evolving concept of sovereignty among the international community. Mithi Mukherjee, *Justice, War, and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachment Trial of Warren Hastings*, 23 LAW & HIST. REV. 589, 593 (2005).

36. U.N. Charter art. 55–56.

37. Manisuli Ssenyonjo, *Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court*, 10 J. CONFLICT & SECURITY L. 405, 433 (2005).

On December 10, 1948, the U.N. General Assembly (General Assembly) confirmed its pledge to human rights by adopting the Universal Declaration of Human Rights (UDHR).<sup>38</sup> The UDHR provides an exhaustive list of civil and political rights, including: the right to life, liberty, and security; the right not to be held in slavery; and the right to freedom of movement and residence.<sup>39</sup> Scholars have argued that the UDHR, though adopted as a non-binding resolution, has been accepted as customary international law,<sup>40</sup> thus representing legal obligations developed from the general acceptance and consistent practice of States.<sup>41</sup>

In addition to the UDHR, the General Assembly adopted a series of U.N. Human Rights Covenants in 1966, which include the International Covenant on Civil and Political Rights (ICCPR),<sup>42</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>43</sup> the Optional Protocol to the ICCPR, and the Second Optional Protocol to the

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38. The General Assembly approved the UDHR upon the recommendation of the U.N. Human Rights Commission. The UDHR was the first worldwide endeavor to identify human rights standards. GORMAN, *supra* note 10, at 124.

39. See generally Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

40. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (recognizing that certain rights, such as the right to be free from torture, have become part of customary international law under the UDHR); see also GORMAN, *supra* note 10, at 124 (contending that although the UDHR is not legally binding, the UDHR has established human rights norms that many States have incorporated into their constitutions or statutes, thereby granting the UDHR domestic legal significance); Reisman, *supra* note 35, at 869 (asserting that the UDHR has acquired customary international law status and its ideals are upheld by several regional agreements).

41. See Statute of the I.C.J. art. 38(1)(b) (stating that "a general practice accepted as law" is international custom); MACALISTER-SMITH, *supra* note 2, at 53 (1985) (explaining that the "creation of a customary rule requires both the existence of a general practice of States and a second constitutive element which is the *opinio juris*, or the acceptance by States of the practice as law"); Michael Y. Kieval, Note, *Be Reasonable! Thoughts on the Effectiveness of State Criticism in Enforcing International Law*, 26 MICH. J. INT'L L. 869, 872-73 (2005) (explaining that customary international law results from established norms that have evolved from State practice).

42. The ICCPR reiterated the following rights: the freedom of movement, the right to be recognized as persons before the law, the freedom of religious and political expression, and the right to nondiscrimination. GORMAN, *supra* note 10, at 113.

43. The ICESCR emphasized the right to have a "healthier, safer, and more satisfying life." Such a right includes: to be free from hunger, to subsistence, to work, to have safe and healthy working conditions, to join unions, to social security, to primary education, and to undertake in cultural life. *Id.* at 113-14.

ICCPR.<sup>44</sup> The adoption of these covenants codified individual human rights principles.<sup>45</sup>

Collectively, the U.N. Charter, the UDHR, and the U.N. Human Rights Covenants, comprise an International Bill of Human Rights,<sup>46</sup> which provides a human rights framework for the international community. While the acknowledgment and significance of specific human rights may vary among individual States,<sup>47</sup> the general respect for the principle of international human rights has made it a universally accepted norm under customary international law.<sup>48</sup>

*C. Resolving the Tension: The Forfeiture of Sovereignty and the Responsibility to Protect*

The escalating concern over catastrophic natural disasters and the lack of clarity pertaining to States' responsibilities to disaster-stricken people<sup>49</sup> necessitates assessing the assimilation of two principles: sovereignty and human rights.<sup>50</sup> Despite worldwide concern over natural disasters, the international community is still fundamentally comprised of sovereign States whose primary concern is to safeguard their sovereignty.<sup>51</sup> Herein arises the dilemma. When disaster-affected States are

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44. *The International Bill of Human Rights*, *supra* note 21.

45. GORMAN, *supra* note 10, at 124 (explaining that the adoption of the ICCPR, Protocol to the ICCPR, and the ICESCR were efforts to codify and enforce human rights principles).

46. See Jimmy Carter, Foreword to *THE INTERNATIONAL BILL OF HUMAN RIGHTS* at ix–xi (Paul Williams ed., 1981) (describing the International Bill of Human Rights as a “universal demand for fundamental human rights”); Peter Meyer, *The International Bill: A Brief History*, in *id.* at xxiii, xlv; Robin Geiss, *Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-up Assessment of Long-Term Effects*, 18 HARV. HUM. RTS. J. 167, 178 n.63 (2005); Amnesty International, *The International Bill of Human Rights*, <http://asiapacific.amnesty.org/apro/aproweb.nsf/pages/bill> (last visited Nov. 18, 2005).

47. See Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L. J. 429, 447 n.60 (1997).

48. See GORMAN, *supra* note 10, at 47–48.

49. See *Hyogo Framework for Action*, *supra* note 3, at 6.

50. Samuels, *supra* note 23, at 263 (noting the misunderstanding and need for resolution regarding issues arising from the obligation of governments to provide relief and the obligation of other governments to receive relief).

51. See, e.g., *Tampere Gives Birth to a New Convention*, *supra* note 6, at 39, 49 (noting that certain countries raised concerns about the possible loss of sovereignty with the ratification of the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (Tampere Convention), an international treaty lowering regulatory barriers to facilitate telecommunications equipment and personnel in the aftermath of a disaster); see also discussion *infra* Part IV.B for more information about the Tampere Convention.

either unable or unwilling to provide adequate relief to disaster victims, the international community of States must be able to provide humanitarian assistance without compromising the sovereignty of disaster-affected States.<sup>52</sup> The examples proffered throughout this Note demonstrate that this is not always the case.

Many theories have emerged to reconcile State sovereignty with human rights in justifying humanitarian intervention: the right of foreign States and international organizations to take intervening and coercive action, specifically military action, in a State's domestic affairs if its citizens are being subject to treatment that "shocks the conscience of mankind."<sup>53</sup> Two theories: "the forfeiture of sovereignty" and "the responsibility to protect" deserve recognition because they justify humanitarian assistance during natural disaster relief operations.

According to the forfeiture of sovereignty,<sup>54</sup> a State temporarily forfeits its sovereignty when it allows gross violations of human rights to occur, thus contravening its citizens' rights.<sup>55</sup>

[W]here the government is not in control or the controlling authority is unable or unwilling to create the conditions necessary to ensure rights, and gross violations of the rights of masses of people result, sovereignty in the sense of responsible government is forfeited and the international community must provide the needed protection and assistance.<sup>56</sup>

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52. Samuels, *supra* note 23, at 248–49.

53. GORMAN, *supra* note 10, at 48 (defining "humanitarian intervention" as a controversial legal doctrine referring to the right of a [S]tate . . . to intervene in the domestic affairs of another [S]tate to prevent it from persisting in flagrant abuse of its own population . . . [such as] persistently violat[ing] the rights of its citizens . . . in a way that 'shocks the conscience of mankind'").

54. The forfeiture of sovereignty theory is also known as the "theory of conditional sovereignty" or the "temporary surrender of sovereignty." Mohamad Y. Mattar, *State Responsibilities in Combating Trafficking in Persons in Central Asia*, 27 LOY. L.A. INT'L & COMP. L. REV. 145, 212–13 (2005).

55. *Id.* at 212; Michael L. Burton, Note, *Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention*, 85 GEO. L. J. 417, 435–36 (1996) (noting that "a [S]tate is endowed with a defeasible right of sovereignty, contingent upon some minimum standard of treatment of its subjects. Should [S]tate action fall below this threshold—for example, by flagrantly violating the human rights of those within its borders—the [S]tate forfeits its sovereignty entirely and thus becomes subject to external intervention.").

56. Elizabeth E. Ruddick, *The Continuing Constraint of Sovereignty: International Law, International Protection, and the Internally Displaced*, 77 B.U. L. REV. 429, 462 (1997) (quoting FRANCIS M. DENG, PROTECTING THE DISPOSSESSED 135 (1993)).

This theory maintains that a State's primary obligation is to protect its citizens. When the State cannot—thereby allowing severe human rights violations to ensue against its people—the State's sovereignty is deemed forfeited.<sup>57</sup> The forfeiture of sovereignty views a State's sovereign status as conditional upon its ability to protect the human rights of its people.<sup>58</sup> Under this theory, intervention from the international community of States is acceptable when a State is perceived to have forfeited its sovereignty by violating human rights.<sup>59</sup>

The second theory is the responsibility to protect.<sup>60</sup> The International Commission on Intervention and State Sovereignty (ICISS)<sup>61</sup> proposed this theory, which is a more positive version of the forfeiture of sovereignty because it reconciles, rather than surrenders, sovereignty with responsibility. Such reconciliation becomes evident from assessing the development of the concept of "State responsibility" and its emergence among the international community.

The responsibility to protect developed from the State responsibility concept, which the International Court of Justice (I.C.J.)<sup>62</sup> established in the *Corfu Channel Case* in 1949.<sup>63</sup> The I.C.J.'s judgment recognized in-

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57. Ruddick, *supra* note 56, at 462.

58. *Id.*

59. *Id.*

60. See generally THE RESPONSIBILITY TO PROTECT, *supra* note 34.

61. Canadian Prime Minister Jean Chretien instituted the ICISS at the U.N. Millennium Summit in September 2000. Jeremy I. Levitt, *The Responsibility to Protect: A Beaver Without a Dam?*, 25 MICH. J. INT'L L. 153, 156 (2003). The function of the ICISS was:

[T]o wrestle with the whole range of questions—legal, moral, operational and political—rolled up in this debate, to consult with the widest possible range of opinion around the world, and to bring back a report [to] help the Secretary-General and everyone else find some new common ground.

THE RESPONSIBILITY TO PROTECT, *supra* note 34, at vii.

62. The I.C.J. is the principal judicial organ of the U.N. It consists of fifteen judges who settle legal disputes between States, in accordance with international law, and provides advisory opinions on legal issues from international organs and agencies. Note on the International Court of Justice, <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html> (last visited Dec. 11, 2005).

63. The *Corfu Channel Case*, (U.K. v. Alb.), 1949 I.C.J. 4 (April 9). In this case, two British cruisers and two destroyers were traveling in the North Corfu Strait, which was considered Albanian waters. One of the destroyers, the *Saumarez*, struck a mine. The other destroyer, the *Volage*, came to the assistance of the *Saumarez* and, while towing it, struck another mine. This accident resulted in damage to both destroyers, the deaths of forty-five British officers and sailors, and injury to forty-two other people. The I.C.J. held Albania liable for its failure to warn of the mines, about which it should have known, located in its territory. *Id.* at 12–13, 118.

international obligations towards humanity that exist during peacetime and during war.<sup>64</sup> Subsequently, the U.N. acknowledged the importance of State responsibility<sup>65</sup> from the International Law Commission's (ILC)<sup>66</sup> Draft Articles on the responsibility of States for internationally wrongful acts (ILC's Draft Articles),<sup>67</sup> which brought State responsibility to the international community's attention.<sup>68</sup> The ILC's Draft Articles state, in pertinent part, "[e]very internationally wrongful act [or omission] of a State entails the international responsibility of that State."<sup>69</sup> Under this rationale, since respect for human rights is a State obligation under customary international law,<sup>70</sup> it is a logical inference that States have an international responsibility not to allow violations of human rights to occur in their territories. Otherwise, they have committed an internationally wrongful act. Therefore, international human rights law has challenged the traditional understanding of State sovereignty by reinforcing a concept of sovereignty that imposes on States the responsibility to protect human rights.<sup>71</sup>

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64. *Id.* at 22. Although international law does not recognize the principle of *stare decisis*, the Corfu Channel Case has generally been viewed as a source of the State responsibility concept. Devereaux F. McClatchey, *Chernobyl and Sandoz One Decade Later: The Evolution of State Responsibility for International Disasters, 1986-1996*, 25 GA. J. INT'L & COMP. L. 659, 665 (1996).

65. G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002). Prior to this recognition, the U.N. Secretary-General Kofi Annan "challenged Member States to resolve the conflict between the principle of non-interference regarding state sovereignty and the responsibility of the international community to respond to massive human rights violations and ethnic cleansing" during his addresses to the General Assembly in 1999 and 2000. WORLD FEDERALIST MOVEMENT-INSTITUTE FOR GLOBAL POL'Y, RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE (2006), available at <http://www.responsibilitytoprotect.org/index.php/features/556?theme=alt5>.

66. The ILC is composed of thirty-four members who are elected by the General Assembly to "encourag[e] the progressive development of international law and its codification." International Law Commission: Introduction, <http://www.un.org/law/ilc/introfra.htm> (last visited Mar. 27, 2007); U.N. Charter art. 13(1).

67. See G.A. Res. 56/83, Annex, *supra* note 65.

68. G.A. Res. 56/83, *supra* note 65, at 2, ¶ 3.

69. G.A. Res. 56/83, Annex, *supra* note 65, at 2, art. 1.

70. See *supra* note 40 and accompanying text.

71. Louis Henkin, *An Agenda for the Next Century: The Myth and Mantra of State Sovereignty*, 35 VA. J. INT'L L. 115, 118 (1994) (acknowledging that "[h]alf a century of human rights law has washed away notions that how a [S]tate treats its inhabitants is nobody else's business, is within its domestic jurisdiction, is within the [S]tate's exclusive power which is the 'very essence of' sovereignty"); see also Vesselin Popovski, *Essay: Sovereignty as Duty to Protect Human Rights*, UN CHRON. ONLINE EDITION, <http://www.un.org/Pubs/chronicle/2004/issue4/0404p16.html> (last visited Oct. 11, 2005). Popovski writes:

The ICISS report further elaborated on the notion of State responsibility by presenting the concept of the responsibility to protect:

[T]he idea that sovereign [S]tates have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of [S]tates.<sup>72</sup>

The report redefines the view of humanitarian intervention from the right to intervene into the responsibility to protect,<sup>73</sup> thus refocusing humanitarian intervention on “the rights of affected populations and the obligations of outsiders to help.”<sup>74</sup> The ICISS report elaborates two basic principles of the responsibility to protect:

[First,] State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the [S]tate itself. [Second,] [w]here a population is suffering serious harm, as a result of internal war, insurgency, repression or [S]tate failure, and the [S]tate in

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A State cannot pretend absolute sovereignty without demonstrating a duty to protect people’s rights . . . . When Governments fail to protect human rights . . . the international community can intervene and exercise an extraterritorial duty to protect people at risk. The principle of sovereignty is not denied by such intervention; it refocuses from being an absolute control over certain territory to being a responsibility to govern in a certain manner. The sovereignty of States . . . depends on their duty when governing to respect human beings. The sovereignty of States means the sovereignty of people, not of leaders.

*Id.*; Katja Luopajarvi, *Is There an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons Under International Law?*, 15 INT’L J. REFUGEE L. 678, 684 (2003) (highlighting Mr. Francis Deng’s, the Representative of the U.N. Secretary-General on Internally Displaced Persons, support for the State responsibility concept. Deng argues that responsible sovereign powers ensure respect for and protection of fundamental human rights, and under exceptional circumstances when governments cannot fulfill that responsibility, the international community has an obligation to step in and provide a remedy for those who are suffering.).

72. THE RESPONSIBILITY TO PROTECT, *supra* note 34, at viii.

73. Gareth Evans, *The Responsibility to Protect: Rethinking Humanitarian Intervention*, 98 AM. SOC’Y INT’L L. PROC. 78, 81 (2004) (explaining that the responsibility to protect is an obligation owed by all sovereign States to their citizens, which must be assumed by the international community of States if sovereign States fail to live up to that responsibility); Levitt, *supra* note 61, at 155 (noting that the ICISS report focuses on the obligations of States, as opposed to the rights of States).

74. Levitt, *supra* note 61, at 155 (quoting Thomas G. Weiss, *To Intervene or Not to Intervene? A Contemporary Snap-Shot*, CANADIAN FOREIGN POL’Y 141, 146 (2002)).

question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.<sup>75</sup>

The ICISS report explains the responsibility to protect as embracing three responsibilities:

1. **The responsibility to prevent:** to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
2. **The responsibility to react:** to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanction and international prosecution, and in extreme cases military intervention.
3. **The responsibility to rebuild:** to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.<sup>76</sup>

The responsibility to protect encompasses three State responsibilities: the responsibility to prevent, to react, and to rebuild, which the U.N. Secretary-General Kofi Annan urged Member States to embrace “as a basis for collective action against genocide, ethnic cleansing and crimes against humanity.”<sup>77</sup> While the ICISS report discusses the responsibility

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75. THE RESPONSIBILITY TO PROTECT, *supra* note 34, at xi. The ICISS report also reads:

The foundations of the responsibility to protect, as a guiding principle for the international community of [S]tates, lie in: obligations inherent in the concept of sovereignty; the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security; specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law; the developing practice of [S]tates, regional organizations and the Security Council itself.

*Id.*

76. THE RESPONSIBILITY TO PROTECT, *supra* note 34, at xi.

77. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, 59, ¶ 135, *follow-up to the outcome of the Millennium Summit*, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom*]. The Secretary-General Kofi Annan writes:

I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it. This responsibility lies, first and foremost, with each individual State, whose primary *raison d'être* and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community to use diplomatic,

to protect under the doctrine of humanitarian intervention—military intervention during situations of gross human rights violations—it would be logical to apply this concept to humanitarian assistance—relief efforts provided for disaster-stricken countries. Applying the responsibility to protect to natural disasters is a novel idea, as much of the legal scholarship regarding State responsibility discusses State responsibility to intervene under the doctrine of humanitarian intervention<sup>78</sup> and State responsibility for international man-made disasters.<sup>79</sup>

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humanitarian and other methods to help protect the human rights and well-being of civilian populations.

*Id.* at 35, ¶ 135.

78. See Scheffer, *supra* note 31, at 264. Scheffer writes:

The classical definition of ‘humanitarian intervention’ is limited to those instances in which a nation unilaterally uses military force to intervene in the territory of another [S]tate for the purpose of protecting a sizable group of indigenous people from life-threatening or otherwise unconscionable infractions of their human rights that the national government inflicts or in which it acquiesces.

*Id.* The concept of State responsibility has recently been addressed in the context of internally displaced persons, which are:

[P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

The Guiding Principles on Internal Displacement, Introduction, ¶ 2, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *The Guiding Principles*]. While protection of civilians during natural disasters is included in *The Guiding Principles*, recognition of the responsibility to protect human rights has primarily been discussed in situations of armed conflict and generalized violence, but is inadequately addressed in the area of natural disasters. INT’L FED’N OF RED CROSS AND RED CRESCENT SOCIETIES [IFRCRCS], INTERNATIONAL DISASTER RESPONSE LAWS, PRINCIPLES AND PRACTICE: REFLECTIONS, PROSPECTS AND CHALLENGES 65 (2003) [hereinafter *INTERNATIONAL DISASTER RESPONSE LAWS*]. *But cf.* The Secretary General, *Report of the Secretary General on Protection for Humanitarian Assistance to Refugees and Others in Conflict Situations, delivered to the Security Council*, U.N. Doc. S/1998/883 (Sept. 22, 1998) (noting the importance and urgency of addressing the issue of humanitarian assistance to refugees, displaced persons, and victims of conflict situations).

79. See generally McClatchey, *supra* note 64 (noting that the international community addressed the concept of State responsibility in the aftermath of two well-known man-made environmental disasters: the Chernobyl explosion in the former Soviet Union and the Sandoz spill in Switzerland); Am. Soc’y of Int’l L. [ASIL], *International Responsibility for Manmade Disasters*, 81 AM. SOC’Y INT’L L. PROC. 320 (1990) (providing a summary of a discussion among legal scholars regarding three aspects of government

This Note proposes that all States, disaster-affected States and the international community of States, have a responsibility to humanity when natural disasters occur. Applying the responsibility to protect to natural disasters would highlight the following responsibilities befalling on all States: (1) to warn people and nations potentially affected by an impending or occurring disaster; (2) to unconditionally provide essential disaster relief and accept it if needed; and (3) to ensure sustainable reconstruction and rehabilitation of disaster-affected areas. Further clarification of how these responsibilities play out in the context of past natural disasters demonstrates the plausibility of applying the responsibility to protect to the provision of humanitarian assistance in natural disaster situations.

### III. WHEN DISASTER STRIKES

#### *A. Empirical Examples: The Responsibility to Protect in Natural Disasters*

State sovereignty is fundamental to international disaster relief operations.<sup>80</sup> When natural disasters strike, disaster-affected States have the authority to manage all aspects of the disaster's aftermath by either requesting or refusing aid from the international community of States.<sup>81</sup> Disaster-affected States may reject assistance for a variety of political reasons, such as, "the embarrassment and dependency implicit in asking the outside (usually the West) for help,"<sup>82</sup> which consequently exposes the disaster-affected States' incompetence in effectively responding to

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responsibility for transnational man-made disasters: (1) State responsibility to prevent disasters; (2) State responsibility to mitigate damages after a disaster has occurred or is imminent; and (3) State responsibility for the payment of damages); Sudhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 VAL. U. L. REV. 235 (1994) (explaining the factual situations of the industrial disasters that occurred in Bhopal, India; Seveso and Meda, Italy; the former Soviet Union; and Basel, Switzerland. Chopra assesses the adequacy of the legal responses to these disasters and recognizes the need for an international legal regime to regulate multinational corporate activity to prevent future industrial disasters.).

80. MACALISTER-SMITH, *supra* note 2, at 55 (1985) (stating that respect for the sovereignty of States and protection of their freedom of action are essential tenets applicable to relief actions).

81. *Id.* at 56 (noting that under international law, there is neither a legal obligation on States to offer disaster relief to other countries nor an obligation on States to respond to requests for help).

82. Ellen Freudenheim, *Politics in International Disasters: Fact, Not Fiction, in DISASTER ASSISTANCE: APPRAISAL, REFORM AND NEW APPROACHES*, *supra* note 17, at 225, 241.

natural disasters.<sup>83</sup> Political motivations significantly influence how disaster-affected States choose to respond to disaster relief offers.<sup>84</sup> For example, political factors may delay disaster-affected States' acknowledgement that a natural disaster has occurred, as well as the full extent of its effects,<sup>85</sup> thereby hindering the provision of relief to disaster victims.<sup>86</sup> Herein lies the problem. Ensuring the adequate protection of natu-

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83. MACALISTER-SMITH, *supra* note 2, at 72 (explaining that similar to other emergency situations, natural disasters draw attention to a disaster-affected State's competence and authority in responding to the adverse effects of such disasters within its territory).

84. Freudenheim, *supra* note 82, at 228. Freudenheim identifies four major political problems: (1) domestic politics, wherein "domestic politics in the disaster-stricken country obstruct formal acknowledgement of the disaster, and/or obstruct disaster preparedness, relief and rehabilitative measures;" (2) domestic corruption, wherein "corruption in the disaster-stricken country leads to inflated assessments of the disaster damage, and misallocation of relief goods;" (3) rejection of aid, wherein "the government of the disaster-stricken country rejects offers of governmental foreign aid for political reasons;" and (4) international politics, wherein "international politics obstruct disaster preparedness, relief or rehabilitation." *Id.*; see also Ullman, *supra* note 27, at 5 (listing political reasons for why those in power may impede disaster relief: to prolong incumbency; to cover up government incompetence; to conceal disagreeable domestic conditions that could hinder tourism, trade, and foreign financial transactions; and to undermine domestic opposition).

85. MACALISTER-SMITH, *supra* note 2, at 73; Ullman, *supra* note 27, at 1 (explaining that the governments of disaster-stricken States may be unwilling to acknowledge, to their own people and the international community of States, the magnitude of a disaster's effects on their territory for both domestic and international political reasons. Governments exhibiting this conduct intensify the devastation and suffering of natural disaster victims.).

86. See Freudenheim, *supra* note 82, at 241 (noting that "[u]nfortunately, without the government's acknowledgement that it needs help, the foreign aid mechanisms of other governments and international agencies (with the important exception of the voluntary agencies) are immobilized"); see also GREEN, *supra* note 20, at 12 (noting that disaster-affected governments may make politically motivated decisions that are harmful to disaster victims. In effect, these decisions have "denied the existence of a disaster[,] . . . steered relief to one ethnic group rather than another[,] . . . given aid on the basis of perceived diplomatic benefits rather than according to the needs of the victims, [and allowed governments to profit] enormously from the sale of relief goods."); Zama Coursen-Neff, *Preventative Measures Pertaining to Unconventional Threats to the Peace Such as Natural and Humanitarian Disasters*, 30 N.Y.U. J. INT'L L. & POL. 645, 650-51 n.19 (1998) (noting that mass human suffering is not always less political in natural disasters than in conflict situations. "The cholera epidemic in Guinea (1969), the tidal wave and floods in East Pakistan (1970), the early and middle stages of the drought in the Sahel (1968-1972), the Ethiopian famine and cholera epidemic (1973), the famines in India and Haiti (1975), and the Philippine earthquake (1976) are but a few of the disasters in which politically prompted official resistance prevented or delayed relief operations.").

ral disaster victims may be in peril<sup>87</sup> because international law does not impose any legal obligations on States regarding disaster prevention, relief, and recovery.<sup>88</sup> Therefore, when disaster-affected States alone cannot adequately protect their disaster-stricken populations—when they are unable or unwilling to provide relief—then intervention from the international community of States in the form of humanitarian assistance becomes necessary to protect the livelihoods of natural disaster victims.<sup>89</sup>

Although there are no established, universal guidelines regarding States' actions during times of natural disasters,<sup>90</sup> past disasters have highlighted certain responsibilities of disaster-affected States and the international community of States before, during, and after natural disasters occur.<sup>91</sup> Applying the responsibility to protect to natural disaster situations illuminates these responsibilities, which include: (1) the responsibility to prevent, which is the responsibility of disaster-affected States and the international community of States to warn people and other regions that may be affected by an impending natural disaster; (2) the responsibility to react, which is the responsibility of disaster-affected States to accept needed humanitarian relief from the international community of States, particularly when they are unable or unwilling to effectively provide relief within their territory, and the concurrent responsibility of the international community of States to provide humanitarian assistance to disaster-affected States by offering relief goods, funding, ser-

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87. *Id.* at 13–14 (noting that “the international disaster relief system does not always serve well the interests of disaster-stricken countries and their people”).

88. MACALISTER-SMITH, *supra* note 2, at 56.

89. *Id.* at 52 (explaining that when States alone cannot ensure effective and adequate protection of disaster victims within their territory, international actions are often taken to ensure the sufficient protection of disaster-stricken populations).

90. Samuels, *supra* note 23, at 263–64 (noting that the legal system for ensuring the practice of disaster relief assistance between States is weak. However, the progress made by the U.N. Disaster Relief Organization (UNDRO) and the International Red Cross Movement regarding the codification of disaster relief practices provides some optimism for developing international disaster relief laws.); *see generally* INTERNATIONAL DISASTER RESPONSE LAWS, *supra* note 78 (The IFRCRCs initiated the International Disaster Response Law Project (IDRL Project) to analyze the various international laws, principles, and practices relating to international disaster response. The IFRCRCs recognized that unlike the detailed and well-recognized provisions for protection and assistance under international humanitarian law during times of armed conflict, there is a lack of an identifiable systematic source of law for humanitarian assistance during times of natural disasters. The IDRL Project is a valuable step towards improving the effectiveness of disaster relief operations.); MACALISTER-SMITH, *supra* note 2, at 165 (noting the important role of the UNDRO in strengthening and improving the coordination of humanitarian assistance).

91. *See* discussion *infra* Part III.A.1–3.

vices, and personnel; and (3) the responsibility to rebuild, which is the responsibility of disaster-affected States and the international community of States to work collectively towards rebuilding disaster-stricken communities.

### 1. The Responsibility to Prevent

The first prong of the ICISS' three-fold responsibility is the responsibility to prevent: the "[p]revention of deadly conflict and other forms of man-made catastrophe."<sup>92</sup> In the context of natural disasters, since prevention requires warning, it would be logical to interpret the responsibility to prevent as encompassing the responsibility to warn. The responsibility to warn would include taking preventative measures to mitigate the consequences of natural disasters.<sup>93</sup> The duty to warn of an impending disaster is not a new concept, particularly in the context of man-made disasters, such as the Chernobyl explosion<sup>94</sup> and the Sandoz spill<sup>95</sup> in 1986. Neither of the offending States, the former Soviet Union nor Switzerland, faced legal consequences for their failure to notify adversely affected neighboring States.<sup>96</sup> However, these incidents have raised awareness among legal scholars concerning the responsibility of disaster-

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92. THE RESPONSIBILITY TO PROTECT, *supra* note 34, ¶ 3.2.

93. GREEN, *supra* note 20, at 27 (explaining that the concept of disaster prevention means that if "properly warned, properly prepared, [and] properly situated and housed, mankind can mitigate the worst effects of natural [disasters] that otherwise would involve great loss of life and suffering").

94. On April 26, 1986, a nuclear reactor in Chernobyl, U.S.S.R. exploded, which resulted in the release of an overwhelming amount of radioactive emissions into the atmosphere that spread throughout the Soviet Republic and Europe. Long-term cancer deaths from this nuclear accident ranged from 14,000 to 475,000 people. Outside of the Soviet Union, the nuclear explosion adversely affected about 600,000 people. McClatchey, *supra* note 64, at 661.

95. On November 1, 1986, a fire broke out in a chemical warehouse in Switzerland. The water used by the firefighters to combat the fire, about 10,000 to 15,000 cubic meters of chemically-infested water, oozed into the Rhine River via the sewer system, resulting in a toxic cloud developing above the Rhine River. This incident caused the destruction of all the flora and fauna in the Rhine, set back the environmental renewal of the river, shut down water supply plants along the Rhine in France, the Netherlands, Switzerland, and West Germany, and killed livestock in France and Germany. *Id.* at 662.

96. McClatchey, *supra* note 64, at 664 (noting that claims were not brought against Switzerland partly because of deficiencies in international law at the time regarding State responsibility and lack of enforcement mechanisms in treaties governing the Rhine River).

affected States to notify other States of impending disasters causing transnational harm.<sup>97</sup>

Additionally, prior international case law has addressed the duty to warn. Some scholars have broadly interpreted the I.C.J.'s ruling in the *Corfu Channel Case* as providing that all States have a general duty to warn other States of potential or impending harm.<sup>98</sup> Other scholars have limitedly construed the I.C.J.'s holding in contending that the duty "not to allow knowingly [their] territory to be used for acts contrary to the rights of other [S]tates" imposes a duty to warn only on disaster-affected States, where the danger is located within their territory.<sup>99</sup> Regardless of these variant views' interpretation of the I.C.J.'s opinion, the *Corfu Channel Case* serves as a building block for the emergence of the duty to warn concept.<sup>100</sup> Due to prior international man-made disasters and case law addressing these events, the responsibility of all States to prevent, or mitigate, harms by warning of impending disasters has become well-recognized. The Indian Ocean tsunami demonstrates how this responsibility to warn materializes in a natural disaster.

*i. Indian Ocean Tsunami*

On December 26, 2004, an earthquake measuring 9.0 on the Richter scale triggered a massive and powerful tsunami across the Indian Ocean.<sup>101</sup> The tsunami struck northern Sumatra; the west coasts of Thai-

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97. See *id.* at 659 (noting that as a result of the Chernobyl and Sandoz incidents, "the past decade has witnessed a concerted effort among international declarations, scholars in international law, and [S]tates as reflected in international treaties to impose more duties upon [S]tates to assist and notify other [S]tates in the event of environmental catastrophes").

98. Hand, *supra* note 2; see also case cited *supra* note 63.

99. McClatchey, *supra* note 64, at 664–65 (explaining that many legal scholars have recognized the I.C.J.'s prudence in not declaring an all-encompassing duty to warn).

100. *Id.* (noting that the I.C.J.'s decision in the *Corfu Channel Case*, which has been cited as a source for the State responsibility concept, is a foundational element for documents that embrace a general duty to warn, such as the ILC's Draft Articles and the Rio Declaration).

101. *Strengthening Emergency Relief*, *supra* note 8, at 2, ¶ 2. The Secretary-General's Report defines the tsunami crisis, describes the initial response from disaster-affected countries and the international community of States, and outlines the lessons learned from this catastrophic multinational disaster. The Secretary-General Kofi Annan wrote:

The Indian Ocean tsunami disaster created one of the most complex coordination and logistical challenges the disaster response system of the United Nations has ever had to manage. The timing and scale of the event required quick and flexible coordination efforts in a variety of countries and contexts, and its global reach led to a proliferation of relief actions and actors and garnered assistance from public, private and government sources at the highest levels.

land, Myanmar, and Sri Lanka; the east coast of India; the Maldives; and northern Africa.<sup>102</sup> As of June 21, 2005, the tsunami had resulted in the deaths of approximately 240,000 people and displacement of more than one-million people.<sup>103</sup>

As a repercussion of the tsunami disaster, European survivors and relatives of the victims brought a class action suit against the Pacific Tsunami Warning Center, the U.S. National Oceanic and Atmospheric Administration (NOAA), the Accor Group (Accor), a French hotel chain with beach resorts in Thailand, and the Kingdom of Thailand for their failure to establish or properly use warning systems for natural disasters.<sup>104</sup> The Complaint alleges, inter alia, that Thailand had a duty to notify countries of the tsunami because it possessed adequate information of the deadly waves and the waves' direction prior to the disaster's occurrence.<sup>105</sup> Specifically, the Petitioners argue that Thailand should have alerted the affected countries through media or other telecommunications means and evacuated Thailand's beach areas.<sup>106</sup>

This alleged duty to warn applies to natural disasters. There is a considerable amount of scholarship suggesting that governments, businesses, and individuals have a duty to prepare for hazardous events, many of which are highly unpredictable, such as tsunamis, meteor strikes, and earthquakes.<sup>107</sup> In the aftermath of the Indian Ocean tsunami, the interna-

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While such global attention and support has been both welcome and constructive, the high-intensity environment it has created has raised expectations of performance and accountability.

*Id.* at 6, ¶ 17.

102. *Id.* at 2, ¶ 2.

103. *Id.* at 2, ¶ 3.

104. Tsunami Victims Group v. Accor N. Am. Inc., No. 05-CV-2599 (S.D.N.Y. filed March 4, 2005) [hereinafter the Complaint].

105. The Complaint, ¶ 19–21. The Complaint also contends that although the NOAA registered the Indian Ocean earthquake, it failed to timely alert the affected countries of the impending tsunami. *Id.* ¶ 17. Further, the Complaint alleges that Accor knew or should have known that its resort in Khao Lak, Thailand was located in an area that was susceptible to earthquakes and tsunamis, and had a duty to notify its guests of impending dangers and take the proper and necessary precautions, such as evacuating the beach and moving people to higher ground. *Id.* ¶ 23. For the purposes of this Note, an analysis of the Complaint solely focuses on the alleged duty of the Kingdom of Thailand—to warn other countries of the approaching tsunami. This Note does not assess the sufficiency of the Plaintiffs' other arguments in the Complaint.

106. The Complaint lists the following suggested notification devices: radio, television, electronic notices, emergency broadcasts, and air raids. *Id.* ¶ 21.

107. See Evan R. Seamone, *The Duty to "Expect the Unexpected": Mitigating Extreme Natural Threats to the Global Commons Such as Asteroid and Comet Impacts with the Earth*, 41 COLUM. J. TRANSNAT'L L. 735, 758 (2003) (justifying the duty to warn of natu-

tional community recognized the lack of disaster preparedness from not having a proper warning system in place, which resulted in the failure to mitigate harm to the people in disaster-stricken regions. In response to the tsunami disaster, the U.S. Agency for International Development (USAID) launched the Indian Ocean Tsunami Warning System (IOTWS) program, an effort to develop “integrated early warning and mitigation systems” to assist the Indian Ocean region in detecting and preparing for natural disasters, such as tsunamis and other coastal hazards.<sup>108</sup> The IOTWS program involves the participation of several U.S. agencies,<sup>109</sup> the Intergovernmental Oceanographic Commission of the U.N. Educational, Scientific, and Cultural Organization, numerous donor nations,<sup>110</sup> and national governments located in the Indian Ocean region.<sup>111</sup> The goal of the IOTWS is “to build up the human and institutional infrastructure to make sure these [warning] systems are interoperable and sustainable for years to come.”<sup>112</sup>

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ral impacts with the duty of cooperative preservation, a framework that assigns State responsibility for natural harm by recognizing that “when facing threats of a great magnitude which endanger more than one nation, nations must cooperate in order to fulfill duties to preserve their own citizens”); *see also* William C. Nicholson, *Legal Issues: Warning Systems*, at 4 (2005), available at [http://www.riskinstitute.org/newsite/uploads/PERI\\_Symposium\\_Nicholson.pdf](http://www.riskinstitute.org/newsite/uploads/PERI_Symposium_Nicholson.pdf) (recognizing that predicting natural disasters like tsunamis is difficult, but possible). Nicholson writes:

[Tsunamis] may occur in a particular geographic area at an indefinite upcoming time. Some coastal locations might not be affected by tsunamis for hundreds or thousands of years. Other localities, like the Indian Ocean, are the tsunami equivalent to San Francisco for earthquakes or Florida for hurricanes. [However, since] [a]ll of these acts of nature are reasonably foreseeable, . . . that fact establishes a duty to use reasonable care to decrease the risks of a catastrophe.

*Id.*

108. Press Release, U.S. Agency for Int'l Dev. [USAID], USAID Announces Launch of Indian Ocean Tsunami Warning System Program (Aug. 17, 2005) available at <http://www.usaid.gov/press/releases/2005/pr050817.html> [hereinafter USAID Press Release].

109. The key U.S. agencies contributing to the IOTWS program include: USAID's Regional Development Mission for Asia in Bangkok, NOAA, U.S. Geological Survey, U.S. Trade and Development Agency, USDA Forest Service, and the Asian Disaster Preparedness Center. *Id.*

110. While donor nations or donor governments repeatedly provide the majority of disaster relief assistance, their relief aid is often directed through the U.N. or private agencies. GREEN, *supra* note 20, at 29.

111. USAID Press Release, *supra* note 108.

112. *Id.* (explaining that a top priority in the post-tsunami reconstruction effort was to work with the participating entities to establish a fully functional warning system in the Indian Ocean).

Considering the international community's response to the tragic tsunami disaster—developing a tsunami warning system in the Indian Ocean—and the recognition of the duty to warn in prior international case law and past international man-made disasters, there is considerable evidence that the international community has acknowledged the duty to warn concept. Thus, in the context of natural disasters, it is conceivable that disaster-affected States and the international community of States have a duty to warn of impending or occurring natural disasters, which encompasses the responsibility to prevent, or mitigate, harm afflicted to disaster-affected people and countries.<sup>113</sup>

## 2. The Responsibility to React

The second prong of the ICISS' three-pronged responsibility is the responsibility to react, which denotes that “when a [S]tate is unable or unwilling to redress the [adverse] situation, then interventionary measures by other members of the broader community of [S]tates may be required.”<sup>114</sup> The duty to intervene has principally been discussed in the context of humanitarian intervention, during which States take armed intervening measures in another State, without its consent, to redress the treatment of its population who are being subject to gross violations of human rights.<sup>115</sup> While there is currently debate over the controversial

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113. Formulating an argument for imposing on all States a duty to warn of natural disasters logically begs the question of whether States should be held liable for their failure to warn. While this Note does not delve into the aspects of States' liability for failure to adhere to their proposed responsibilities, it is arguably not in the best interest of the international community to hold States strictly liable because of the value of international diplomacy over adverse political implications arising from a finding of liability. *Cf.* McClatchey, *supra* note 64, at 676–78 (explaining that international law prefers to use a negligence standard for State responsibility for transboundary harm, rather than a strict liability standard. Under a traditional tort analysis of negligence for transboundary harm, the complaining State must prove that: (1) the offending conduct is attributable to the defendant State; (2) the offending State breached an international duty; (3) a causal connection exists between the conduct and the injury; and (4) material damages took place.). *Id.* This Note does not inquire into the intricacies of States' liability for failure to adhere to their responsibilities regarding natural disasters, but posits that implementing diplomatic measures and political incentives, which focus on shared interests and foster international cooperation among States, would more effectively influence the conduct of States in adhering to their responsibilities. *Id.* at 680.

114. THE RESPONSIBILITY TO PROTECT, *supra* note 34, ¶ 4.1.

115. A.P.V. Rogers, *Humanitarian Intervention and International Law*, 27 HARV. J.L. & PUB. POL'Y 725, 730 (2004) (noting that humanitarian intervention is generally thought of as the “use of force without the authorization of the Security Council to protect sections of a State's population from gross and persistent human rights abuses”); Ravi Mahalingam, Comment, *The Compatibility of the Principle of Nonintervention with the*

doctrine of humanitarian intervention,<sup>116</sup> this Note does not delve into the complexities of the humanitarian intervention dispute. Rather, this Note posits that the responsibility to react can conceivably apply to catastrophic natural disasters, during which there also exists grave human suffering. Such responsibility would be to unconditionally provide and accept needed humanitarian assistance when disaster-affected States are unwilling or unable to provide disaster relief.

International case law has addressed the responsibility to provide and accept humanitarian assistance. The I.C.J. in *Nicaragua v. U.S.*<sup>117</sup> articulated this responsibility:

There can be no doubt that the provision of strictly humanitarian aid [such as food, clothing, and medicine] to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.<sup>118</sup>

In its opinion, the I.C.J. justified neutral offers of humanitarian aid, which is offered in accordance with the purposes declared by the Red

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*Right of Humanitarian Intervention*, 1 UCLA J. INT'L L. & FOREIGN AFF. 221, 258 (1996); Ken Roth, *War in Iraq: Not a Humanitarian Intervention*, Human Rights Watch World Report 2004 (Jan. 2004), available at <http://www.hrw.org/wr2k4/3.htm> (stating that as a threshold issue, humanitarian intervention, without the target government's consent, can only be justified when there is evidence of imminent or existing genocide, or other similar mass slaughter or loss of human life); Arnison, *supra* note 29, at 200 (noting that the U.N. has recognized the need for humanitarian intervention when a vast amount of human lives are at risk, such as during situations of "armed conflict, massive human rights abuses, or starvation").

116. Rogers, *supra* note 115, at 730–32 (explaining that the opinions of international lawyers regarding humanitarian intervention typically fall into six views: (1) humanitarian intervention is unlawful; (2) humanitarian intervention is presently unlawful, but may become lawful in the future in distinctly defined circumstances, and argue for a principled code of law regarding humanitarian intervention; (3) lukewarm acceptance for humanitarian intervention, especially when used to save a large number of lives; (4) justification for humanitarian intervention when States collapse and there is a need for immediate and short-term emergency action to protect lives; (5) the right of humanitarian intervention is emerging, yet still in its infancy; and (6) there is a legal right to humanitarian intervention as a matter of last resort only in extreme humanitarian emergencies that involve large-scale loss of life).

117. In *Nicaragua v. U.S.*, Nicaragua claimed that the United States supported a mercenary army by financing and assisting the army's movement to overthrow the Sandinista Government of Nicaragua, thus using armed force against Nicaragua. According to Nicaragua, the United States violated its obligations under international law, the U.N. Charter, the Organization of American States Charter, and the bilateral U.S.-Nicaragua Treaty of Friendship and Commerce. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 18–22 (June 27).

118. *Id.* ¶ 242.

Cross: “to prevent and alleviate human suffering,” “to protect life and health,” “to ensure respect for the human being,” and to “be given without discrimination to all in need.”<sup>119</sup> Based on these stated objectives, it is reasonable to conclude that international law supports humanitarian assistance for natural disaster victims, provided that the relief offered is for purely humane purposes.<sup>120</sup>

Several past natural disasters, in particular North Korea’s famine and Hurricane Katrina, have highlighted the responsibility of disaster-affected States to accept needed humanitarian assistance and the concurrent responsibility of the international community of States to unconditionally offer humanitarian aid.

*i. North Korea’s Famine*

In the 1990s under the Pyongyang regime,<sup>121</sup> a famine in North Korea killed approximately one-million people, about five percent of its population.<sup>122</sup> This famine continues today as North Korea is now facing its second decade of food shortages.<sup>123</sup> There exists disagreement over the causes of this famine.<sup>124</sup> North Korea claims it arose primarily from natural disasters, such as the floods of 1995, which devastated its rice-growing regions.<sup>125</sup> Conversely, other views regard the floods as a significant exacerbating factor that diverted blame away from the North Korean government, and ultimately speculate that the causes of the famine are political.<sup>126</sup> Regardless of the cause, the effects of the famine are

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119. *Id.* ¶¶ 242–43.

120. *Id.*

121. Jean-Hervé Bradol, *Introduction: The Sacrificial International Order and Humanitarian Action*, in *IN THE SHADOW OF ‘JUST WARS:’ VIOLENCE, POLITICS AND HUMANITARIAN ACTION* 1, 17–18 (Fabrice Weissman ed., 2004) (noting that the Pyongyang Regime was profiting from one of the largest food aid operations carried out by the U.N. World Food Program (WFP)).

122. Stephan Haggard & Marcus Noland, *Hunger and Human Rights: The Politics of Famine in North Korea*, at 8 (2005), available at <http://www.hrnk.org/hunger/hungerReport05.pdf>.

123. *Id.*

124. *Id.* at 11.

125. *Id.*; Fiona Terry, *North Korea: Feeding Totalitarianism*, in *IN THE SHADOW OF ‘JUST WARS:’ VIOLENCE, POLITICS AND HUMANITARIAN ACTION*, *supra* note 121, at 88, 90 (noting that heavy flooding in the mid-1990s exacerbated an already distressed agricultural sector).

126. Critics argue that North Korea’s pursuit of food security through its strategy of self-sufficiency—meeting food demands entirely with domestic production—led to the recurrent food shortages because of the high ratio of the population to arable land. Haggard & Noland, *supra* note 122, at 12–13; Terry, *supra* note 125, at 90 (noting that in the case of North Korea, there are several possible origins of the famine crisis. However,

devastating as close to two-million people have died and children continue to suffer from chronic malnutrition.<sup>127</sup> These figures show that North Korea was not only slow to recognize the extent of its famine problem, but also slow to provide adequate relief for its famine-stricken population.<sup>128</sup>

North Korea's inadequate response became evident at the height of the famine in the mid-1990s when it allowed humanitarian assistance from the international community of States, but kept tight restrictions over the entry of relief goods into many areas of the country.<sup>129</sup> North Korea also refused "to allow swift and equitable distribution" of the aid to its people.<sup>130</sup> Furthermore, North Korea's recent request to end all humanitarian relief has received much criticism.<sup>131</sup> Deputy Foreign Minister Choe Su-hon asserted that because of North Korea's good harvest, North Korea has enough food and no longer needs food aid.<sup>132</sup> However, putting a stop to relief efforts such as the U.N. World Food Program ("WFP"),<sup>133</sup>

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because of its isolation, the particular cause of its famine are unknown.). This Note neither probes into an analysis of opposing views regarding North Korea's famine crisis, nor seeks to determine which view was correct, be it floods or political agenda. Rather, this Note focuses on North Korea's inadequate response to its famine crisis. Terry, *supra* note 125, at 90.

127. May Lee, *Famine May Have Killed 2 Million in North Korea*, CNN.COM, Aug. 19, 1998, available at <http://www.cnn.com/WORLD/asiapcf/9808/19/nkorea.famine>; Press Release, Amnesty International, *North Korea: Denial of Right to Food*, Jan. 20, 2004, available at <http://web.amnesty.org/library/print/ENGASA240042004>.

128. Haggard & Noland, *supra* note 122, at 20 (noting that the Public Distribution System—the rationing system implemented to ensure food security—was unable to provide even the minimal amount of food needed for human survival during the mid-1990s).

129. *North Korea Rejects UN Food Aid*, BBC NEWS, Sept. 23, 2005, <http://www.news.bbc.co.uk/go/pr/ft/-/1/hi/world/asia-pacific/4273844.stm>.

130. Press Release, Amnesty International, *supra* note 127.

131. See *N. Korea Says Asked UN to End All Humanitarian Aid*, REUTERS ALERTNET, Sept. 22, 2005, <http://www.alertnet.org/thenews/newsdesk/N22591326.htm>; Paul Eckert, *North Korea Plan to Halt Aid a Bad Idea*, REDORBIT, Sept. 27, 2005, [http://www.rednova.com/news/international/252321/nkorea\\_plan\\_to\\_halt\\_aid\\_a\\_bad\\_idea\\_us\\_agency/index.html](http://www.rednova.com/news/international/252321/nkorea_plan_to_halt_aid_a_bad_idea_us_agency/index.html) (quoting Andrew Natsios, head of USAID, "[North Korea is] going to shut down the World Food Program efforts at the end of this year, which we think is a mistake, . . . humanitarian needs in North Korea remain significant").

132. *N. Korea Says Asked UN to End All Humanitarian Aid*, *supra* note 131 (quoting Deputy Foreign Minister Choe Su-Hon, "[h]umanitarian assistance cannot last too long . . . [w]e have very good farming this year. Our government is prepared to provide the food to all our people.").

133. The U.N. established the WFP in 1961. Its purpose is to provide food on an emergency basis to disaster-stricken and famine-affected regions. The WFP also provides technical support to developing countries to help improve their food production, storage, and distribution systems. GORMAN, *supra* note 10, at 83–84.

an international food aid agency that has nourished approximately 6.5 million North Koreans, raises concerns about North Korea's ability to provide adequate relief to its famine-stricken population.<sup>134</sup>

Governments of disaster-affected States have rejected relief offers in the past. During the 1976 Guatemalan earthquake and the 1976 Philippine earthquake and tidal wave,<sup>135</sup> humanitarian aid to both disaster-affected States appeared to "have strings attached."<sup>136</sup> Likewise, Mr. Choe Su-hon asserted that food aid to North Korea also had strings attached and argued that the international community of States, particularly the United States, "politicize[d] humanitarian assistance, [by] linking it to the human rights issue."<sup>137</sup> The U.S. State Department has adamantly rejected North Korea's accusations, arguing that the United States' decisions to provide humanitarian assistance were not based on political agenda, but rather on need: the need of the country involved, competing needs elsewhere, and ensuring that the provision of aid goes to the neediest.<sup>138</sup> This need-based rationale provides a sensible approach for all

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134. See sources cited *infra* note 140.

135. Freudenheim, *supra* note 82, at 242 (explaining that in the aftermath of the 1976 Guatemalan earthquake, the Guatemalan government rejected a British offer of aid, not because the aid was unnecessary, but rather because of a "political dispute between the two countries over the neighboring country of Belize." Freudenheim notes that Guatemala's acceptance of the British aid "would have been politically embarrassing." Additionally, in the aftermath of the Philippine earthquake and tidal wave in 1976, President Ferdinand Marcos refused American aid because the Philippine government viewed the aid as "aid for concessions in their treaty negotiations." Freudenheim notes that while the Philippine government declared that no foreign aid was necessary in its relief operation, it consequently stated that UNICEF aid and aid from other U.N. agencies did not classify as foreign aid.). *Id.*

136. *Id.* Freudenheim further notes the concern that political considerations of national governments, donor governments, and international agencies may influence the provision of disaster relief, stating, "[t]he effects of this political reality, which can be as disastrous to the victim as any earthquake, drought, or epidemic, should be of urgent concern to all those interested in improving the international and national response to natural disaster situations." *Id.* at 244.

137. See *N. Korea Says Asked UN to End All Humanitarian Aid*, *supra* note 131.

138. *Id.* In the World Disasters Report of 2000, the IFRCRCS quoted Margareta Wahlström, the Under-Secretary General for Disaster Response and Operational Coordination, on the effects of continuing aid to North Korea in the wake of political upheaval. Wahlström states:

The [aid] system might be utilized but . . . it is for a good purpose because you cannot create stability in this part of the world without creating a bridge. The humanitarian agencies, be it the UN, the Red Cross or NGOs . . . have made an incredible contribution to creating that bridge unconditional[ly]. The conditions we have imposed . . . belong to the humanitarian agenda . . . [W]e have not said that in order to give food we need something else from you.

States to follow regarding the provision and acceptance of international disaster relief aid.<sup>139</sup> Therefore, North Korea's justification for rejecting humanitarian assistance should depend on whether its harvest meets the needs of its people.

North Korea's harvest has eased the food shortage. However, the international community still believes that North Korea needs humanitarian assistance, particularly to provide food for those most in need: children, pregnant women, urban poor, and elderly.<sup>140</sup> Current conditions in North Korea also show that its obstruction of needed humanitarian aid is hurting, rather than benefiting its population.<sup>141</sup> Therefore, because of North Korea's unwillingness to protect the well-being of its people, the international community of States has a responsibility to provide unconditional humanitarian assistance to protect the people of North Korea. Accordingly, North Korea should have a responsibility to accept the needed humanitarian relief.

*ii. Hurricane Katrina*

From August 25 to August 31, 2005, Hurricane Katrina, varying in strength from a category one to category five hurricane,<sup>142</sup> swept across the southern United States striking Florida, Louisiana, Mississippi, and Alabama.<sup>143</sup> Homeland Security Secretary Michael Chertoff described

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Terry, *supra* note 124, at 101.

139. See *N. Korea Says Asked UN to End All Humanitarian Aid*, *supra* note 131.

140. *Id.*; see also *North Korea Rejects UN Food Aid*, BBC NEWS, Sept. 9, 2005, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/asia-pacific/4273844.stm> (citing Undersecretary-General Jan Egeland's, the U.N. humanitarian affairs coordinator, statement that "an 'abrupt' end to food aid would harm North Korea's most vulnerable." Also, Gerald Bourke, a spokesman for the WFP, stated that, "North Korea has a substantial and chronic food deficit, [and] malnutrition rates, especially for mothers and young children, were still very high.").

141. *Id.*

142. For an explanation of the Saffir-Simpson Hurricane Scale, see NOAA, *The Saffir-Simpson Hurricane Scale*, <http://www.nhc.noaa.gov/aboutsshs.shtml> (last visited Nov. 12, 2005).

The Saffir-Simpson Hurricane Scale is a 1–5 rating based on the hurricane's present intensity. This is used to give an estimate of the potential property damage and flooding expected along the coast from a hurricane landfall. Wind speed is the determining factor in the scale, as storm surge values are highly dependent on the slope of the continental shelf and the shape of the coastline, in the landfall region.

*Id.*

143. The Brookings Institution, *Hurricane Katrina Timeline*, available at <http://www.brookings.edu/fp/projects/homeland/katrinatimeline.pdf> (last visited Nov. 12,

the hurricane as an “ultra-catastrophe,” ravaging through four states, triggering a flood due to failed canal levees that swamped New Orleans,<sup>144</sup> the nation’s thirty-fifth largest city, and resulting in a breakdown of civil order.<sup>145</sup> As of September 15, 2005, Hurricane Katrina had caused “\$125 billion dollars in damage/costs, making [it] the most expensive natural disaster in U.S. history.”<sup>146</sup> Additionally, Hurricane Katrina devastated the lives of thousands of people.<sup>147</sup> Ordinary citizens and other countries criticized the United States’ response to this hurricane<sup>148</sup> as a disaster in itself because of the lack of preparedness and the many days it took for relief aid and personnel to reach New Orleans and other hurricane-devastated areas.<sup>149</sup> President George W. Bush acknowledged the United States’ inadequate response to the hurricane saying, “Katrina exposed serious problems in our response capability at all levels of government and to the extent the federal government didn’t fully do its job right, I take full responsibility.”<sup>150</sup>

A congressional investigation revealed that the U.S. government at all levels failed to adequately prepare for and respond to this tragedy.<sup>151</sup> For

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2005). *How the Hurricane Crisis Unfolded*, BBC NEWS, <http://news.bbc.co.uk/1/hi/world/americas/4211404.stm> (last visited Nov. 12, 2005).

144. It is also possible to view the breached canal levees, which flooded about eighty percent of New Orleans, as a failure of the responsibility to prevent, or mitigate, harm resulting from Hurricane Katrina. Investigation is pending regarding whether the failure of the levees was due to poor engineering, faulty construction, or lack of proper maintenance. Kevin Krolicki, *Louisiana Mulls Legal Action on Failed Levees*, Reuters AlertNet, Nov. 8, 2005, <http://www.alertnet.org/thenews/newsdesk/N08646512.htm>.

145. Spencer S. Hsu & Steve Hendrix, *Hurricanes Katrina and Rita Were Like Night and Day*, WASH. POST, Sept. 25, 2005, at A01.

146. National Climatic Data Center, *Billion Dollar U.S. Weather Disasters*, <http://www.ncdc.noaa.gov/oa/reports/billionz.html> (last visited Mar. 27, 2007).

147. *Id.*

148. Juan Forero & Steven R. Weisman, *U.S. Allies, and Others, Send Offers of Assistance*, N.Y. TIMES, Sept. 4, 2005 (noting that the circulation of televised and printed images of destruction, suffering, and death from Hurricane Katrina provoked disbelief and an outpouring of sympathy and assistance from the international community); *World Shocked by U.S. Response to Storm*, GAINESVILLE.COM, Sept. 4, 2005, <http://www.gainesville.com/apps/pbcs.dll/article?AID=/20040904/WIRE/50904039/1117/news> (noting the world’s shock and criticism over such a wealthy and powerful country’s response to the storm).

149. John King & Suzanne Malveaux, *Bush: ‘I take responsibility’ for Federal Failures After Katrina*, CNN.COM, Sept. 13, 2005, <http://www.cnn.com/2005/POLITICS/09/13/katrina.washington/index.html>.

150. *Id.*

151. H.R. REP. NO. 109-377, A FAILURE OF INITIATIVE: FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO

example, in the aftermath of the hurricane's destruction, it took several days to get help to the thousands of people left behind without food and water. Those who sought safety in shelters such as the Superdome stadium were subject to grossly degenerate conditions.<sup>152</sup> Moreover, as aerial shots of New Orleans showed, hundreds of school and city buses were flooded with water—buses that could have been used in the evacuation process.<sup>153</sup> The rest of the United States and the world watched these horrific images on television, questioning why the United States was unable to respond effectively to the disastrous effects, as well as criticizing the United States for its lack of any competently executed evacuation plan, organized relief effort, or central command to coordinate relief.<sup>154</sup>

Despite criticism regarding the United States' inability to effectively provide relief to its disaster-stricken regions, other countries expressed their sympathy and generosity towards disaster victims, as offers of over \$1 billion in cash and supplies poured in from nearly ninety-five nations,<sup>155</sup> which included several countries that are adversaries or typically aid recipients, not aid donors.<sup>156</sup> The United States graciously accepted

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HURRICANE KATRINA, at 1–5 (2005), available at [http://katrina.house.gov/full\\_katrina\\_report.htm](http://katrina.house.gov/full_katrina_report.htm).

152. Evan Thomas, *The Lost City: What Went Wrong: Devastating a Swath of the South, Katrina Plunged New Orleans into Agony. The Story of a Story—and a Distastefully Slow Rescue*, NEWSWEEK, Sept. 12, 2005, available at <http://www.msnbc.msn.com/id/9179587/site/newsweek/?g=1> (describing the nightmarish conditions at the Superdome: the air conditioning failed; the lights went out, leaving the stadium only dimly lit; the hurricane broke holes through the roof; the availability of bottled water was scarce; the stench of unwashed bodies and overflowed toilets; the occasional sounds of gunshots; and the occurrences of rapes).

153. Tom Foreman, Mike M. Ahlers, & Anderson Cooper, 'People Making Decisions Hesitated: More Officials' Jobs May Fall to Katrina Response Criticism', CNN.COM, Sept. 13, 2005, <http://www.cnn.com/2005/US/09/13/katrina.response/index.html>.

154. Thomas, *supra* note 152.

155. *U.S. Receives Aid Offers from Around the World*, CNN.COM, Sept. 4, 2005, <http://edition.cnn.com/2005/US/09/04/katrina.world.aid/>; *Offers of Aid from Around the World*, CNN.COM, Sept. 5, 2005, <http://www.cnn.com/2005/US/09/05/katrina.world.aid> (highlighting examples of documented foreign aid, which include: Nigeria's pledge of \$1 million; Japan's offer of \$200,000 to the American Red Cross and \$300,000 in emergency supplies; India's \$5 million donation to the American Red Cross and willingness to donate medicine; Afghanistan's offer of \$100,000; Sri Lanka's donation of \$25,000 to the American Red Cross; Mexico's offer of \$1 million and delivery of fifteen truckloads of water, food, and medical supplies; Israel's offer to provide medical assistance in the form of personnel, equipment, and medicines; and Qatar's offer of \$100 million).

156. Barbara Slavin, *Some Foreign Attempt to Send U.S. Aid Stymied*, USATODAY.COM, Sept. 7, 2005, [http://www.usatoday.com/news/world/2005-09-07-katrina-world\\_x.htm?POE=click-refer](http://www.usatoday.com/news/world/2005-09-07-katrina-world_x.htm?POE=click-refer) (noting that Mexico's offer to deliver relief supplies and medical personnel to Texas, via a Mexican army convoy and navy ship, would

much of the disaster relief aid, provided that it was matched with need and offered in the spirit of humanitarian assistance,<sup>157</sup> and was thankful for the generosity expressed by the international community.<sup>158</sup> Although the United States accepted most of the offered relief, there were complaints from the international community of States concerning the “bureaucratic entanglements” that hindered the shipment of relief supplies to the United States.<sup>159</sup> However, it is reasonable to perceive that such delay was due to temporary technical and logistical problems,<sup>160</sup> as well as the novelty of coordinating the acceptance of such a considerable amount of international aid to the United States.<sup>161</sup> Similar to North Korea’s response to its famine, international criticism also arose from the United States’ rejection of aid from certain countries.<sup>162</sup> This rejection has been

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be the first time Mexican soldiers entered the United States unarmed since 1846); *A Foreign Aid Twist: U.S. Gets, Others Give*, USATODAY.COM, Sept. 6, 2005, [http://www.usatoday.com/news/opinion/editorials/2005-09-06-US-aid\\_x.htm](http://www.usatoday.com/news/opinion/editorials/2005-09-06-US-aid_x.htm) (noting Cuba’s offer to send medical personnel and tsunami-devastated Sri Lanka’s \$25,000 donation to the American Red Cross).

157. Slavin, *supra* note 156 (quoting U.S. State Department official Harry Thomas, who was in charge of coordinating foreign aid offers, “[t]he worst thing we could do is to take things, have them . . . sit on the ground and not be utilized, to have something rot or not get to people quickly”).

158. *A Foreign Aid Twist: U.S. Gets, Others Give*, *supra* note 156 (noting Secretary of State Condoleezza Rice’s efforts in profusely thanking other countries for the humanitarian assistance offered to the United States); César G. Soriano, *Foreign Aid Flows in for Katrina Victims*, USATODAY.COM, Sept. 5, 2005, [http://www.usatoday.com/news/world/2005-09-05-aid-katrina\\_x.htm](http://www.usatoday.com/news/world/2005-09-05-aid-katrina_x.htm) (quoting Secretary of State Condoleezza Rice’s deep appreciation for the foreign offers, “[p]eople have said that America has been so generous . . . in other places, and now it is time to be generous to America”); Forero & Weisman, *supra* note 148 (quoting Secretary of State Condoleezza Rice, “[r]ecently we have seen the American people respond generously to help others around the globe during their times of distress, such as during the recent tsunami . . . [t]oday we are seeing a similar urgent, warm and compassionate reaction”).

159. *German Plane with Katrina Food Aid Turned Away*, USATODAY.COM, Sept. 10, 2005, [http://www.usatoday.com/news/nation/2005-09-10-german-aid\\_x.htm](http://www.usatoday.com/news/nation/2005-09-10-german-aid_x.htm).

160. *Id.*

161. Forero & Weisman, *supra* note 148 (noting that the United States seemed initially unprepared for the outpouring of aid, which surpassed the humanitarian aid offered after the 9/11 attacks); Slavin, *supra* note 156 (quoting Natalie Loiseau, press counselor at the French Embassy in Washington, D.C., “this is the first time the United States has [had] to welcome foreign aid, so no one has had this job (of facilitating foreign aid)”).

162. Mary Murray, *Katrina Aid from Cuba? No Thanks, Says U.S.*, MSNBC.COM, Sept. 14, 2005, <http://msnbc.msn.com/id/9311876> (explaining that the United States asserted it would not need Cuba’s medical brigade because of a “robust response from the American medical community”); Wolfson, *supra* note 13 (noting that the United States rejected Iran’s offer of ten million barrels of crude oil because it was conditioned on lifting economic sanctions).

justified because certain offers were either not needed or conditional, not solely for the protection of disaster victims.<sup>163</sup>

Nevertheless, the outpouring of hurricane relief to the United States further supports the responsibility of the international community of States and disaster-affected States regarding humanitarian assistance. Hurricane Katrina demonstrates that when disaster-affected States, regardless of their wealth and power, are unable to effectively provide adequate relief to its disaster-stricken populations, the international community of States has a responsibility to unconditionally offer aid and disaster-affected States have a responsibility to accept it, provided that the aid is needed and in the spirit of humanitarian assistance.

### 3. The Responsibility to Rebuild

The third prong of the ICISS' three-pronged responsibility is the responsibility to rebuild, which implies that:

[B]ecause of a breakdown or abdication of a [S]tate's own capacity and authority in discharging its 'responsibility to protect'—there should be a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development.<sup>164</sup>

In the context of natural disasters, the responsibility to rebuild refers to the responsibility of disaster-affected States and the international community of States to cooperatively work towards “[e]nsuring [the] sustainable reconstruction and rehabilitation”<sup>165</sup> of communities that have suffered extensive destruction caused by natural disasters. The responsibility to rebuild coincides with the U.N. Declaration on the Right to Development (“Right to Development”):

[A]n inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.<sup>166</sup>

The Right to Development imposes on all Member States the duty to improve the well-being of their populations, by ensuring “access to basic resources, education, health services, food, housing, employment, and the fair distribution of income.”<sup>167</sup> The right to development, as it per-

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163. *Id.*

164. THE RESPONSIBILITY TO PROTECT, *supra* note 34, ¶ 5.1.

165. *Id.* ¶ 5.2.

166. Declaration on the Right to Development, G.A. Res. 41/128, art. 1, ¶ 1, U.N. GAOR, Supp. No. 53, U.N. Doc. A/41/53 (Dec. 4, 1986).

167. *Id.* art 2, ¶ 3; art. 8, ¶ 1.

tains to natural disasters, is the responsibility of all States to rebuild disaster-stricken communities by assisting in the post-disaster reconstruction phase and providing essential resources for disaster victims. The earthquake in Pakistan is an example of a natural disaster where all States recognized their responsibility to rebuild.<sup>168</sup>

*i. Pakistan's Earthquake*

On the morning of October 8, 2005, a devastating earthquake, measuring 7.6 on the Richter scale,<sup>169</sup> struck Northern Pakistan, triggering landslides and hundreds of continuous aftershocks.<sup>170</sup> As of November 20, 2005, the earthquake had killed approximately 86,000 people, including more than 17,000 children, most of whom died as a result of being crushed by collapsing concrete roofs of poorly constructed schools;<sup>171</sup> injured over 100,000 people; and caused destruction to infrastructure and housing, leaving an estimated 500,000 families homeless.<sup>172</sup> Immediately after the earthquake, the Pakistani army and aid workers struggled to overcome logistical challenges that led to difficulties providing relief for disaster victims.<sup>173</sup> During the weeks following the earthquake, conditions in Pakistan worsened as the estimated death toll increased and the provided aid to victims remained grossly insufficient.<sup>174</sup>

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168. Although not discussed more fully in this Note, another example of the failure to adhere to the responsibility to rebuild was apparent with the intense criticism that arose over the reconstruction efforts after Hurricane Katrina. While President Bush pledged the federal government's commitment to "stay as long as it takes to help citizens rebuild their communities and their lives," many state and local officials cited several stalled bills and policy changes, including measures to finance hurricane protection, revive small businesses, and compensate uninsured victims, all of which were vital to rebuilding New Orleans and encouraging evacuees to return to the city. James Dao, *Louisiana Sees Faded Urgency in Relief Effort*, N.Y. TIMES, Nov. 22, 2005.

169. Pakistan Earthquake, *Pakistan Earthquake 2005: Recent Earthquake Disaster in Pakistan*, <http://www.earthquake.com.pk/> (last visited Nov. 20, 2005).

170. Somini Sengupta & David Rohde, *Pledges Exceed Goal for Pakistan Quake Aid*, N.Y. TIMES, Nov. 20, 2005, <http://www.nytimes.com/2005/11/20/international/asia/20quake.html>.

171. *Id.*

172. *Id.*

173. OFF. OF THE U.N. HIGH COMMISSIONER FOR REFUGEES [UNHCR], *Pakistan Earthquake*, <http://www.unhcr.ch/cgi-bin/texis/vtx/earthquake?page=intro> (last visited Nov. 20, 2005).

174. *Id.* (noting that the estimated death toll climbed from 10,000-15,000 people on the first day to more than 50,000 people two weeks later. Additionally, funds from the international community, both governments and private organizations, were extremely slow to materialize.). Comparing the relief efforts in Pakistan with that of the Indian Ocean tsunami demonstrate the grossly inadequate international responses to catastrophic natural

In its relief efforts, Pakistan focused on two goals: (1) to provide adequate shelter to the 200,000 people in the high altitude villages, which would be cut off by snow; and (2) to improve the sanitation system of hundreds of refugee camps.<sup>175</sup> The U.N. reaffirmed these goals in its relief operation's reconstruction efforts, which involved providing adequate shelter, particularly for those communities in high altitudes, and rebuilding houses to withstand future natural disasters.<sup>176</sup> However, insufficient funding significantly hindered the U.N. relief effort.<sup>177</sup> Because the funding needed to rebuild the earthquake-devastated areas of Pakistan did not reach the requested level, U.N. Secretary General Kofi Annan called upon the entire international community, including governments, the private sector, and individuals, for the relief supplies, resources, and funding needed to adequately rebuild Pakistan's communities.<sup>178</sup>

Along with the U.N. relief effort, the U.N. High Commissioner for Refugees (UNHCR), an organization whose mandate is to assist refugees fleeing war and persecution and is not normally involved in natural disaster relief efforts, was entrusted to manage over 500 camps consisting of nearly 187,000 people.<sup>179</sup> Moreover, the United States, through USAID and the U.S. military, remained committed to providing humanitarian

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disasters. *Quake 'Is UN's Worst Nightmare,'* BBC NEWS, Oct. 20, 2005, [http://www.news.bbc.co.uk/go/pr/fr/-/1/hi/world/south\\_asia/4358902.stm](http://www.news.bbc.co.uk/go/pr/fr/-/1/hi/world/south_asia/4358902.stm) (highlighting that while ninety-two countries provided humanitarian assistance for the Indian Ocean tsunami, only fifteen to twenty countries have responded to the earthquake in Pakistan).

175. Sengupta & Rohde, *supra* note 170.

176. *Urging Greater Generosity, Annan Arrives in Pakistan for Quake Donor Conference*, UN NEWS CENTRE, <http://www.un.org/apps/news/story.asp?NewsID=16592&CR=Pakistan&CR1=quake#> note (last visited Nov. 20, 2005).

177. *Id.* (quoting U.N. Secretary-General Kofi Annan's plea for help, "[w]e need more resources, not just for emergency relief, but also for recovery and reconstruction . . . We are going to do what we tend to call 'recovery plus.' Not just build what was there before, but build in a manner that can withstand . . . if another disaster struck." Further noting that in its latest update, the "UN Office for the Coordination of Humanitarian Affairs (OCHA) reported that the UN's \$550 million flash appeal was still less than thirty percent funded, with only five percent of shelter needs and nine percent of water and sanitation requirements so far met."); Sengupta & Rohde, *supra* note 170 (noting that dangers persisted as the U.N. relief operation remained grossly underfinanced).

178. *Urging Greater Generosity, Annan Arrives in Pakistan for Quake Donor Conference*, *supra* note 176 (quoting U.N. Secretary-General Kofi Annan, "I would expect the world, those with capacity, to be generous and to give, and give willingly and I am not just speaking to governments, I am also speaking to the private sector and individuals who have been generous in other situations. I call on all of them to help us here as well").

179. UNHCR, *UNHCR Reinforces Cold-Weather Supplies in Earthquake Survivor Camps*, UNHCR NEWS STORIES, Dec. 9, 2005, <http://www.unhcr.ch/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=4399a2054>.

assistance to the earthquake-devastated region during both the immediate emergency response phase and long-term reconstruction phase.<sup>180</sup> In a joint news conference with Pakistani Foreign Minister Mian Khurshid Mahmood Kasuri, Secretary of State Condoleezza Rice stated:

[T]he United States will want to support[,] along with the international community[,] the people of Pakistan as they try to rebuild . . . . [S]o as we think about the immediate needs we will also start with the Pakistani Government to look to the future . . . . [O]ur thoughts are with you [the people of Pakistan] . . . in your hour of need . . . . [W]e will be with you not just today, but also tomorrow as you try to rebuild.<sup>181</sup>

The combined actions of Pakistan and the international community of States, through their support of the relief efforts of organizations such as the U.N. and the UNHCR, demonstrate the responsibility of disaster-affected States and the international community of States to work together, beyond the immediate relief phase, to rebuild disaster-devastated regions.

*B. Problem: Authority for the Responsibility to Protect in Natural Disasters*

These past natural disasters have demonstrated a regard among all States for the responsibility to prevent harm to disaster-affected populations, to react to the devastation, and to rebuild destroyed communities.<sup>182</sup> However, the issue remains of finding the basis for this collection of responsibilities under international law. The responsibility to protect is justified as arising from legal obligations, primarily imposed by international treaties and customary international law.<sup>183</sup> Since there are no in-

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180. USAID, *US Continues Massive Humanitarian Response to Pakistan Earthquake*, available at <http://www.usaid.gov/pl/> (last visited Dec. 11, 2005) (noting that USAID has organized nine airlifts of emergency relief supplies consisting of 45,000 blankets, 1,570 winterized tents, plastic sheeting, water purification units, emergency kits, and over 4,800 metric tons of food. The U.S. military has delivered over 2,400 metric tons of relief supplies and evacuated 10,000 casualties.).

181. U.S. DEPT. OF STATE, *U.S. to Provide Additional Help to Pakistan Earthquake Victims*, USINFO, Oct. 12, 2005, <http://usinfo.state.gov/sa/Archive/2005/Oct/12-964090.html>.

182. See discussion *supra* Part III.A.

183. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1116 (1999) (recognizing two main forms of international law: treaty and custom); Coursen-Neff, *supra* note 86, at 693–702 (explaining in depth the two requirements for creating an obligation on States under customary international law: the *opinio juris* requirement—States’ acceptance that a certain rule is obligatory, and the State practice requirement—the general practice of States reflecting that the rule is obligatory); MACALISTER-SMITH, *supra* note 2, at 6 (noting that under the principles of

ternational legal instruments that set forth the obligations of all States regarding natural disasters,<sup>184</sup> it is logical to justify the responsibility to protect under customary international law.

Under customary international law, there must be general agreement among all States to be bound to the responsibility to protect and extensive and uniform State practice of this responsibility.<sup>185</sup> While the international community of States and disaster-affected States, especially during the Indian Ocean tsunami, North Korea's famine, Hurricane Katrina, and Pakistan's earthquake, have demonstrated an interest to be bound to the responsibility to protect,<sup>186</sup> this interest may not rise to the level of a legal duty<sup>187</sup> since State practice of the responsibility to protect victims of natural disasters is likely insufficient under customary international law standards.<sup>188</sup> Thus, justifying the responsibility to protect under customary international law may encounter difficulty meeting the State practice requirement.

#### IV. TOWARDS RECOGNIZING THE RIGHTS OF DISASTER VICTIMS

Within the international community, it has been widely recognized that in the event of a natural disaster, "States have the primary responsibility to protect the people and property on their territory."<sup>189</sup> When a disaster

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international law, international instruments (rules, conventions, declarations, and resolutions), State practice, and international organizations, all of which address disaster relief actions, are relevant to determining "the potential extent of the role of law within global relief policy").

184. See *supra* text accompanying note 90; Coursen-Neff, *supra* note 86, at 704 (noting that "[i]nternational law has progressed to the point where there is recognition of responsibility to disaster victims, but this recognition has not yet become legally binding").

185. North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth.), 1969 I.C.J. 3, 43, ¶¶ 74, 77 (Feb. 20) (stating that the "[t]he frequency, or even habitual character of [State] acts is not in itself enough [to constitute State practice under customary international law]," but that there must also be a sense of legal duty for the acts).

186. See discussion *supra* Part III.A.

187. See *supra* text accompanying note 90.

188. See Coursen-Neff, *supra* note 86, at 697 (noting that current "State practice thus lags behind the developing principle of responsibility to disaster victims").

189. INT'L STRATEGY FOR DISASTER REDUCTION [ISDR], *Hyogo Declaration*, World Conference on Disaster Reduction (Jan. 18–22, 2005), at 2, ¶ 4, available at <http://www.unisdr.org/wcdr/intergover/official-doc/L-docs/Hyogo-declaration-english.pdf>. The goal of the ISDR is to build disaster-resilient communities through increasing public awareness of disaster risk and vulnerability, implementing disaster reduction policies and actions through the commitment of public officials, fostering the creation of partnerships among entities to expand risk reduction networks, and improving scientific knowledge about disaster reduction. ISDR: Mission and Objectives,

initially strikes, the first seventy-two hours are the most critical.<sup>190</sup> During this initial relief phase, the responsibility of disaster-affected States is triggered, as the local and national response—in the form of civilian volunteers, local governments, and non-governmental organizations—provide the most immediately available relief to disaster victims.<sup>191</sup> However, when disaster-affected States are unable or unwilling to provide relief to victims of natural disasters, help from the international community of States is required.<sup>192</sup> Typically, the international community of States responds by unconditionally providing the humanitarian relief needed to protect the livelihoods of disaster victims.<sup>193</sup> This emerging global recognition of the responsibility of all States to provide protection to natural disaster victims implies that these victims have certain rights deserving of protection.

Since it may be problematic to find sufficient State practice of the responsibility to protect natural disaster victims under customary international law standards,<sup>194</sup> recognizing and codifying the rights of disaster victims within international human rights law would impose on all States a legal duty to protect these victims, thus justifying the responsibility to protect.

#### *A. The Relationship Between Human Rights and Natural Disaster Victims*

Acknowledging the applicability of human rights to natural disaster victims would expand the scope of international human rights and reinforce the regime of international human rights law.<sup>195</sup> If natural disaster

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[http://www.unisdr.org/eng/about\\_isdr/isdr-mission-objectives-eng.htm](http://www.unisdr.org/eng/about_isdr/isdr-mission-objectives-eng.htm) (last visited Nov. 25, 2005). The World Conference on Disaster Reduction recognized the achievements of disaster risk reduction practices, assessed the remaining challenges and emerging issues relating to risk reduction, and developed disaster risk reduction objectives. World Conference on Disaster Reduction, <http://www.unisdr.org/wcdr/preparatory-process/why-wcdr.htm> (last visited Nov. 23, 2005).

190. Report on Wilton Park Conference, *The Immediate Response to Disasters: Improving National Aid and International Frameworks* (Sept. 13–16, 2004), available at <http://www.wiltonpark.org.uk/web/papers/pdfs/pdfreports/WP757/WP757.pdf> (noting that “[ninety-eight percent] of victims saved alive after an earthquake are rescued by family members or local responders”).

191. *See id.*

192. *See, e.g., supra* Part III.A.2.

193. *Id.*

194. *See* Coursen-Neff, *supra* note 86, at 704 (noting that political factors, which envelop almost every natural disaster relief operation, may permanently obstruct State practice of international disaster relief from emerging into customary law).

195. Samuels, *supra* note 23, at 250. Arguments for applying human rights law to the area of refugees have also been made. Acknowledging the rights of refugees as human

victims possess rights to protection and all States recognize their legal obligation to protect those rights, then the international response to natural disasters would improve because all States would possess a sense of legal duty to protect the rights of disaster victims regardless of their political concerns.<sup>196</sup> Recognizing and codifying the relationship between human rights and disaster victims would impose on all States a legal responsibility to protect natural disaster victims by: (1) preventing and mitigating adverse effects from disasters; (2) reacting to the needs of disaster victims by unconditionally providing and accepting needed humanitarian assistance; and (3) rebuilding disaster-stricken communities.<sup>197</sup>

### *B. Legal Codification of the Rights of Natural Disaster Victims*

In a General Assembly Resolution entitled *Setting International Standards in the Field of Human Rights* (General Assembly Resolution 41/120), the General Assembly reaffirmed the primary importance of the UDHR, the ICCPR, and the ICESCR to the framework of international human rights.<sup>198</sup> The General Assembly recognized the value of further

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rights would recognize a legal right to asylum, thus strengthening the existing fundamental right to life and liberty and expanding the recognition of the UDHR, the ICCSR, and the ICESCR as applicable to all human beings, including refugees. Henkin, *supra* note 71, at 119. Since applying international human rights law to refugees would strengthen and expand the existing fundamental human rights framework, it logically follows that applying international human rights to natural disaster victims would have the same effect on the international human rights regime.

196. See generally Forsythe, *supra* note 22, at 276–79 (recognizing the political obstacles of international disaster relief and proposing four models of diplomatic approaches to cope with these political problems: (1) model one embraces the principle of State sovereignty and focuses on solving disaster relief problems by “improving traditional diplomacy between nations;” (2) model two is a “laissez-faire vision of international disaster relief that curtails government involvement in society;” (3) model three is a “transnational vision of international disaster relief” that allows intergovernmental and nongovernmental organizations to “act for individuals rather than as instruments of governments;” and (4) model four envisions the drafting of a multilateral “treaty, or legal, conception of international disaster relief” that regulates relief). Under this categorical distinction, the proposed solution in this Note advocates for a combination of certain aspects of models one and four—reinforcing State sovereignty as the responsibility to protect the rights of natural disaster victims and codifying this principle under international law.

197. See Coursen-Neff, *supra* note 86, at 701–02 (explaining that the relationship between human rights and disaster victims would impose three legal obligations on States: (1) “the obligation to assist another in time[s] of natural disaster;” (2) “the obligation to prepare for disaster relief within [their] own territory and to take preventative measures in order to minimize the suffering resulting from natural disasters;” and (3) “the obligation to accept relief for [their] people from other [S]tates after the occurrence of a natural disaster, if [their] own resources are inadequate”).

198. G.A. Res. 41/120, U.N. Doc. A/RES/41/120 (Dec. 4, 1986).

developing the regime of international human rights law by discovering specific areas that call for international action with respect to human rights.<sup>199</sup> Article 4 of General Assembly Resolution 41/120 sets forth guidelines for Member States and the U.N. bodies to follow when proposing new human rights instruments.<sup>200</sup> Under Article 4, to establish a human rights instrument for natural disaster victims, the instrument must meet the following requirements:

1. [b]e consistent with the existing body of international human rights law;
2. [b]e of fundamental character and derive from the inherent dignity and worth of the human person;
3. [b]e sufficiently precise to give rise to identifiable and practicable rights and obligations;
4. [p]rovide, where appropriate, realistic and effective implementation machinery, including reporting systems; [and]
5. [a]ttract broad international support.<sup>201</sup>

The first requirement for establishing a human rights instrument for natural disaster victims is that the proposed rights of disaster victims be consistent with the current international human rights framework.<sup>202</sup> In meeting the first requirement, the UDHR supports principles that are relevant to humanitarian assistance, that: (1) all States should prepare for disasters by taking preventative and precautionary measures to minimize suffering and destruction; (2) disaster-affected States should accept needed and neutral relief aid from the international community of States if their resources are inadequate; and (3) the international community of States and disaster-affected States should assist each other during emergencies.<sup>203</sup> More specifically, Article 25 of the UDHR provides that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>204</sup>

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199. *Id.*

200. *Id.* ¶ 4.

201. *Id.*

202. *Id.* ¶ 4(a).

203. MACALISTER-SMITH, *supra* note 2, at 64.

204. UDHR art. 25(1).

In the event of natural disasters, the UDHR recognizes that all States have a responsibility to protect the victims to ensure their right to humanitarian relief to improve the standard of living.

Along with the UDHR, Article 11 of the ICESCR also encourages the cooperation of all States to promote and ensure the right to humanitarian assistance, stating:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.<sup>205</sup>

It is logical to interpret “continuous improvement of living conditions” and “international cooperation” to mean that all States have a responsibility to work together towards improving the well-being of natural disaster victims. Specifically, this continuous cooperation among disaster-affected States and the international community of States should encompass the continuum of responsibilities outlined in the responsibility to protect.<sup>206</sup> While neither the UDHR nor the ICESCR explicitly mention natural disasters, these covenants are nevertheless applicable to disaster victims because the devastating effects of natural disasters significantly affect the protection of the rights enshrined in these covenants.<sup>207</sup> Therefore, the right of natural disaster victims to receive protection is consistent with the International Bill of Human Rights, thus satisfying the first requirement for establishing a human rights instrument.

The second requirement is that an international human rights instrument pertaining to natural disaster victims “derives from the inherent dignity and worth of the human person.”<sup>208</sup> Natural disasters wreak grave destruction on communities, killing and injuring many people and destroying homes and infrastructure.<sup>209</sup> This suffering is similar to that borne by victims of armed conflict and other gross violations of human rights who also experience death and displacement.<sup>210</sup> Because the suffering of natural disaster victims parallels that of victims deserving of

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205. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 11(1) (Dec. 16, 1966), available at [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm).

206. See discussion *supra* Part III.A.

207. Samuels, *supra* note 23, at 248.

208. G.A. Res. 41/120, *supra* note 198, ¶ 4(b).

209. See, e.g., discussion *supra* Part III.A.

210. See sources cited *supra* note 78 and accompanying text.

humanitarian intervention, it is reasonable to surmise that disaster-affected States' refusal of needed humanitarian assistance for natural disaster victims also "shock[s] the conscience of mankind."<sup>211</sup> Moreover, General Assembly Resolution 45/100 specifically pertains to humanitarian assistance for natural disaster victims and regards neglect of these victims as constituting a "threat to human life and an offence to human dignity."<sup>212</sup> Therefore, affording human rights protections to natural disaster victims satisfies the second requirement because such protection derives from the recognition of their inherent dignity and worth.

The third requirement for establishing an international human rights instrument for natural disaster victims is that the instrument be precise enough to demonstrate "identifiable and practicable rights and obligations."<sup>213</sup> Applying the ICISS' responsibility to protect theory to natural disasters reveals the rights and obligations of all States regarding disaster victims. The responsibility to protect identifies three obligations of disaster-affected States and the international community of States with respect to victims of natural disasters.<sup>214</sup> Thus, under the rationale of the ICISS' theory of the responsibility to protect, the third requirement is met because the responsibility to protect demonstrates "identifiable and practicable rights and obligations"<sup>215</sup> of all States to protect natural disaster victims.

The fourth requirement is that a human rights instrument for natural disaster victims provides "realistic and effective implementation machinery, including reporting systems."<sup>216</sup> The current implementation methods for protecting the human rights of disaster victims exist through international treaties, which establish agreements on ways to implement effective disaster relief operations.<sup>217</sup> One notable international treaty is

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211. Scheffer, *supra* note 31, at 270–71 (arguing that a new definition of humanitarian intervention should encompass responses to natural disasters, such as earthquakes, floods, famine, volcanic eruptions, and man-made disasters because victims of these disasters suffer harms similar to those suffered by victims of oppressive governmental regimes who endure gross human rights abuses).

212. G.A. Res. 45/100, U.N. Doc. A/RES/45/100 (Dec. 14, 1990).

213. G.A. Res. 41/120, *supra* note 198, ¶ 4(c).

214. See discussion *supra* Part III.A.

215. G.A. Res. 41/120, *supra* note 198, ¶ 4(c).

216. *Id.* ¶ 4(d).

217. See generally INTERNATIONAL DISASTER RESPONSE LAWS, *supra* note 78, at 24–39 (noting that the IFRCRC collected and analyzed various international disaster response treaties, which consisted of multilateral and bilateral treaties and U.N. resolutions. These treaties and resolutions addressed a broad range of disaster relief issues, relating to: (1) relationships between requesting and responding States; (2) responsibility and coordination of humanitarian assistance; (3) instructions for emergency relief teams; (4) access of

the Tampere Convention, which came into effect January 8, 2005 after unanimous adoption by seventy-five countries and ratification by thirty countries.<sup>218</sup> The formation of the Tampere Convention resulted from the recognition of national regulations that hinder the import of telecommunications equipment, thereby causing delay in the provision of relief and ultimately loss of life.<sup>219</sup> Its provisions describe the procedures for effectively deploying telecommunications resources to assist with disaster mitigation and relief operations.<sup>220</sup> The Tampere Convention eases the restrictions imposed on telecommunications assistance by waiving certain regulatory barriers.<sup>221</sup> The implementation of this international treaty recognizes the rights of natural disaster victims by ensuring an effective response from the telecommunications field.<sup>222</sup> Another example is the aforementioned IOTWS program, which is a conglomeration of international agencies and national governments working towards establishing a tsunami warning system in the Indian Ocean.<sup>223</sup> The Tampere Convention and the IOTWS are just some of the methods designed to provide effective protection of disaster victims, which thus demonstrates satisfaction of the fourth requirement.

The final requirement for establishing an international human rights instrument for natural disaster victims is that the instrument attracts "broad international support."<sup>224</sup> With the recent catastrophic natural disasters and the intense international criticism over disaster relief operations,<sup>225</sup> proposing an international human rights instrument for natural disaster victims would garner support from several countries. Furthermore, a report by U.N. Secretary-General Kofi Annan highlights the world's vulnerability to natural disasters and recognizes the need for collective ef-

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disaster relief personnel and equipment; (5) relief goods and customs procedures; (6) status, immunities, and protection of personnel; and (7) costs resulting from disaster relief operations.).

218. Press Release, U.N. Office at Geneva, Tampere Convention: Saving Lives Through Emergency Telecommunications, U.N. Doc. M/05/01 (Jan. 7, 2005).

219. *Id.*

220. *Id.*

221. *Id.* (explaining that the Tampere Convention: (1) waives various regulatory barriers that inhibit the import, coordination, and use of telecommunications equipment; (2) exempts relief agencies from taxation and duties; and (3) grants privileges and immunities to the NGO staff).

222. *Id.* (quoting Jan Egeland, U.N. Emergency Relief Coordinator and Operational Coordinator of the Tampere Convention, "OCHA aims to ensure the best response to disasters to prevent loss of life and help survivors").

223. See discussion *supra* Part III.A.1.i.

224. G.A. Res. 41/120, *supra* note 198, ¶ 4(e).

225. See discussion *supra* Part III.A.

forts to address their devastating effects.<sup>226</sup> Therefore, this last requirement is met because it seems promising that launching a proposal for an international human rights instrument for natural disaster victims would receive extensive international support.

Implementing an international human rights instrument for natural disaster victims requires some sort of legal framework detailing its implications,<sup>227</sup> which would be clarified once all States enter into an international agreement founded upon this principle.<sup>228</sup> The recent catastrophic natural disasters demonstrate the need for an international treaty clarifying the responsibilities of all States regarding natural disasters.<sup>229</sup>

An international disaster relief treaty is not a novel idea, but one that the Convention Establishing an International Relief Union (the Convention) pioneered in the 1930s.<sup>230</sup> The Convention attempted to establish a legal framework for humanitarian assistance to natural disaster victims: the International Relief Union (IRU).<sup>231</sup> The Convention founded the IRU on two principles: respect for territorial sovereignty and non-discrimination in disaster assistance.<sup>232</sup> Members of the Convention appointed an Executive Committee to control and organize relief operations through the services of the International Committee of the Red Cross and the League of Red Cross Societies.<sup>233</sup> Article 2 of the IRU outlined the Convention's mission:

- to furnish first aid, in the form of funds, resources, and assistance, to victims of natural disasters;
- to coordinate the efforts of disaster relief organizations;

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226. *In Larger Freedom*, *supra* note 77, at 21, ¶¶ 65–66.

227. Coursen-Neff, *supra* note 86, at 702 (recognizing that even if the rights of disaster victims were recognized as human rights norms, the implications of such rights on the role of disaster-affected States and the international community of States would remain unclear without a legal framework detailing their implications).

228. *Id.*; see GREEN, *supra* note 20, at 68.

229. *In Larger Freedom*, *supra* note 77, at 49–50, ¶¶ 202–08 (recognizing that events, in particular the Indian Ocean tsunami, have escalated the demands of the international humanitarian response system and demonstrated the need for more predictability in response capacity, funding, and right of access and security for humanitarian relief workers).

230. Forsythe, *supra* note 22, at 286.

231. MACALISTER-SMITH, *supra* note 2, at 18. The League of Nations took up the IRU project in 1922. Forty-three member States attended the Conference for the Creation of an International Relief Union in Geneva and adopted the Convention and Statute of the IRU. Thirty States adhered to the Convention, which became effective on December 27, 1932. *Id.* at 19.

232. *Id.*

233. *Id.* at 19–20.

- to encourage the study of preventative measures against disasters; and
- to induce all people to render mutual international assistance.<sup>234</sup>

The IRU's objectives seemed sensible. Although as a practical matter, it failed to provide the means for supplying relief to disaster victims, which brought about its demise.<sup>235</sup> Later attempts to revive the IRU in the 1940s also failed.<sup>236</sup> Nevertheless, the IRU initiative raised awareness concerning the need for an international legal framework that clarifies the responsibility of all States to provide humanitarian assistance to natural disaster victims.<sup>237</sup>

## V. CONCLUSION

The proposed solution to the issue of providing adequate relief for catastrophic natural disasters attempts to clarify the responsibilities of all States to protect disaster victims.<sup>238</sup> The suggested scheme entails: (1) applying the responsibility to protect to natural disasters; (2) recognizing and codifying the rights of disaster victims within the regime of international human rights law; and (3) establishing an international treaty that imposes on all States the responsibility to protect natural disaster victims.

During the past decade, the world has endured the wrath of natural disasters, which have caused substantial destruction to numerous countries and severe devastation to mass amounts of people.<sup>239</sup> Now is the time to revive the vision originally embarked upon by the IRU.<sup>240</sup> Due to the

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234. CAMILLE GORGÉ, *THE INTERNATIONAL RELIEF UNION: ITS ORIGINS, AIMS, MEANS AND FUTURE* 24–25 (1938).

235. MACALISTER-SMITH, *supra* note 2, at 20–21 (noting that the IRU's failure was due to inadequate funding and its premature expression of universal solidarity aimed at benefiting disaster victims).

236. *Id.* at 95.

237. *Id.* at 20–21 (noting that the creation of the IRU, an organization focused primarily on providing humanitarian assistance for natural disaster victims, raised awareness of the issue of international disaster relief among the international community).

238. Green proposes a noteworthy approach to establish international responsibility (a shared responsibility among States) regarding natural disasters. First, the proposal calls for delegating “the authority and responsibility” of representing the needs of disaster victims “to one [independent] agency,” which must be agreed upon by the international community (State governments and international and private organizations). Second, the proposal emphasizes the need for the international community to establish a formal mechanism that recognizes international responsibility for humanitarian assistance during natural disasters. GREEN, *supra* note 20, at 65–76.

239. *See* discussion *supra* Part III.A.

240. *See* GREEN, *supra* note 20, at 15–17 (noting that while the occurrence of natural disasters has not increased in frequency, but remained relatively stable, the worldwide

emerging principle of the responsibility to protect and the universal recognition of international human rights, an international agreement recognizing how these ideals apply to natural disasters would improve humanitarian assistance. Such an agreement would hopefully obligate all States to defer to their responsibility to protect disaster victims rather than their political agendas, thus de-politicizing international disaster relief. Establishing an international treaty that clarifies the responsibilities of all States to protect natural disaster victims would require a great deal of international diplomacy.<sup>241</sup> Achieving such international cooperation would be difficult to accomplish in the near future.<sup>242</sup> However, increased awareness among all States concerning their responsibility to protect natural disaster victims would improve the imperfect system of international disaster relief in our vulnerable world.

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human cost of natural disasters has gradually escalated, as disasters have become more complex, causing destruction to diverse regions and populations). Green further notes the need to consider natural disasters not as an “isolated” problem, but as a “multidimensional” occurrence that compels different approaches and responses in handling their consequences. *Id.* at 77. In 1989, the General Assembly declared the 1990s to be the International Decade for Natural Disaster Reduction, which was an attempt to “reduce through concerted international action, especially in developing countries, the loss of life, property damage, and social and economic disruption caused by natural disasters” and improve disaster prevention, mitigation, and response. G.A. Res. 236, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/236/Annex (1989); Coursen-Neff, *supra* note 86, at 656, n.42; Levitt, *supra* note 61, at 176 (expressing the imperativeness with which the international community should recognize the responsibility to protect by inquiring, “[h]ow many more millions of people must die before the international community [recognizes the responsibility to protect as] a global imperative?”).

241. McClatchey, *supra* note 64, at 679–80 (noting that scholars have recently begun focusing on the value of international diplomacy, rather than the merits of international law, to reinforce all States to recognize their responsibilities to humanity).

242. *Id.* at 678–79 (recognizing the view that despite the binding force of international law, States will continue to act in their own best interests and not that of their people, especially when matters concerning their sovereignty arise).

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