

2015

Challenges for "Affected States" in Accepting International Disaster Aid: Lessons from Hurricane Katrina

E. Katchka

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Disaster Law Commons](#), and the [International Law Commons](#)

Recommended Citation

E. Katchka, Challenges for "Affected States" in Accepting International Disaster Aid: Lessons from Hurricane Katrina, 48 *Vanderbilt Law Review* 921 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol48/iss4/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Challenges for “Affected States” in Accepting International Disaster Aid: Lessons from Hurricane Katrina

E. Katchka*

ABSTRACT

The International Law Commission (ILC) draft articles on the protection of persons in the event of disasters purport to “facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with respect to their full rights” by setting forth complementary principles governing both individual state responsibilities and international cooperation in disaster response. The principles presented in the draft articles reflect an application of established international law principles as well as current, practical challenges to coordinating international disaster cooperation. This article applies specific ILC draft articles targeting the role of the state impacted by a disaster to the United States’ experience in managing international assistance in the aftermath of Hurricane Katrina. In particular, it highlights the critical responsibility of the national government to take advance, deliberate steps to implement the principles set out in the ILC draft articles—ensuring sufficient legal authorities and protocols and plans for implementing them in a disaster context—if it hopes to effectively maximize the supplemental resources available from the international community to support its domestic response to a catastrophic disaster.

TABLE OF CONTENTS

I.	INTRODUCTION	922
II.	OVERVIEW OF THE UNITED STATES AS AN “AFFECTED STATE”	923

* Counselor to the Chief Counsel, FEMA, Office of Chief Counsel. This Article presents the author’s views. It is not intended to reflect the position of the Federal Emergency Management Agency, nor official U.S. government comment on the ILC draft articles. References to SBU and FOUO materials were approved March 2015.

III.	IS THAT A “YES”? CONSENT OF THE AFFECTED STATE TO EXTERNAL ASSISTANCE (ARTICLE 14)	927
IV.	RECEIVING GOODS FOR HURRICANE KATRINA: THE BALANCING ACT BETWEEN CONDITIONING AND FACILITATING EXTERNAL ASSISTANCE (ARTICLES 15 AND 17).....	930
V.	CONTINUING CHALLENGE: STRIKING THE BALANCE FOR RESPONSE PERSONNEL.....	934
VI.	CONCLUSION.....	939

I. INTRODUCTION

The International Law Commission (ILC) draft articles on the Protection of Persons in the Event of Disasters (ILC draft articles) purport to “facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect for their rights”¹ by setting forth complementary principles governing both individual state responsibilities and international cooperation in disaster response. The ILC draft articles reflect an application of established international law principles, such as those pertaining to sovereignty and humanitarian rights,² as well as recognition of current, practical challenges to the effective coordination of international disaster cooperation. For example, with respect to states³ impacted by a disaster, the draft articles first set out the fundamental role and responsibilities of the sovereign state that are impacted by a disaster in Articles 11 and 12, and then show the inherent practical challenges faced by that state in draft Articles 14, 15, and 17. Specifically, the latter articles set out roles for that state in providing its consent to, conditions on, and facilitation of external assistance it will accept to support its response to those impacted by a disaster.

The draft articles are valid as far as they go, but they serve as flags, rather than solutions, to the practical challenges states must take up. Such an international legal instrument is arguably not the place to prescribe particulars of how states should give practical effect to the principles and goals set out by the articles. Indeed, this is not feasible given the diverse circumstances among states in terms of

1. Int’l Law Comm’n, Rep. on the Work of its Sixty-Sixth Session, U.N. Doc. A/69/10, at 86 (2014), <http://legal.un.org/ilc/reports/2014/2014report.htm> [<http://perma.cc/ZJC7-EPRH>] (archived Sept. 10, 2015).

2. *See id.* at 99–103 (addressing human dignity, human rights, humanitarian principles, and themes of individual rights and sovereignty generally).

3. Unless otherwise noted, the term “state” in this Article refers to the country or nation-state.

their individual existing emergency management legal framework, operational capabilities, degree of centralization in disaster responsibility, and extent of ancillary considerations, such as cultural or humanitarian practices. The commentary to the draft articles acknowledges in multiple contexts the intentional flexibility reflected in the drafting of these provisions.⁴ It is incumbent on each state to determine what actions to take to meaningfully implement the intent of the draft articles based on that state's distinctive national situation—not just arising from an ongoing disaster, but in light of its existing legal and operational framework.

This Article will focus on the challenge of giving meaningful effect to certain ILC draft articles—particularly, the practical relevance of those draft articles that address the role of the state impacted by a disaster in contemplating international assistance in support of its national disaster response. The Article will examine these issues in the context of the U.S. government's experience as the "affected state"—largely drawing on its experience dealing with offers of "external assistance" in the aftermath of Hurricane Katrina—and subsequent U.S. efforts to strategically shape a mechanism that, in effect, balances the principles set out in ILC draft Articles 14, 15, and 17.⁵ The goals of these articles posed the greatest practical implementation challenges to the U.S. government.

II. OVERVIEW OF THE UNITED STATES AS AN "AFFECTED STATE"

In terms of responding to disasters affecting its own territory and people, the United States comes from its own set of circumstances, distinct from those of many other states considering how to apply the ILC articles to their own circumstances. The U.S. experience and domestic legal framework posed both advantages and disadvantages when the United States first considered receiving international assistance in support of its disaster response operations.

First, the United States is fortunate to have a relatively comprehensive and well-established domestic legal and institutional emergency management framework based in the U.S. government's system of federalism. While the U.S. Constitution reserves to the U.S. states the authority and responsibility to protect the public health

4. See, e.g., Int'l Law Comm'n, *supra* note 1, at 128 ("[T]he procedure to identify needs is not predetermined, and it is left to the affected State to follow the most suitable one.")

5. See *id.* at 95 (defining "affected state" as the state with jurisdiction over the persons and property impacted by a disaster and "external assistance" as "relief personnel, equipment and goods, and services" provided by assisting states to the affected state).

and safety of individuals within their territories,⁶ the U.S. government recognized it had a role in supplementing state and local disaster relief efforts throughout the nineteenth and first half of the twentieth centuries.⁷ The first general, standing authority for the federal government to respond to disasters was authorized in 1950.⁸ In the 1970s, the United States secured both the legal and institutional precursors to today's U.S. emergency management structure: Congress enacted comprehensive U.S. emergency management law, which is the basis of the current authority for federal emergency management, the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).⁹ In 1979, the President integrated multiple emergency management-related agencies and offices into a new independent agency dedicated to the federal coordination of emergency management, the Federal Emergency Management Agency (FEMA).¹⁰ These actions established a framework for the federal government to assist and supplement the United States' response capabilities and to generally coordinate federal, state, tribal, and local government roles across the range of emergency management areas: preparedness, hazard mitigation, response, and recovery. Since then, the U.S. government has also developed operational frameworks to clarify and guide response roles and coordination among federal agencies.¹¹ In addition, U.S.

6. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively . . ."); see also *Jacobson v. Massachusetts*, 197 U.S. 11, 25–27 (1905) (concluding that states may establish safeguards to secure public health and safety).

7. See Keith Bea, Congressional Research Service Report, *Transfer of FEMA to the Department of Homeland Security: Issues for Congressional Oversight* at 13 (Dec. 17 2002) (offering examples of how federal disaster relief was provided through ad hoc disaster relief legislation to address specific incidents).

8. See Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109–10 (enacting a federal assistance response to disasters); see also Civil Defense Act of 1950, Pub. L. No. 81-920, 64 Stat. 1245-51 (1951) (enacting a national plan for civil defense measures against attacks on life and property).

9. See Disaster Relief Act of 1970, Pub. L. No. 91-606, 84 Stat. 1744–60 (establishing comprehensive federal disaster relief program); see also *id.* at 143–64 (revising and expanding federal relief programs for major disasters); Robert T. Stafford Disaster Relief and Emergency Assistance (Stafford) Act, Pub. L. No. 100–707, 102 Stat. 4689–4716 (1988) (codified as amended at 42 U.S.C. §§ 5121-5207) (amending Disaster Relief Act of 1974).

10. See Exec. Order No. 12,127, 44 Fed. Reg. 19,367 (Mar. 31, 1979), <http://www.archives.gov/federal-register/codification/executive-order/12148.html> [<http://perma.cc/3RM4-BP4W>] (activating FEMA); Exec. Order No. 12,148, 44 Fed. Reg. 43,239 (July 20, 1979), <http://www.archives.gov/federal-register/codification/executive-order/12148.html> [<http://perma.cc/M6Y5-QW96>] (consolidating disaster relief authorities within FEMA); see also Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135–2321 (incorporating FEMA into the newly created Department of Homeland Security).

11. See, e.g., DEP'T. OF HOMELAND SECURITY, NATIONAL RESPONSE FRAMEWORK 3 (2d ed. 2013) [hereinafter NRF], <http://www.fema.gov/media-library-data/20130726->

government agencies, as well as state and local governments, are—for better or worse—well practiced in implementing these legal and operational authorities in disaster response: in the last fifty years, the U.S. government has provided federal assistance for over 2100 declared major disasters and emergencies, and state and local governments have responded to many more incidents that did not warrant supplemental federal assistance.¹²

The United States also has an elaborate legal framework for regulating the entry and use of goods and people to the United States. About thirty laws regulating medicine, food, agricultural products, and related items are administered by fifteen agencies—with lead oversight by the U.S. Department of Health and Human Services (HHS), Food and Drug Administration (FDA), U.S. Department of Agriculture (USDA), Food Safety Inspection Service (FSIS), and Animal and Plant Health Inspection Service (APHIS).¹³ The U.S. Department of Commerce (DOC), the U.S. Department of Transportation, the National Highway Traffic Safety Administration (NHTSA), and the Environmental Protection Agency have regulatory oversight responsibility for other materials, vehicles, and equipment. Within the U.S. Department of Homeland Security (DHS), Customs and Border Control (CBP) is a lead agency for border management and control, including administration of general customs and entry requirements for both goods and personnel.

In spite of its robust history of disaster response engagement and purposeful establishment of legal and operational frameworks to respond to disasters, the United States is relatively *inexperienced* in accepting and integrating international assistance into its domestic response procedures. It was not until September 2005, when Hurricane Katrina slammed the Gulf Coast and caused massive destruction across five states due to wind, storm surge, dozens of tornadoes, and levee breaches, that the United States was faced with entertaining offers of international disaster assistance. Hurricane

1914-25045-1246/final_national_response_framework_20130501.pdf [http://perma.cc/U K8Q -CNKQ] (archived Oct. 16, 2015) (setting forth respective federal agency response roles and responsibilities); *see also* Fed'l Emergency Mg't Agency, National Response Plan (NRP) (2003) (the predecessor to the NRF governing federal operations at the time of Hurricane Katrina). *See generally* FEMA, <https://www.fema.gov/national-response-framework>. [http://perma.cc/7ACW-QVE7] (archived Sept. 11, 2015) (showing how other national planning frameworks exist to inform federal coordination in particular areas of emergency management).

12. *See* FEMA, DISASTER DECLARATIONS BY YEAR (Feb. 25, 2015), <https://www.fema.gov/disasters/grid/year>. [http://perma.cc/X7R7-9BZN] (archived Sept. 11, 2015) (depicting how many major disaster declarations were made between 1953 and 2015).

13. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-290, HIGH RISK SERIES: AN UPDATE, 262, 268 (Feb. 2015), <http://www.gao.gov/assets/670/668415.pdf> [http://perma.cc/KK6G-5JQL] (archived Sept. 11, 2015) (highlighting the oversight and actions of certain administrative agencies).

Katrina displaced over one million people from their homes and ultimately caused over \$150 billion in damage, prompting more than \$120 billion in federal aid.¹⁴ All told, 151 countries and international organizations offered cash and in-kind assistance, including equipment, food, and other supplies, as well as response personnel and other technical experts.¹⁵ FEMA and the U.S. government at large had no guidance or systems in place to ensure orderly consideration, acceptance, and utilization of such offers for the benefit of persons impacted by the disaster. FEMA, in coordination with the U.S. Department of State (DOS) and the U.S. Agency for International Development/Office of Foreign Disaster Assistance (USAID/OFDA), quickly established ad hoc processes for managing international assistance offers to support the domestic response to Hurricane Katrina.¹⁶ This approach temporarily filled the vacuum in preestablished procedures. It also largely served to highlight that even though the ad hoc approach ostensibly reflected principles now set out for affected states in ILC draft Articles 14, 15 and 17, it was not a sustainable or ideal model for the United States, as an affected state, to manage offers of international assistance effectively.

Consequently, in the wake of the Hurricane Katrina response, DHS/FEMA, DOS, and USAID/OFDA led an interagency effort composed of sixteen federal agencies to develop U.S. legal and operational mechanisms into a practicable system for managing international assistance that would balance operational, political, and public policy interests.¹⁷ The resulting International Assistance System Concept of Operations (IAS CONOPS) was intended to meet the needs of those impacted by the disaster without undue

14. See ALLISON PLYER, *FACTS FOR FEATURES: KATRINA RECOVERY 1-4* (2014) www.datacenterresearch.org [<http://perma.cc/9CCKB-X747>] (detailing the economic impact of Hurricane Katrina).

15. THE WHITE HOUSE, *THE FEDERAL RESPONSE TO HURRICANE KATRINA, CHAPTER FIVE: LESSONS LEARNED* n.90 (2006), <http://georgewbush-whitehouse.archives.gov/reports/katrina-lessons-learned/chapter5.html> [<http://perma.cc/E3ZY-KXW5>] (archived Sept. 11, 2015) (“One hundred fifty-one (151) nations and international organizations offered financial or material assistance to support relief efforts.”).

16. See U.S. GOV'T ACCOUNTABILITY OFF., *GAO-06-460, HURRICANE KATRINA: COMPREHENSIVE POLICIES AND PROCEDURES ARE NEEDED TO ENSURE APPROPRIATE USE OF AND ACCOUNTABILITY FOR INTERNATIONAL ASSISTANCE 3* (2006), <http://www.gao.gov/new.items/d06460.pdf> [<http://perma.cc/J9KT-AXMK>] (archived Sept. 11, 2015) (“The U.S. government had never before received such large amounts of international disaster assistance, and ad hoc procedures were developed to manage the acceptance and distribution of the assistance.”).

17. See Fed. Emergency Mgmt. Agency, U.S. Dep't. of State & U.S. Agency for Int'l Dev., *International Assistance System: Concept of Operations 13-20* (2010) [hereinafter *IAS CONOPS 2010*], <https://www.ifrc.org/docs/idrl/748EN.pdf> [<https://perma.cc/3Z3G-WZYL>] (archived Sept. 11, 2015) (explaining the mechanisms developed to manage international assistance).

operational interference; ensure that the assistance provided was safe, useful, and useable; and provide for timely communications on external assistance needs and offers.¹⁸ This included identifying existing flexibility, discretion, and gaps in the U.S. regulatory and emergency management legal framework and consciously considering how to integrate and apply those authorities in the specific context of coordinating international assistance in support of a federal response to a catastrophic disaster in the United States.

III. IS THAT A "YES"?: CONSENT OF THE AFFECTED STATE TO EXTERNAL ASSISTANCE (ARTICLE 14)

In keeping with basic tenets of national sovereignty, the ILC includes in Article 14 that external assistance requires the consent of the affected state.¹⁹ In addition to international law principles, there are operational reasons why the affected state's consent to international aid is crucial—and as a practical concern, knowing what entity or officials from within the affected state has authority to consent. While it was presumably no state's intent to infringe on U.S. sovereignty when it made generous offers to aid the United States' response efforts for Hurricane Katrina, there were in fact numerous instances of assistance arriving in the United States where U.S. officials were not clear about who, if anyone, had accepted the assistance.²⁰ It is not clear whether Article 14 is intended to reflect a general concurrence by an affected state that it will accept external aid *in principle* for an event or from a particular assisting state offering aid, or whether that consent should extend to each instance of a particular offer. The United States did agree generally to accept international aid for Hurricane Katrina.²¹ But as a practical matter, this general consent is not adequate and can serve to undermine the

18. See *id.* at 7 (detailing the objectives of IAS CONOPS); see also FED. EMERGENCY MGMT. AGENCY, U.S. DEP'T. OF STATE & U.S. AGENCY FOR INT'L DEV., INTERNATIONAL ASSISTANCE SYSTEM CONCEPT OF OPERATIONS (SBU/FOUO) (2009) [hereinafter IAS CONOPS 2009]; FED. EMERGENCY MGMT. AGENCY, INTERNATIONAL ASSISTANCE SYSTEM: CONCEPT OF OPERATIONS (2015) [hereinafter IAS CONOPS 2015], (updating original IAS CONOPS), http://www.fema.gov/media-library-data/1444411200092-5b09869d53801ceb5640c00b2f337e64/2015_IAS_CONOPS_Public_Version_Accessible.pdf [<http://perma.cc/43Q2-VB7X>] (archived Oct. 16, 2015).

19. See Int'l Law Comm'n, *supra* note 1, at 88 ("The provision of external assistance requires the consent of the affected State.").

20. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 4–5 (explaining that a lack of guidance and coordination resulted in certain supplies not being used).

21. See Transcript of Daily Press Briefing at 1, U.S. Dept. of State (2005), <http://2001-2009.state.gov/r/pa/prs/dpb/2005/52402.htm>. [<http://perma.cc/VMX6-JMH4>] (archived Sept. 11, 2015) ("[T]he White House has made it clear that we will accept all offers of foreign assistance.").

effectiveness of the very operational response the external assistance is intended to support if it is not also deliberately made and communicated at a more specific level.

U.S. domestic law requires a federal agency to have express authority to accept gifts or donations from non-federal entities.²² During the Hurricane Katrina response, FEMA had clear authority to accept gifts in furtherance of the disaster relief purposes of the Stafford Act.²³ In addition, DOS and DOD had gift acceptance authority consistent with their missions, but it was not clearly established at the time whether it extended to supporting domestic disaster response efforts.²⁴ Thus, the U.S. government initially discussed incoming offers of assistance through an informal process without a clear basis for accepting offers or clear entity that made the call to consent to an offer, resulting in inconsistent communications of offer acceptance to assisting states and the arrival of goods that were unexpected or unnecessary.²⁵ Conversely, the United States lost opportunities to get needed supplies when, for example, the government of Switzerland withdrew its offer to send relief supplies already loaded on the aircraft; by the time the United States communicated its consent to a portion of the offer nine days after it was made, there was no time to unload and repackage supplies.²⁶ This result may be attributed to the lack of initial procedures detailing how the U.S. government would accept and communicate any consent to the offer, once made, to the offering state. It also highlights the practical importance of the provision of Article 14 requiring an affected state, when possible, to communicate its decision regarding the offer to the one extending the offer.²⁷

22. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-223 (2006), <http://www.gao.gov/special.pubs/d06382sp.pdf> [<http://perma.cc/H39B-D5AA>] (archived Sept. 11, 2015) (establishing that agency acceptance of donations without statutory authority constitutes an unlawful augmentation of federal appropriations).

23. See 42 U.S.C. § 5201(b) (2012) ("In furtherance of the purposes of this Act, the President or his delegate may accept and use bequests, gifts, or donations of service, money, or property, real, personal, or mixed, tangible or intangible.").

24. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 7 (explaining that DOS and DOD have gift authorities, though they may face certain restrictions).

25. See *id.* at 5 (explaining that no system existed to track the assistance provided).

26. See THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: CHAPTER FOUR: A WEEK OF CRISIS n. 189 (2006), <http://georgewbush-whitehouse.archives.gov/reports/katrina-lessons-learned/chapter4.html> [<http://perma.cc/KY3L-4GBQ>] (archived Sept. 12, 2015) (explaining that, due to inadequate management, the generous contributions could not be unloaded and repackaged quickly enough).

27. See Int'l Law Comm'n, *supra* note 1, at 123 ("When an offer of assistance is extended . . . the State shall, whenever possible, make known its decision regarding the offer.").

With respect to the principle of "consent" in Article 14 then, there appeared no intent to usurp the sovereignty of the United States to address the needs of its citizens; the U.S. government had existing legal authority under its national law to accept or "consent" to the goods and services offered; and the U.S. government even had contemplated in its National Response Plan the role of DOS in communicating with other nations on matters related to disasters.²⁸ Yet, without proper advance planning of procedures to determine when and how to consent to contributions from the international community, FEMA risked, on the one hand, foregoing potentially essential resources for addressing a catastrophic response and, on the other, an influx of unexpected and unnecessary goods, complicating logistics efforts and serving as an operational distraction and public relations embarrassment.

Ultimately, in the course of coordinating international assistance for Hurricane Katrina, the interagency team instituted internal procedures for routing incoming offers of assistance from DOS through USAID/OFDA to FEMA to accept. Internally, FEMA issued delegations to clarify which individual officials were authorized to make decisions to accept offers and communicated that to USAID/OFDA and DOS officials.²⁹ After the response effort, the U.S. government institutionalized in the IAS CONOPS clear roles and responsibilities for communications regarding offers and acceptance of international aid, including methods by which FEMA is informed of all offers made, operational and policy considerations for accepting offers, and ways in which the U.S. government communicates with the international community about offers of or needs for external assistance.³⁰ The U.S. government also pre-scripted external messaging to ensure consistent, prompt communication from its missions to other states upon any catastrophic event in the United States—even before offers might be made. Such messaging serves, in the first instance, both to inhibit an uncoordinated influx of offers as well as to offer suggestions for directing immediate aid to non-governmental organizations active in the disaster affected area, and in other instances, this messaging serves to inform offering states of

28. See DEPT OF STATE, NATIONAL RESPONSE PLAN: INTERNATIONAL COORDINATION SUPPORT ANNEX INT-4 (2004), <https://aglearn.usda.gov/customcontent/NRP/assets/SupInternational.pdf> [<https://perma.cc/7B44-F9DU>] (archived Sept. 13, 2015) (explaining DOS's role as a coordinator for foreign assistance).

29. Memorandum from Acting Undersecretary Paulison on Delegation of Gift Acceptance Authority for Hurricane Katrina, to the Dir. of Response, Recovery, and Preparedness, and associated redelegation to designated Response and Recovery Division deputies, designated officials in the National Response Coordination Center officials & Disaster Field Offices (Sept. 16, 2005).

30. See generally IAS CONOPS 2010, *supra* note 17; see also IAS CONOPS 2015, *supra* note 18.

logistics and conditions applicable to offers the United States may accept.³¹ These early communications are intended to quell the confusion that offering countries experienced during Katrina in light of delayed or conflicting communications from the U.S. government, as well as to give the United States the opportunity to assess the operational needs arising from the disaster.

Ideally, these practices prevent the affected state both from arbitrarily consenting, or withholding consent, to external assistance—either of which can jeopardize the effective response to the disaster if inconsistent with the needs of persons impacted. Thus, the affected state must consider in advance how, practically, to implement Article 14's deference to the affected state's consent, limited by its implication that such consent be deliberate and not arbitrary.

IV. RECEIVING GOODS FOR HURRICANE KATRINA: THE BALANCING ACT BETWEEN CONDITIONING AND FACILITATING EXTERNAL ASSISTANCE (ARTICLES 15 AND 17)

The expediency with which disaster assistance is delivered is, of course, critical to meeting the needs of those affected by the disaster. At the same time, an inflow of unanticipated or unnecessary resources can distract from and hinder effective response operations. The tension in the responsibilities of the affected state to manage external assistance smartly to avoid impeding operations while ensuring timely access to that support is inherent in Articles 15 and 17. While the concern also applies to an affected state's acceptance of personnel, the United States' experience in receiving goods in support of Hurricane Katrina illustrates the importance of considered and coordinated implementation of Articles 15 and 17.

The principle that the "needs of the persons affected by disasters" informs to what extent the affected state will exercise its discretion in consenting to external assistance under Article 14 carries over, and is supplemented by consideration for "the quality of assistance," to guide an affected state in establishing "conditions on the provision of external assistance," pursuant to Article 15.³² This article also provides that such conditions shall be made within the parameters of the ILC draft articles, international law, and "the national law of the affected State."³³ Given FEMA's role as the lead

31. See, e.g., IAS CONOPS 2015, *supra* note 18, at 10, 15, 25–26, 40–44 (highlighting the ways and means through which the U.S. government will accept aid offers).

32. Int'l Law Comm'n, *supra* note 1, at 127.

33. *Id.*

federal coordinating agency for disaster response operations, the necessity of conditioning external assistance was likely the most critical lesson it learned with respect to ensuring external assistance would benefit, rather than hinder, effective delivery of disaster response operations to persons affected by Hurricane Katrina.

The greatest logistical and economic cost of the influx of external assistance FEMA received was due to assistance the U.S. government accepted in general terms, without posing specific conditions. For example, the United States received first aid kits with medication and "meals ready to eat" (MRE) with food or alcohol that were unacceptable for general public distribution in the United States because they did not meet federal regulatory requirements.³⁴ The highest profile example was the receipt of about 359,600 MREs that included restricted food items, such as beef from a prohibited source country due to U.S. bans in place at the time to prevent the import of Bovine Spongiform Encephalopathy (BSE), commonly known as "Mad Cow Disease."³⁵ As a result, the U.S. government spent about \$80,000 to store the meals at a private warehouse in Little Rock, Arkansas for up to six months after Hurricane Katrina struck, as it struggled with the practical and political considerations for the disposition of the meals.³⁶ This was on top of time and resource costs spent on the logistics of initially transporting the majority of the meals to distribution sites, only to recall them to the warehouse.³⁷ Had the U.S. government ensured specificity in the "scope and type of assistance" it accepted, as purported by Article 15, it could have utilized significantly more of the incoming goods to benefit Hurricane Katrina survivors.

In the examples of unusable or unnecessary first aid or food, the problem of dealing with the goods often arose in the first place because the United States failed to recognize and timely apply existing regulatory prohibitions to their entry. The flip side of this is that the goods arrived quickly and without initial impediment. This is the essence of the dichotomy of Articles 15 and 17.

Put simply, Article 17 of the ILC draft articles recognizes the critical factor of timing in disaster relief, requiring the affected state to "take the necessary measures, within its national law, to facilitate the prompt and effective provision of external assistance."³⁸ This includes facilitating the entry of both goods and personnel by streamlining, waiving, and making more transparent national regulations or requirements that may impede or serve to

34. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 22–23.

35. *Id.*

36. *Id.*

37. *Id.*

38. Int'l Law Comm'n, *supra* note 1, at 131.

disincentivize timely entry—for example, those governing customs, taxation, and transport of goods, or visas, work permits, privileges and immunities for personnel. In Hurricane Katrina, there were numerous examples of the U.S. government exercising discretion to decrease entry restrictions; in the case of the MREs, FEMA generally accepted these pallets, USAID/OFDA coordinated logistical arrangements of them, and CBP facilitated their entry—but these parties all did so without first coordinating with USDA and FDA on regulatory restrictions.³⁹ It was not clear which agency engaged in accepting or receiving the goods was responsible for first clearing the items or identifying appropriate conditions for them based on safety regulations. Facilitating entry of external assistance without conscious consideration of when and how to do so may prove inefficient and costly both for the affected and assisting states.

U.S. domestic law and regulations, as well as FEMA operational experience, had technically pre-identified what equipment, supplies, and consumables were suitable to meet the general needs of U.S. disaster survivors and responders. In addition to this complex safety regulatory system, U.S. law and regulations had numerous provisions providing measures of flexibility in the implementation or enforcement of relevant entry requirements. DOC and CBP have authority to allow importation of vehicles, equipment, and other disaster relief supplies without entry and without payment of duty, taxes or fees.⁴⁰ CBP also has discretion to waive visa requirements and parole personnel for entry into the United States for emergency and humanitarian reasons.⁴¹ The lack of planning and application of these administratively disbursed responsibilities, however, to support a time-sensitive catastrophic disaster response in the United States severely limited their usefulness in guiding U.S. government decisions on accepting offers in the early aftermath of Hurricane Katrina. As the U.S. government experienced during Hurricane Katrina, the midst of a major disaster response effort is not the time to call an interagency meeting with a dozen U.S. government offices to identify the universe of discretionary waivers sprinkled among the agencies, debate which public policy interests are more important, and practically determine how to execute and communicate the discretion. After all, while we want to facilitate entry of external goods and services in the interest of meeting the health and safety needs of disaster survivors, the same regulations that inhibit easy entry, or bar certain foods and medications, exist in the interest of the general health and safety of our citizens.

39. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 16, at 22.

40. 19 U.S.C. § 1318 (2002); 19 U.S.C. § 1322(b) (1984).

41. Immigration and Nationality Act (INA) § 212, 8 U.S.C. §§ 1182(d)(4)–(5)(A) (2012).

After Hurricane Katrina, the interagency group incorporated procedures for timely coordination of the operational and regulatory agencies at the time of a disaster into the IAS CONOPS,⁴² and in the course of its five-year review of the IAS CONOPS, the group proposed that FEMA convene an International Resources Coordination Group when the IAS CONOPS is activated for a disaster and include representatives from pertinent operational and regulatory agencies to ensure that accepted resources are appropriately transported and cleared into the United States.⁴³ The IAS CONOPS incorporated processes for streamlining or waiving entry requirements during disaster response, including spelling out specific information and timeframes to guide operational agencies in providing information about proposed external assistance to pertinent regulatory agencies to obtain timely clearances or instruction for foods and medications, as well as for expedited entry of, for example, foreign response team members.⁴⁴ It also developed internal and evolving reference tools to pre-identify the types and specifications of equipment and supplies likely to be useful and useable to meet operational needs in most any disaster response, and assessed what goods, foods, and medications could be more or less readily integrated into federal disaster response operations. This included consideration of, on the one hand, which items posed minimal logistical constraints to entry into the United States and were culturally appropriate for the disaster affected population and, on the other hand, which items were subject to current restrictions under national law or otherwise faced difficulties for clearing the items for entry into the United States.⁴⁵

The respective objectives of Articles 17 and 15 in facilitating entry and conditioning assistance are at odds, if the affected state does not consider both in a deliberate manner to inform a comprehensive approach to how to facilitate entry of those goods and services that are particularly of the quality and purpose to benefit persons impacted by the disaster. Compared to most other ILC draft

42. See, e.g., IAS CONOPS 2010, *supra* note 17, at 23–24 (listing agency roles and responsibilities); see also IAS CONOPS 2009, *supra* note 18.

43. IAS CONOPS 2015, *supra* note 18, at 9.

44. See IAS CONOPS 2010, *supra* note 17, at 10–11, 14–17, 22–25 (detailing agency roles and responsibilities and the regulation of food, personnel, and transportation); see also IAS CONOPS 2015, *supra* note 18, at App. B-H (detailing internal regulatory coordination references).

45. See IAS CONOPS 2015, *supra* note 18, at 4, 26 (additionally conditioning acceptance of external assistance offers on the assisting state's agreement that FEMA could make any unused supplies available for future U.S. disaster response efforts. While not specifically contemplated by the ILC draft articles, this serves to limit waste or costs associated with return or disposal of goods that ultimately were not needed or used for the specific disaster that the assisting state otherwise intended and reflects Article 15 consideration of managing the scope of external assistance with respect to the needs of the disaster).

articles, the second paragraph of Article 17 more clearly anticipates that a potentially affected state will, in *advance* of a disaster, institute the necessary legal authorities to ensure flexibility during the incident to facilitate external assistance. But, as the United States' experience showed, even if the affected state has a legal framework to guide both conditions on external assistance, as well as flexibility in entry procedures, the state needs to plan ahead specifically for the coordinated disaster application of those authorities if it hopes to achieve the balance between expediency and, in effect, operational control and quality control.

V. CONTINUING CHALLENGE: STRIKING THE BALANCE FOR RESPONSE PERSONNEL

In most cases, the U.S. government was fortunate that its existing national legal and regulatory framework—both in its disaster legal authorities and general welfare provisions of other laws—provided most of the necessary legal and regulatory tools for the United States to ultimately apply them to the disaster assistance context in the form of IAS CONOPS. This will ideally ensure a smooth, “facilitated” entry of goods and personnel suitable to the disaster impacts in the future—and consistent with the intent of the current draft articles’ mandates for affected states both to condition and facilitate external assistance. For the critical asset of first responders, however, existing U.S. legal authorities arguably do not accommodate the need to address that tension between the interests of facilitating assistance and of imposing conditions to maintain, in particular, the “quality” of that assistance.

When a catastrophic disaster strikes, the first hours and days are focused on life-saving efforts of those in the impact area. Timely, unimpeded access to the site for urban search and rescue teams and medical response personnel is essential to preserving as many lives as possible; for example, when a no-notice incident in the United States warrants federal urban search and rescue support, FEMA initially identifies and deploys the closest of twenty-eight domestic task forces to report within twenty-four hours.⁴⁶ But, given the time-sensitive and labor-intensive nature of deploying to, locating, and extricating disaster survivors from extensive debris or earth, the needs from catastrophic or simultaneous large-scale disasters impacting the United States may exceed the capacity of the twenty-eight search and rescue task forces that compose the National Urban Search and Rescue System and other federal search and rescue

46. FEMA Directive 2014-018, US&R Program Directive: Event Resource Selection Process (FEMA Dec. 19, 2014).

assets. As with other personnel, the United States can employ existing flexibilities to expedite entry of international urban search and rescue teams, as well as medical teams or other first response personnel, as summarized in the IAS CONOPS.⁴⁷ The potential need for FEMA to access external assistance from other countries' first response search and rescue and medical personnel in order to save lives in the immediate aftermath of a catastrophic disaster is perhaps the most direct illustration of how Article 17's focus on facilitating aid serves the ILC draft articles' fundamental purpose of protecting persons affected by disasters. Likewise, it is also a critical area in which the affected state must exercise its responsibility carefully to ensure the external assistance will be effective and competent in meeting high-stake health and life-saving needs—that is, the affected state must determine how to condition such assistance, pursuant to Article 15, in consideration of the “need” and “quality” required.

Whereas the U.S. regulatory framework presents a system within which the federal government has express prohibitions and limitations in place to regulate food and drugs, the U.S. federalist system of government complicates national level “quality control” over individual professionals. The federal government generally has no authority for professional licensing and registration. Individual U.S. states license medical professionals for practice within that state's jurisdiction and in accordance with that state's own medical and professional standards.⁴⁸ In-state licensing requirements would not permit a member of a foreign rescue or medical team to obtain an in-state medical license in the hours or days necessary to allow for timely support to a U.S. disaster response effort. To further complicate easy access to medical and other first responders, the exercise of medical or search and rescue services raises liability concerns for the response personnel's actions while performing in the United States.

In the *domestic* context, the U.S. emergency management legal framework has addressed these issues by authorizing the U.S. government to “federalize” members of certain first response teams in support of federal disaster response operations: in the United States,

47. See IAS CONOPS 2015, *supra* note 18, at 45–52 (establishing the procedures for requesting and receiving urban search and rescue teams).

48. UNITED STATES MEDICAL LICENSING EXAMINATION, <http://www.usmle.org/about/> [<http://perma.cc/CQW5-P8MD>] (archived Sept. 11, 2015); see FEDERATION OF STATE MEDICAL BOARDS: DIRECTORY OF STATE MEDICAL & OSTEOPATHIC BOARDS, <http://www.fsmb.org/about-fsmb/directory-hub> [<http://perma.cc/ZAC5-P5HP>] (archived Sept. 11, 2015) (providing links to each U.S. state and territory medical licensure requirements); NATIONAL REGISTRY OF EMERGENCY MEDICAL TECHNICIANS: CERTIFICATION V. LICENSURE, https://www.nremt.org/nremt/about/Legal_Opinion.asp [<https://perma.cc/SKC7-FFDE>] (archived Sept. 11, 2015) (explaining that state licensure also required for EMT practice in a state).

urban search and rescue task forces are community-based, and when needed to support a major disaster response, FEMA activates and deploys one or more of the twenty-eight task forces it has pre-identified as part of the National Urban Search and Rescue System.⁴⁹ The task forces in the System maintain certain standards and, once activated for federal deployment, are under the direction of the federal government and are generally expected to have the protections from tort claims as federal employees.⁵⁰ With respect to health and medical professionals, the National Response Framework, through HHS, uses the National Disaster Medical System (NDMS) as a federally coordinated means to activate and deploy various types of medical teams to provide supplemental federal response capability for disasters.⁵¹ Similar to search and rescue assets, the U.S. government through the NDMS can “federalize” and rapidly deploy pre-identified Disaster Medical Assistance Teams (DMAT).⁵² When NDMS/DMAT personnel licensed in a U.S. state are activated as intermittent federal employees, their licensure and certification are recognized by all states, and the Federal Tort Claims Act protects them from liability in the event of a malpractice claim for actions they took in the course of the federal medical response effort.⁵³ These legal mechanisms do not, however, extend to permit the U.S. government to facilitate access to or address qualification standards of foreign medical and other professionals in the same way. Nor do they address liability considerations with respect to foreign response and medical teams performing services in the United States.

In the case of urban search and rescue teams, there exists a well-established set of international guidelines specifying team technical qualifications, deployment time capability, and a methodology for international coordination: the guidelines of the International Search and Rescue Advisory Group (INSARAG), established in 1991 within the UN framework, provide clear, objective standards the U.S.

49. NATIONAL RESPONSE FRAMEWORK, EMERGENCY SUPPORT FUNCTION (ESF) NO. 9-4: SEARCH AND RESCUE ANNEX (2013), http://www.fema.gov/media-library-data/20130726-1914-25045-1746/final_esf_9_search_and_rescue_annex_201305_01.pdf [<http://perma.cc/T2AN-HEAK>] (archived Sept. 11, 2015).

50. 44 C.F.R. § 208.11 (2009).

51. NATIONAL RESPONSE FRAMEWORK, EMERGENCY SUPPORT FUNCTION NO. 8-4: PUBLIC HEALTH AND MEDICAL SERVICES ANNEX (2013), http://www.fema.gov/media-library-data/20130726-1914-25045-5673/final_esf_8_public_health_medical_20130501.pdf [<http://perma.cc/BXJ4-HRSR>] (archived Sept. 11, 2015).

52. 42 U.S.C. § 300hh-11(c) (2013).

53. See U.S. DEP'T OF HEALTH AND HUMAN SERVS, PUB. HEALTH EMERGENCY: DISASTER MED. ASSISTANCE TEAM, <http://www.phe.gov/preparedness/responders/ndms/teams/pages/dmat.aspx> [<http://perma.cc/93SK-JZB2>] (archived Sept. 11, 2015) (referencing the Federal Tort Claims Act, as amended, 28 U.S.C. § 1346(b)).

government can accept.⁵⁴ Unfortunately, this does not solve our liability and medical licensure issues.⁵⁵

After Hurricane Katrina, the IAS CONOPS acknowledged the possibility of accepting INSARAG-certified urban search and rescue teams, but in the absence of federal law to address liability and medical licensing issues, the IAS CONOPS deferred to the individual U.S. states impacted by a disaster and those states offering external assistance to accept responsibility.⁵⁶ The IAS CONOPS provided that before FEMA would accept foreign medical or response teams, the impacted U.S. states would need to waive or address licensure issues, and DOS would inform a state offering external assistance that the U.S. government could not accept liability for harm to or caused by the foreign response team members.⁵⁷

Liability. In 2011, FEMA and other federal agencies participated in a National Level Exercise to test certain interagency and intergovernmental responses for a catastrophic earthquake in the New Madrid Seismic Zone scenario causing extensive damage across eight states in the southern and midwestern U.S. states.⁵⁸ During the exercise, FEMA requested twenty-four international urban search and rescue teams to supplement the twenty-eight domestic task forces in the national system. Through the post-Katrina IAS CONOPS process, the United States received and accepted offers for teams from twelve EU member states and eleven other states.⁵⁹ Pursuant to the IAS CONOPS, acceptance notifications explained the U.S. condition that the assisting state would need to accept potential tort liability. All but two assisting states rescinded their offers.⁶⁰ In a 2014 exercise further developing the 2011 scenario, modeling indicated that 715,000 buildings would be damaged in the eight-state study region, and about 42,000 search and rescue personnel working

54. See G.A. Res. 57/150, (Dec. 16, 2002) (urging states to take into account the guidelines of INSARAG). The United States was one of 58 countries that sponsored the UN resolution endorsing the INSARAG guidelines.

55. See UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, INTERNATIONAL SEARCH AND RESCUE ADVISORY GROUP: GUIDELINES AND METHODOLOGY 66 (2012), http://www.insarag.org/images/stories/INSARAG_Guidelines-2012_ENG_Read_version.pdf [<http://perma.cc/R47L-24VH>] (archived Sept. 11, 2015) (explaining that teams only include a medical component to meet team needs and, if approved by affected state, to treat entrapped victims).

56. See IAS CONOPS 2015, *supra* note 18, at 42, 46 (noting that in the absence of any specific provision for the United States or affected state to cover such liability, the offering country or organization must acknowledge that the United States cannot provide liability protection).

57. *Id.* at 15.

58. FEDERAL EMERGENCY MANAGEMENT AGENCY, NATIONAL LEVEL EXERCISE 2011 AFTER-ACTION REPORT (Oct. 28, 2011).

59. *Id.*

60. *Id.* at 43.

in 1,500 teams will be required to respond.⁶¹ Based on the 2011 exercise, the United States may not receive the external assistance needed to meet the needs of those impacted by a catastrophic disaster.

Medical qualifications. If the U.S. government sought medical teams to support federal medical response capability, there is currently no international standard or U.S. mechanism for the federal government to accept qualifications for medical professionals. In 2013, a Foreign Medical Team working group, established by the World Health Organization in the aftermath of the significant international medical response to the 2010 Haiti earthquake, completed a draft document setting out minimum standards and classification criteria for foreign medical teams.⁶² Similar in some respects to the INSARAG guidelines, once finalized, this tool may serve to provide a reference for the U.S. government in assessing capability and quality of foreign medical response teams, but it is unclear to what extent it could satisfy U.S. medical licensure and credentialing concerns. In the meantime, while some U.S. state laws provide authority for waiver of their licensing and credentialing requirements in certain emergency circumstances,⁶³ it is uncertain what considerations the states would have in issuing a waiver permitting foreign medical practitioners to practice in that state, or if they are procedurally prepared to implement a waiver during a disaster without delay.

While the United States could likely manage some patchwork of state waivers and mechanisms for coordination to facilitate the entry of foreign medical teams to support the medical needs of persons impacted by a catastrophic disaster in the United States, domestic state and federal legal authorities do not currently provide a means for the United States both to facilitate acceptance (e.g., through state-licensing waivers) while also maintaining national level coordination and quality control, for example, through the NDMS. Since this federal medical response capability is typically activated when the disaster response exceeds state and local capacity, impacted U.S.

61. CENTRAL UNITED STATES EARTHQUAKE CONSORTIUM, CAPSTONE-14 AFTER-ACTION REPORT 15 (July 2014) (citing the model based on MID-AMERICA EARTHQUAKE CENTER, REPORT 09-03: IMPACT OF EARTHQUAKES ON THE CENTRAL USA Vol. 1 (October 2009)).

62. IAN NORTON ET AL., TECHNICAL CRITERIA FOR CLASSIFICATION AND MINIMUM STANDARDS FOR FOREIGN MEDICAL TEAMS (Mar. 2013), <http://www.apednn.org/uploads/ForeignMedTeamsMinimumStandard.pdf> [<http://perma.cc/5GYB-EVKQ>] (archived Sept. 11, 2015).

63. ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICIALS, VOLUNTEER LICENSING, CREDENTIALING, AND PRIVILEGING AND WAIVER AND RECIPROCITY FACT SHEET (2015), <http://www.astho.org/Programs/Preparedness/Public-Health-Emergency-Law/Emergency-Volunteer-Toolkit/Volunteer-Licensing-Credentialing-and-Privileging-and-Waiver-and-Reciprocity/> [<http://perma.cc/5TC8-Q4X6>] (archived Sept. 11, 2015).

states would presumably not be prepared to take on the coordination of foreign medical teams when, in fact, the U.S. government requests foreign teams for a catastrophic disaster that overwhelms its *federal* response capability. In short, to be prepared to respond effectively to a catastrophic disaster, an affected state needs to identify in steady state—before the need arises—processes to address licensing, credentialing, and verification for timely entry of medical and other professionals during the critical early response phase of a disaster.

In this instance, the U.S. legal framework could be improved to ensure that the United States can meet the objectives of ILC draft Articles 15 and 17 in steady state, by instituting clear authority and mechanisms for the *federal* government to verify and accept qualifications of foreign medical professionals (and other technical specialists), and to facilitate the entry of foreign medical teams and professionals deemed qualified, with privileges and immunities as may be appropriate to protect such personnel from suit for actions they take to protect lives under the direction of the U.S. government. The enactment and advance planning for using such legal authority could assure orderly, coordinated U.S. access to competent, external medical assistance should U.S. first responder resources ever prove insufficient to meet the needs of individuals impacted by a catastrophic disaster in the United States.

VI. CONCLUSION

As the U.S. experience in the aftermath of Katrina showed, even the U.S. government, which historically was well practiced in coordinating domestic disaster response operations, struggled to manage external assistance without established, advance protocols and targeted legal authorities in place that specifically contemplated receiving international disaster assistance. The ILC draft articles set forth a brief but comprehensive framework of fundamental principles for states to cooperate in disaster response efforts and can serve as a flexible roadmap for states to consider in strengthening various aspects of their law and practices to fit their unique emergency management legal frameworks and disaster response challenges. States should not underestimate the importance of proactively and deliberately anticipating and addressing at a practical level the legal and operational challenges to international support for a domestic event. Lessons learned and model tools, such as those developed by the International Federation of the Red Cross and Red Crescent Societies, can further assist this effort.⁶⁴ To be prepared to effectively

64. See, e.g., International Federation of the Red Cross and Red Crescent, Guidelines for the domestic facilitation and regulation of international disaster relief

manage external assistance to meet the needs of individuals impacted by a catastrophic disaster, a government must examine its own legal and institutional circumstances and address these issues when in steady state—before it is an “affected state”—through advance development and application of national legal authorities in the specific context of disaster response, as well as related operational procedures.

and initial recovery assistance (IDRL Guidelines), <http://www.ifrc.org/en/what-we-do/idrl/idrl-guidelines/> (last visited Oct. 16, 2015) [<http://perma.cc/3BRL-H69S>] (archived Sept. 11, 2015) (explaining IDLR guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance and adopted by the state parties to the Geneva Conventions in Nov. 30, 2007).