The Use of Military Units and Personnel for International Rescue and Relief Operations: Pertinent Issues Related to the 2011 East Japan Earthquake

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ABSTRACT

This article attempts to examine the challenges and possible prescriptions of operations by foreign military and civil rescue and relief assistance teams, using the 2011 East Japan earthquake as a case study. The article then presents a framework for inter-State military and civil operations in civil rescue and relief assistance. The article particularly examines how military units and personnel have advantages in ground operations, though its use has been under-evaluated in existing inter-State frameworks, including the 2006 Oslo Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, UN-authorized guidelines for military and civil rescue/relief operations. The article then explores possible inter-State and domestic statutory frameworks, covering civil and military operations as prescriptive proposals, on such issues as the entry into and transport of equipment and personnel within the territory, swift duty-free introduction of emergency materials, access to affected areas via airports and seaports, domestic transport, as well as medical qualifications. It also addresses the rules on immunities from the receiving State's domestic laws and regulations.

Introduction

This article examines the challenges and possible prescriptions of operations by foreign military and civil rescue and relief assistance teams, using the 2011 East Japan

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earthquake as a case study. This article then presents a framework for inter-State military and civil operations in civil rescue and relief assistance.

On 11 March 2011, the east coast of the northeast region of Japan was hit by an unprecedented large-scale earthquake. The epicenter was under the seabed off the coast of the Tohoku Region in Northeast Japan.[1] The earthquake brought about a significant number of casualties as well as physical damage to buildings and infrastructure, leading to a total or partial eradication of towns and villages as well as paralysis of lifelines.[2] This damage further caused protracted difficulties in the recovery of agricultural and industrial supply sources.

For rescue operations, the first seventy-two hours is crucial for saving people's lives. To that end, prompt and well-organized operations are a prerequisite and pre-arranged international agreement is important. Immediately after the earthquakes, rescue operations were commenced by Japan's domestic fire and police agencies, supported by the Japan Self-Defense Forces.[3] The initial rescue operations faced difficulties caused by delay in collecting and compiling information on casualties and damage. This was exacerbated by the disruption of electricity, gas, telecommunications, as well as transport links. Rescue and relief operations by domestic agencies encountered obstacles at their initial search and life-saving activities.

The rescue and initial relief operations were supported by the United States forces stationed in Japan, which are settled in Japan's territory under the 1960 Japan-US Status of Forces Agreement.[4] The situation presents a unique example of post-disaster emergency assistance operations by foreign forces stationed in the host State's territory.

The East Japan earthquake demonstrated that in the case of disasters of such scale, military units, both institutionally and practically, can fulfill the need for self-sufficiency and self-containment, without requiring support and resources from local authorities and communities. Rescue teams were required to be equipped with their own transport means as well as fuel and basic living needs, including water, food and sanitary tools. They needed their shelter and camps in affected areas. However, even

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[1] Joint Editorial Committee for the Report on the Great East Japan Earthquake Disaster, *Report on the Great East Japan Earthquake Disasters*, Tokyo, 2014 (Japanese language. Citations are the author's translation.) part 3; Japanese Fire and Disaster Management Agency, *Compiled Records on the East Japan Great Earthquake*, Tokyo, 2013 (Japanese language. The author's translation) Ch. 2, 12.

[2] Japanese Agency *ibid,* Ch. 3.

[3] *Ibid*, Ch. 4.

[4] Agreement under Article VI of the Treaty for Mutual Cooperation and Security between Japan and the United States of America regarding Facilities and Areas and the Status of United States Armed Forces in Japan, 1009 UNTS 365, 19 January 1960 (entered into force 23 June 1960).

military units had difficulties in coordinating and communicating with local agencies. There were cases when foreign military rescue teams sought fuel from local authorities.[5]

Earthquakes of this scale demand self-sufficiency and cost-owning under United Nations General Assembly Resolution 57/150 (2002), as well as the Guidelines for Urban Rescue and Recovery Operations (2004) by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) as an inter-governmental basis for guidance and reference.[6] In applying such guidelines, military units have advantages with their ability to engage in autonomous deployment in affected areas.

There have been debates in judicial cases and academic treatises on the scope and conditions for immunities applied to military troops in foreign territories.[7] Based on judicial decisions and State practice, international law provides at least a certain scope of immunities enjoyed by troops operating in a foreign territory, with the receiving State's consent to the troops' presence therein.[8] The scope has been generally narrowed to non-commercial official duties under current international law.[9]

In most cases, military personnel's permanent or mission-specific stationing in a foreign country is regulated by inter-State legal instruments, such as status-of-forces agreements, which contribute to the clarity of the status and treatment of forces in station.[10] As a recent trend, the clarity of foreign forces' treatment in a foreign territory are also established by bilateral defense cooperation agreements and

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[5] Japanese Agency, above note 1, Ch. 4.

[6] UNGA Res. 57/150, 2012; United Nations, Office for the Coordination of Humanitarian Affairs (OCHA), Field Coordination Support Section, Preparedness-Response, International Search and Rescue Advisory Group, *Guidelines and Methodology*, Geneva, 2012. On disaster relief in general, recent basic documents and reports are UNGA Res. A/RES/69/283, Sendai Framework for Disaster Risk Reduction 2015-2030, New York, 2015; United Nations Office for Disaster Risk Reduction, *Disaster Risk Reduction and Resilience in the 2030 Agenda for Sustainable Development*, New York, 2015; United Nations Economic and Social Council (ECOSOC) Integration Segment, *United Nations International Strategy for Disaster Reduction*, New York, 2014; Tom Mitchell, *Options for including disaster resilience in post-2015 development goals*, Background Note, London, 2012.

[7] See, *e.g.*, John Woodliffe, *The Peacetime Use of Foreign Military Installations under Modern International Law*, Nijhoff, The Hague, 1992; Serge Lazareff, *Status of Military Forces under Current International Law*, Nijhoff, The Hague, 1971.

[8] Supreme Court of the Unites States, *The Exchange v McFaddon,* 7 Cranch 116, 1812; *Coleman v Tennessee*, 97 US 509, 1878.

[9] Woodliffe *ibid*, Ch. 8.

[10] Lazareff, above note 7, Ch. IV.

domestic visiting forces legislation.[11] Such instruments typically provide for the principle of respecting domestic law and regulations; exemption or facilitation of military personnel's entry into the receiving State; special treatment in customs and procedures for goods employed for official duties; the facilitation of movement within a territory; as well as special status and arrangement in the application of criminal and civil procedures to military personnel.[12]

When rescue teams are part of military forces, the challenge will be in screening and selecting immunity rules that apply during natural disaster emergency operations. The emergency nature of deployment will reduce the need for long-term immunities which conventionally presuppose permanent or semi-permanent stationing of forces. Immunities for dependents, as traditionally provided for under the relevant treaties including status-of-forces agreements, may also not be at issue, and the use of domestic facilities and equipment may be less required for emergency rescue units. On the other hand, their emergency operations necessitate exceptional modalities, such as in the entry into and transport of equipment and personnel within the territory, swift duty-free introduction of emergency materials, and access to affected areas via airports and seaports.

With this initial issue-setting, this article examines how military units and personnel have advantages in ground operations, though its use has been under-evaluated in existing inter-State frameworks, including the 2006 Oslo Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, UN-authorized guidelines for military and civil rescue/relief operations.[13] The article will then explore possible inter-State and domestic statutory frameworks, covering civil and military operations as prescriptive proposals, with special attention to the rules on immunities from the receiving State's domestic laws and regulations.

The Practical Use of Military Units and Personnel in Disaster Emergencies

Current Trends

There is an increasing trend of using military units and personnel for humanitarian assistance and disaster relief operations, particularly for rescue and relief activities in

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[11] E.g., Agreement between the Government of Australia and the Government of the French Republic regarding Defence Cooperation and Status of Forces, 14 December 2006, Australian Treaty Series 2009 ATD 18.

[12] *Ibid*, Annex I.

[13] OCHA, *Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief* ("*Oslo Guidelines*") (updated November 2006, Revision 1.1, November 2007).

large-scale disasters.[14] This reflects the capacity and technical abilities of military teams suitably catering to initial rescue activities. Military units in particular have capabilities for tackling dangerous work, including the treatment of hazardous materials accidentally spread in disasters. Such units also have advantages with speed and mobility capacities that are suitable for immediate response to emergencies and life-saving operations.[15] In most cases, particularly when the affected State or regions are located in remote or geographically segregated areas, or have archipelagic features, military rescue teams are the first to arrive in affected areas. This is enabled by military transport capacities, including cargo aircraft for transporting personnel and aid materials, as well as helicopters for rescue and aid material transport operations.[16]

It has been reported that in fragile States, military units are the main, if not initial, responders before civilian units for rescue and relief activities. During the 2010 Haiti earthquake, for instance, peacekeeping operation units were particularly mandated to engage in humanitarian convoy protection and airspace management.[17] In the Pacific region, where islands and reefs widely disperse, military transport and rescue/relief operations are distinctively crucial.[18] In an island country covered by tropical plants, it has been observed that rescue/relief teams are first engaged in cutting fallen coconut trees in order to revive transport routes to affected areas.[19] Military units are also characteristically useful for their self-contained and self-

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[14] UNGA Res. A/66/L.33, 19 December 2011; UNGA Res. A/65/L.45, 10 December 2010. Here, "disaster" mainly means extensive damage and injuries caused by natural events undermining economic and social functions in a broad sense, such as typically earthquakes and tsunami, which require physical rescue and relief operations. The current trend of international practice and discussions formulate "disaster" as covering both natural and technological/industrial damage, including, for instance, cyberattacks and electromagnetic anti-telecommunication pulse explosive devices. See International Law Commission (ILC), Draft Articles on the Protection of Persons in the Event of Disasters, in Report of the International Law Commission, The Work of its Sixty-Eighty Session, ILC Secretariat, 2016.

[15] OCHA, *Guidelines for Civil-Military Coordination in Haiti: Guidelines for the Engagement and Coordination of Humanitarian Actors and Military and Police Actors in Haiti*, Geneva, 2011.

[16] OCHA, Inter Agency Standing Committee (IASC), *Civil Military Coordination during Humanitarian Health Action, Provisional version*, Geneva, 2011: Risk Assessment of Possible Military Involvement in Health Action by Scenario and Typology of Task.

[17] OCHA, *Guidelines Haiti*, above note 15, 1.1.

[18] The Asia Pacific Conference on Military Assistance to Disaster Relief Operations (APC-MADRO), *Asia Pacific Regional Guidelines for the Use of Foreign Military Assets: Natural Disaster Response Operations*, Bangkok, 2015, Background, 3, which states that "there is recognition amongst all these parties that military capacities in Asia Pacific countries are often the first capabilities offered and make a valuable contribution in responding to regional natural disaster emergencies."

[19] Anonymous interview with governmental official (on file with author), Tokyo, 17 August 2017.

sustaining capabilities, without demanding basic subsistence from local supplies, like water, food, fuel and shelters.[20] There are thus no additional cost burdens on the affected host State.

Despite such notable contributions of military units and personnel in the initial stages of a natural disaster, international frameworks and guidelines generally take a restrictive approach to their involvement as a whole. The 2006 Oslo Guidelines on the Use of Foreign Military and Defence Assets in Disaster Relief (revised in 2007) prescribe the principle of "last resort" for military involvement, by virtue of which military units should only be deployed when there is no alternative to civilian organisation.[21] The military teams are limited in duration and scope, minimizing their missions to what is called "indirect operations", meaning transport and infrastructure building.[22] Given this, the crucial role played by military units for initial rescue/relief operations, with their rapid deployment capacities, are quite undervalued. From the beginning, the Oslo Guidelines define "civilian defence organisations" by formulating an open-ended scope, with reference to paragraph 61 of the Additional Protocol to the 1949 Geneva Convention.[23] This demonstrates the linkage made by the guidelines with military rules on operations. The Oslo Guidelines provide a restrictive approach to military and civilian defence organisations as a whole, considering their inclusion of military elements.

It is curious that, on the other hand, the Oslo Guidelines prescribes highly privileged treatment for military personnel, by respecting each sending State's military command. The Guidelines propose privileges and immunities for military personnel at the same level as UN Peacekeeping operations personnel as provided in the UN model rules, roughly equivalent with the level of diplomatic privileges and immunities.[24] This is beyond the level of immunities under established customary international law, or practice widely prevalent on a "diplomatically referable" basis.

Such a minimalist approach to military involvement is also preserved in several United Nations frameworks, with the principle of "last resort" and a provision for a limited time and scope for missions.[25] This reflects an underestimation of the practical role of military units in rescue/relief operations. It may also be derived from

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[20] Joint Editorial Committee, above note 1.

[21] OCHA, Oslo Guidelines, above note 13, para. 26, ii.

[22] *Ibid.*, 32, iv and 38.

[23] *Ibid.*, Introduction, 3.

[24] *Ibid.*, 79 et Annex I; UNGA, Model status-of-forces agreement for peace-keeping operations, Report to the Secretary General, UN Doc. A/45/594, 9 October 1990.

[25] OCHA, *The Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies*, 2003, Revision I, 2006.

the traditional dichotomy between civil and military operations, in favour of their separate treatment.

The origins of "military minimalism" in disaster rescue and relief operations can be traced to the following: first, the traditional legal distinction between war and peace situations affects approaches to military involvement.[26] The law of armed conflict obliges occupying forces to protect the local population by ensuring the delivery of aid materials, for instance.[27] Such rules presuppose military conflicts and hostilities, which are fundamentally different from disaster rescue/relief operations. Second, there is a policy stance that military involvement will lead to intrusion into the host State's sovereignty, since it is contrary to the principles of neutrality and impartiality.[28] Disaster relief operations are conducted on the basis of the consent of the host State, as is the case in most contemporary military operations.[29] Third, there is a perception that the presence of foreign military units make them subject to being targeted by external or internal belligerent entities, thus exposing local populations to the risk of military conflicts.[30]

Possible New Guidelines

Against this backdrop, it can be said that the principles provided under the 2006 Oslo Guidelines, which are the United Nations-authorized guidelines for civil-military disaster relief operations, do not reflect the current need for and practice on the involvement of military units and personnel in disaster rescue/relief operations.[31] While preserving some provisions of the Oslo Guidelines, principles more suitable for current practice can be summarized as follows:

First, foreign military units and personnel shall be engaged pursuant to the consent of the host State. In addition, their operations shall be in accordance with a humanitarian mandate, in line with respecting sovereignty, territorial integrity and political independence. Military units are prohibited from engaging in activities contrary to neutrality and impartiality.

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[26] Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 9th ed., Longman, London, 1992; Ian Brownlie, *Principles of Public International Law*, 4th ed., OUP, 1990.

[27] Jane Barry with Anna Jeffreys, *A Bridge Too Far, Aid Agencies and the Military in Humanitarian Response*, Humanitarian Practice Network, Network HPN Paper, 2002.

[28] OCHA, *Oslo Guidelines*, above note 13, 9, 95.

[29] ILC, above note 13; Sandesh Sivakumaran, "Arbitrary Withholding of Consent to Humanitarian Assistance in Situation of Disaster," *International & Comparative Law Quarterly*, Vol. 64, CUP, p. 501.

[30] David Fisher, "The Law of International Disaster Response: Overview and Ramifications for Military Actors," *International Law Studies,* Vol. 83, XIX.

[31] OCHA, above note 13.

Second, if possible, foreign military units shall coordinate with local rescue/relief teams as well as with third countries' teams. This is practically important in avoiding duplications and inefficiency. Geographical allocations for each operation as well as on-the-spot cooperation in rescue/relief activities should be well-coordinated. Information-sharing among rescue/relief teams on local needs and situations is also crucial, and should be done in a timely manner. Military command within each country's unit shall also be preserved, as an essential prerequisite and basis for discipline and efficiency within the military structure.

Third, self-sufficiency for basic subsistence and conditions shall be ensured by the sending State. Foreign military units should not unnecessarily further strain local resources.

Fourth, foreign units should be, in principle, unarmed, given the humanitarian nature of their operations. They may only carry arms with the consent of the host State, if called for by a deteriorating local security situation and for purposes of self-protection (both the protection of individual personnel and his or her unit), unless there is consent from the host State or a multilateral mandate for wider use of arms, including the protection of the local population.

Whether arms may be used in an emergency to protect local people and third parties is an issue beyond humanitarian assistance and disaster relief. The mandate of local security assurance may be granted by the host State's consent to the foreign military unit. Any such controversy on the scope of a mandate should be settled in reference to the mandate, and in accordance with local laws and regulations and established international practice and standards.

Fifth, foreign military units have a duty to respect local laws and regulation, subject to certain privileges and immunities granted to them under statutory instruments or customary international law. The issue of military immunities should be settled in accordance with existing arrangements between the host and sending States, established customary international law (though its substance may not be sufficiently clear as applied), as well as international practice and standards.

These are only some of the basic principles that can be referred to with respect to the involvement of military personnel in disaster relief operations. If the situation at hand involves armed conflict, explicit observance of neutrality and impartiality should also be adhered to, for example, when disaster relief operations are undertaken in a State where different separatist groups are situated. Table 1 summarizes the principles applicable to military personnel and units engaged in rescue and relief operations in natural disasters in foreign territories.

The Status of Foreign Military Personnel under General International Law

Issues to be Examined

This section examines the status of military units involved in rescue and relief operations during disasters in foreign countries, from the viewpoint of customary international law. This issue was particularly relevant in receiving foreign military rescue and relief operations following the 2011 East Japan earthquake. In that case, several States sent military rescue teams to Japan without being covered by a status of forces agreement.[32]

The dispatch and acceptance of military rescue/relief teams, whether independently or as part of governmental emergency teams, including civilian rescue workers, should be based strictly upon the consent of the affected State.[33] Following that clearance, legal situations leading to the involvement of military units are quite diverse.

First, there are cases where a status of forces agreement had been concluded between the host and sending States, and on that basis, foreign forces are stationed permanently in the territory of the host State.[34] Such forces are swiftly engaged in rescue and relief activities, based upon a request from the host State. This was the case for the United States forces stationed in Japan under the 1960 Japan-US Status of Forces Agreement, which joined in rescue and support activities during the 2011 East Japan Earthquake.[35] Multilateral status of forces agreements, like the 1951 North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA), can also be invoked for humanitarian assistance and disaster relief activities, with the participation of NATO members' forces stationed in other members' territories.[36] Privileges and immunities are granted to military units under such frameworks.

Second, there are cases where a status of forces agreement for a limited scope and objectives may be relied on, and applied *mutatis mutandis* to disaster relief activities. In the 2011 East Japan earthquake, Australian units used military bases in Japan for transporting aid materials. Such military bases were originally dedicated for use under the 1954 Agreement regarding the Status of the United Nations Forces

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[32] Joint Editorial Committee, above note 1.

[33] ILC, above note 14.

[34] Lazareff, above note 7, p. 6; Woodliffe, above note 7, p. 35.

[35] Joint Editorial Committee, above note 1, Fundamental Aspect II.

[36] Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces (NATO/SOFA) (19 June 1951) NATO Basic Documents, Selected Texts, NATO (Brussels, 2016) p. 55.

in Japan, which in the relevant texts are intended to support the forces "which are participating in the United Nations action in Korea."[37]

Third, as seen in recent practice, defense cooperation agreements or visiting forces agreements, which are not specifically undertaken for mutual or collective defense, can be used for disaster rescue and relief activities, by applying status of forces rules under such agreements. Typically, as a model example, the 2004 France/Australia Defense Cooperation Agreement is aimed to be applied to humanitarian assistance and disaster relief purposes, with its annex on the status of forces.[38]

Fourth, there are situations where there are no bilateral or multilateral legal instruments regulating the status of forces, but military units are sent to the affected State in order to engage in rescue operations and the transport of emergency aid materials. There may be cases where non-binding instruments are concluded, such as a memorandum or guidelines, aimed for cooperation in natural disasters and facilitating rescue and relief operations to a certain extent.

Without such agreements or guidelines, however, military units are obliged to refer to customary international law, as far as there is reliable clarity and specificity in areas such as entry and immigration, customs duties and taxes, domestic transport, arms carriage, and civil and criminal jurisdictional allocation.[39] If customary international law is not considered as sufficiently developed and defined, military units will have to resort to *ad hoc* settlement with the host State.

One cannot set up such settlement instantly in the face of large-scale natural disaster emergencies. This was the case for the South Korean unit engaged in aid material transport in the 2011 East Japan earthquake, which had not been covered under a status-of-forces agreement.[40] Military rescue operations by foreign units in the 2004 Indonesian tsunami and the 2015 Nepal earthquake also lacked legal frameworks for the treatment of rescue/relief forces.[41] These circumstances have led to a need for clarification and specification of applicable rules or where applicable, customary international law.

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[37] Agreement regarding the Status of the United Nations Forces in Japan, 10 UNTS 3, 19 February 1954 (entered into force 11 June 1954) Preamble, para. 4.

[38] Australia/France Agreement, above note 11, Annex 1.

[39] Dieter Fleck (ed.), *The Handbook of the Law of Visiting Forces*, OUP, I.

[40] Joint Editorial Committee, above note 1.

[41] IFRC, *Law and Legal Issues in International Disaster Response: A Desk Study*, Geneva, 2007.

State Practice and Cases in Early Periods

Rules on military immunities under customary international law have been distinctively vague and ambiguous.[42] There have been arguments on the conditions and scope for applying domestic laws and regulations to foreign military personnel and units present in a host State, and when they are exempted as privileges and immunities.[43] Rules have been particularly crystallized by synthesizing and interpreting the accumulation of cases, including domestic judicial judgments and inter-governmental arbitration awards. The steady creation of bilateral and multilateral legal instruments on the status of foreign forces stationed permanently in peacetime for mutual or collective defense cooperation, through the First to Second World Wars and after, have also blurred the outer limit of customary international law.[44]

Notable positions have been advanced early on in The Exchange v. McFaddon (the "Schooner Exchange"), decided by the United States Supreme Court in 1812.[45] The Schooner Exchange concerns a French military ship confiscated by a United States private citizen claiming original ownership thereof in the course of transit within the United States territory, based on the consent by the United States authority.[46] The Court held that the warship concerned was exempted from United States jurisdiction, judicial procedures and enforcement.[47]

The judgment famously stated that "a public armed ship … constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by [the sovereign] in national objects," then was exempted from the host State jurisdiction.[48] This is an application of the sovereign immunity doctrine that exempts military forces from a host nation's jurisdiction, based on the need to complete their mission under the sending State's discipline.[49] In such a situation, thus, the jurisdiction of a sending State's court martial applies to its own units, which are exempted from the host State's legal jurisdiction.[50]

This general reasoning for the conclusion was, however, *obiter*, as the immediate scope of the judgment is a warship in transit in a foreign country.

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[42] Fisher, above note 30.
[43] Fleck, above note 39, IV/2.
[44] *Ibid.*, II.
[45] *Schooner Exchange*, above note 8.
[46] *Ibid.*, para. 117.
[47] *Ibid.*, para. 135.
[48] *Ibid.*, para. 144.
[49] *Ibid.*, para. 139.
[50] *Ibid.*, para. 140.

Thereafter, in their respective writings, Oppenheim has claimed that "military immunity is no longer maintained as state practice," while Brownlie stated that "military forces [are] subject to home country (host State) rules and disciplines."[51] This shows a lack of fixed views in that generation of scholastic work. Others highlighted that the judgment was made by a domestic court in a newly emerging State in the nineteenth century.[52]

In handling the incident in the Schooner Exchange, the United States Administration had been in a position to claim diplomatic protection of its citizen's property against France, following the seizure of the ship by a French military brigade on 30 December 1810.[53] It should have been handled on a State-to-State basis, as it concerned military operations by a foreign country. The judgment reflects the United States' hesitation to claim restitution against France, and to initiate as a last resort a counter-attack against the earlier French military action against the United States citizen's property.

The Schooner Exchange also purportedly relied upon consent by the host State for providing immunities to a foreign warship. Exemption from the local jurisdiction was justified by the interpretation of host State consent at the timing of entry, whether explicitly or implicitly, for the sake of the warship's efficient operations as a military unit.[54] If the consent, even implicitly, was well interpreted in such a manner, there was no need for arguing general legal norms. The intention of the host State is a matter of fact, not of law. The judgment, nevertheless, stipulated logic and reasoning based upon general principles, providing a basis for normative consolidation.

One can surmise the reasons advanced for minimizing the precedential value of the Schooner Exchange: first, international legal practitioners tend to hold State sovereignty in high regard, hence a wider scope of military immunities as shown in the case could today be seen as intrusion and intervention into a host State's sovereignty.

Second, since the Schooner Exchange, a more restrictive approach to State immunity has emerged, as in the functional immunity doctrine, by which non-public State activities, such as commercial profit-making engagements, are considered not immune from local jurisdiction.[55]

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[51] Oppenheim's, above note 26, p. 1154; Brownlie, above note 26, p. 369.

[52] Brownlie *ibid.*, e. iii.

[53] *Schooner Exchange*, above note 8, para. 117.

[54] *Ibid.*, para. 137.

[55] Oppenheim's, above note 26, p. 1033.

Third, a distinction has existed between how international law applies in peacetime and wartime situations.[56] Accordingly, in peacetime, military forces are subject to peacetime rules; in situations of armed conflict, *jus in bello* applies.

Finally, there may also be a policy judgement viewing military involvement negatively, with the risk of escalation and security destablization, thus advancing the position that the free hand of military units should be limited.[57]

The rationale of the Schooner Exchange has been frequently referred to in subsequent United States cases, such as Coleman v. Tennessee in 1878 and Sow v. Johnson in 1879.[58] Following Schooner Exchange these judgments upheld military immunities from judicial procedures. The parties in the case concerned the United States Civil War, thus, there might have been rooms for treating them in a war claim context. It may not have been a reasonable treatment if the court had accepted claims against former segregating parties in a single country for their deeds in battles, particularly given the strong need for reconciliation and recommencement at that point in US history.

The 1909 *Casablanca* arbitration award between Germany and France applied the logic of military immunity to deserted consular officials from Germany to France as members of a military organization.[59] This case, in fact, seems to have concerned the application of consular immunity and its scope of application.[60] A 1925 Panama Supreme Court judgement also upheld the immunity of United States military units from local jurisdiction, though it appears to be based on the application of a bilateral treaty granting special treatment to US forces.[61]

Together, these demonstrate the sporadic but steady accumulation of cases favouring military immunities, lend support to the crystallization of customary international law and demonstrates "general principles of law recognized by civilized nations,"[62] although some hesitancy in academic fields may remain. One may argue that a customary international rule has been established in favour of the immunity of military forces at least from enforcement jurisdiction, with respect to the implementation of judicial procedures, or in on-duty or *inter se* cases within a force.

[56] Lazareff, above note 7, p. 6.

[57] Fisher, above note 30.

[58] *Coleman v Tennessee*, above note 8; *Sow v Johnson*, 100 US 158, 1879.

[59] *France v Germany*, the Casablanca Arbitration Award, Permanent Court of Arbitration at the Hague, 22 May 1909, *AJIL* Vol. 3, 1909.

[60] *Ibid.*, para. 1.

[61] Supreme Court of Justice, Republic of Panama, the Republic of Panama against Wilbert L. Schwartzfiger, 11 August 1925.

[62] Statute of the International Court of Justice, 188 UNTS 137, 1945, Art. 36,1,c.

Such immunities concern deeds in the performance of duties as well as those related to the interests of military personnel or property of a sending State.

Immunity from local enforcement jurisdiction is in line with the mainstream construction in international law of State and diplomatic immunities.[63] It is unthinkable for military immunities to be defined as something greater than diplomatic immunities[64] which ensure exemption from enforcement jurisdiction. If one follows the logic of allowing for military immunities for State organs, off-duty deeds may be also exempted from local jurisdiction. The trend has been for cases to be more functionally based. As the Schooner Exchange judgement stated, mission completion is the purpose of immunities, thus extra-duty matters can be well-settled outside the scope of exemptions, by an application of functional immunity to acts in the course of performance of duties.[65]

Current Practice

The reasoning for minimizing the application of military immunities has lost ground in the post-Second World War period, especially with the increasing use of military units for disaster rescue and relief activities. This could be due to a number of reasons: first, State sovereignty will not be intruded upon when consent by the host State is obtained. Thereafter, it can be argued whether the consent is genuine or not, whether it was made by threat or under external pressure by a foreign State, but that is a matter of the application of rules, and not the rules themselves.

Second, neither peacetime military presence nor natural disaster rescue and relief activities are commercial activities under a claim of functional State immunity. These are governmental public activities, so covered under the restrictive State immunity doctrine.[66]

Third, the legal distinction between wartime and peacetime situations is no longer of practical relevance, given the prevalence of peacetime military cooperation based on host States' consent.[67]

Finally, the policy judgement for refraining from military involvement needs rethinking in light of the fact that military forces are engaged in peacetime cooperation, notably for humanitarian assistance and disaster relief. The use of military units for such operations has been gaining ground.

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[63] Vienna Convention on Diplomatic Relations, 500 UNTS 95, 1961, Art. 31,1.

[64] *Ibid*, esp,c.

[65] *Schooner Exchange*, above note 8.

[66] Fleck (ed.), above note 39, I.

[67] Fisher, above note 30.

The above trends have served to expand the reasoning in the Schooner Exchange. In practical terms, the rules of military immunities, namely the exemption of military units and personnel from enforcement jurisdiction for on-duty and *inter se* claims, can be viewed on a "diplomatically referable" basis in diplomatic consultations or public statements. Whether diplomats refer to established international law may vary from case to case, due to the generality of customary rules. This reflects the limits of current practice. In the case of the 2011 East Japan earthquake, military units sent from States without status-of-forces agreements did not claim privileges and immunities by referring to customary international law.[68]

Under current international instruments, military immunities have been well-adopted and formulated following the undertaking of bilateral and collective defense frameworks after the Second World War.[69] In this regard, the 1951 NATO/SOFA provides a basis of standardized patterns of rules for military presence in foreign countries.[70] NATO/SOFA is wholly or partially adopted in no small number of bilateral and regional military cooperation agreements.[71] Even former Warsaw Pact members reportedly adopted similar rules in their agreements.[72] Which provisions in NATO/SOFA precisely reflect customary international law, or its modification and expansion, are difficult to identify due to the ambiguity of customary rules.

NATO/SOFA has allegedly introduced some novel rules departing from customary international law: one is the introduction of "concurrent jurisdiction" by the host and sending States, followed by the allocation of "primary jurisdiction" in criminal cases.

Under the NATO/SOFA framework, on-duty and *inter-se* criminal actions are subject to the jurisdiction of the sending State. This is a logical departure from the strict demarcation of State jurisdictions. Its practical application is, however, not totally different from the pre-NATO/SOFA practice of handling criminal cases for stationed soldiers.[73] It also departs from absolute military immunities and the strict application of territorial sovereignty. Even under a strict distinction of jurisdiction, a sending State may waive its military discipline jurisdiction, allowing a host State's territorial sovereignty to persist, and vice versa.

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[68] Joint Editorial Committee, above note 1.

[69] Fleck (ed.), above note 39, II.

[70] NATO/SOFA, above note 36.

[71] E.g., Japan/US Agreement for Mutual Cooperation and Security, above note 4.

[72] Fleck (ed.), above note 39, IV, which states that 'in respect of criminal jurisdiction, the [Warsaw] Agreements were not dissimilar to their NATO equivalent.'

[73] Lazareff, above note 7, Ch. IV and V.

This is practically analogous to the notion of concurrent jurisdiction shared by the host and the sending States, with the allocation of primary rights for exercising jurisdiction. It appears that political considerations have been taken into account by the drafters in order to cater to possible public resistance against the absolute immunities for foreign soldiers stationed in that State.

On the other hand, civil jurisdiction under NATO/SOFA is anchored on the immunity from a host State's local enforcement jurisdiction in case of on-duty deeds.[74] This may be rooted in customary international law. The framework of civil claims under NATO/SOFA is, in any case, formulated by a practical treatment in favour of efficient and fair process as well as reasonable cost-sharing. It provides mutual waiver for inter-governmental claims as well as substitution for the sending State's personnel by the receiving State, in the case of on-duty actions.[75] The Agreement provides the offer of *ex gratia* payment handled by the host State, in the case of off-duty actions.[76]

NATO/SOFA provides two more specific novel rules from the viewpoint of ambiguous customary rules; first, it sets out clearly the inclusion of civilian components of a sending State's forces within the scope of exemptions and waiver from the application of local laws.[77] This is intended to ensure military immunities by reference to military autonomy and internal discipline, and court-martial proceedings. Civilians are not eligible for court-martial in major countries.[78] The scope has thus been expanded in this case for purposes of the effective fulfilment of missions by stationed forces.

Second, NATO/SOFA allows for civil claims by civil components and locally employed technical staff, having the nationality of the host State, against the host State, if it relates to the interest and property of the sending State's forces.[79] This is a departure from the rules of diplomatic protection under customary international law which provide strict nationality requirements. Traditionally, a national of the host State is not immune from host State jurisdiction, and is not treated under inter-State rules.[80]

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[74] NATO/SOFA, above note 36, Art. 8.

[75] *Ibid.*, 5.

[76] *Ibid.*, 6.b.

[77] *Ibid.*, Art. 7, 3.

[78] Fleck (ed.), above note 39, II, which states that "The [US] Supreme Court [held] that US civilians were not subject to Court Martial jurisdiction in Peacetime."

[79] NATO/SOFA, above note 36, Art. 5, 3.a.

[80] *Ibid.*

Possible Rules for Civil and Military Coordination in Foreign Rescue and Relief Operations

General Considerations

In most cases, foreign rescue and relief operations are conducted by military and civilian personnel in coordination with each other.[81] In some cases, joint civil and military relief teams are formed and act as one body for operations.[82] In most cases, military units first engage in initial rescue operations, immediately after the outbreak of disasters. This is followed by civilian medical teams and aid material transport units. Military cargo aircraft may carry both military rescue personnel and civilian aid workers. Civilian infrastructure reconstruction teams may then join at subsequent phases for relief operations.

It is therefore practically reasonable that both military and civilian personnel are treated equally, in order to promote operational efficiency. Both face the same physical bottlenecks and are subject to the same local rules and regulations.

In the course of rescue operations, rescue teams may also destroy local property by negligence. In such cases, military immunities may exempt military personnel from local civil judicial procedures, while civilian personnel become subject to civil claim procedures initiated by a local property owner. This complicates the situation and may hinder operations. If the temporary nature of rescue teams in the host State is taken to account, military and civilian defendants may be treated jointly if they belong to combined operations. Such an issue can be ideally addressed by inter-governmental settlement between the sending and host States on applicable remedies, for example.[83]

Unlike military units or personnel, for which the scope of military immunities may be established under customary international law, or at least can be identified on a "diplomatically referable basis", civilian rescue and aid workers are not exempt from local judicial procedures. There are also differences between military and civilian personnel in terms of their legal status, command structures and mentality.

At the same time, it appears to be a trend for inter-governmental arrangements to provide that civilian elements in military forces, such as locally-

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[81] Joint Editorial Committee, above note 1.

[82] International Development Centre of Japan, *Comprehensive Review of Assistance from Overseas for the great East Japan Earthquake*, Tokyo, 2014.

[83] UN Model status-of-forces agreement for peace-keeping operations, above note 24, seems on text to apply to military and non-military peace-keeping operations, but such a broad application is not established in international practice. NATO/SOFA, above note 36.

employed civilian technical staff, are covered by the rules for special treatment including exemption from local enforcement jurisdiction.[84] This is a departure, albeit in limited scope, from the traditional military-civil distinction, including the extension of the sending State's jurisdiction to military personnel subject to its court-martial. There have been cases where a limited extent of exemptions are granted to aid experts and workers, like tax exemptions and liability clearance.[85]

It is worth considering legal frameworks that treat civilian aid workers and military personnel in a similar manner in local civil and criminal procedures, especially if they work in a unit or are under the same command. International standard practice may be applied to civilian personnel, including for instance the provision of consular assistance in criminal cases, and in civil cases, mutual waiver for inter-governmental claims, the host State's substitution for the defendant of the sending State, and pre-calculated amounts of compensation for third party claims.[86]

Based upon these rationales and trends, possible rules and guidance for facilitating joint civil and military foreign rescue and relief operations will be explored in the succeeding part of this article. It particularly presupposes large-scale disasters which occur in a State with insufficient capacity for coping with it. It is hoped that the following examination will fill in gaps overlooked by the International Law Commission during its deliberations for Draft Articles on the Protection of Persons in the Event of Disasters, which mainly focus upon foreign civilian rescue and relief operations.[87]

Possible General Rules for Rescue and Relief Operations[88]

Request or Consent

Foreign rescue and relief operations are subject to sovereign consent by a receiving State, unless there are specific exceptions under international law, as in the case of enforcement measures founded on United Nations Security Council resolutions.[89] Thus, it is widely viewed that foreign rescue and relief operations shall be based upon a request by a receiving State, or, as its corollary, an affected State's consent to offers

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[84] NATO/SOFA, *ibid.*, Art. 8.5.g.

[85] Agreement on Technical Cooperation between the Association of Southeast Asia Nations and the Government of Japan, 13 May 2019, Art. VI, See https://www.mofa.go.jp/press/release/press4e_002444.html (all internet references were accessed 23 August 2018).

[86] *Ibid.*, Arts. 7 and 8.

[87] ILC, above note 14.

[88] Bruce Oswald, et al., Documents on the Law of UN Peace Operations, OUP, 2019.

[89] Charter of the United Nations, 1 UNTS VI, 26 June 1945, Ch.VII.

extended by prospective assisting States.[90] This rule follows the principle of sovereignty under established international law.[91]

The practical implications of receiving foreign assistance are also of different dimensions: in most cases of foreign assistance for rescue and relief. An issue can lie in the management and coordination of a large number of offers, or already arriving personnel and materials, especially immediately after the occurrence of natural disasters.[92] At the initial stage, a responsibility assumed by a sovereign State, and due to the immediacy with which response must be provided, an affected State must engage in disaster assessment and assistance coordination, particularly for domestic rescue and relief teams.

In some cases, there is a genuine need for immediate foreign assistance, such as urgent surveillance and rapid rescue operations with the use of radar and censor facilities, or sometimes, highly-trained special operation teams if capacities for such operations are lacking in the affected State. There is even less time and resources for counting and coordinating the distribution of water bottles and blankets, which are still subject to screening when arriving at airports and seaports.

Governmental assistance is normally offered through diplomatic or consular channels, or collective appeals by international organisations. In some cases, such offers are driven by humanitarian and diplomatic motivations by public-minded foreign States.[93] An affected State may well hesitate in flatly refusing such humanitarian offers, which may vicariously result in delays and inefficiency for immediately-required assessment and coordination.

These problems were seen in the 2014 Nepal earthquake, where relevant government officials subsequently pointed out a great deal of uncontrollable offers for rescue and assistance immediately after the outbreak.[94] This phenomenon was present to a lesser extent in the 2011 East Japan earthquake.[95] Based on these, it is evident that a clear manifestation of consent in accepting foreign assistance will be of practical use in order to handle orderly rescue and relief operations.

Another issue in practice pertains to the lack of capable local authorities, in situations where there is virtually no one functioning to coordinate rescue and relief

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[90] ILC, above note 13, para.105; IFRC, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, Geneva, 2007, as a Red Cross instrument for governmental and non-governmental operations, providing general guidance for practitioners. part I, 3; Macalister-Smith, *International Guidelines for Humanitarian Assistance Operation*, Max Planck Institute for Comparative Law and International Law, Heidelberg, 1991, part I.

[91] Brownlie, above note 26, p. 107.

[92] IFRC, *A Desk Study*, above, note 41, 8.1; Sivakumaran, above note 29.

[93] IFRC, *Guidelines*, above note 90, 10.

[94] Anonymous interview with government officials, Malaysia, 15 May 2017 (on file with author).

[95] Centre, above note 82, 2.1.

activities. Natural disasters may destroy central and local administrative functions by depriving a State of necessary human resources and infrastructure. This was the case in the 2011 Haiti earthquake, and even in the 2011 East Japan earthquake, where the destruction of basic infrastructure, including electricity grids and telecommunications, resulted in central governmental coordination not meeting its normal operational capabilities.[96]

Thus, there are cases where legitimately-organized international intervention is required, ideally based upon United Nations Security Council resolutions, or decisions by inter-governmental organisations, either regional or functional, of which the affected State must ideally be a Member State.

There is an issue with respect to non-consent assistance operations without or before authorisation by international organisations, which may be engaged by neighbouring States or States whose nationals are in danger in the affected State.[97] Urgency, on one hand, and procedural back-ups such as subsequent collective endorsement, on the other hand, should be considered in such cases.

Based upon these considerations, possible texts to address the issue are as follows: (a) a State or international organisation may provide rescue and relief assistance when requested by an affected State, or when it consents to offers of assistance by other States or international organisations; and (b) when the administrative functions of an affected State are gravely impeded as a result of disasters, other States or international organisations may extend rescue and relief assistance on the basis of a resolution by the United Nations Security Council or a decision by a relevant international organisation.

Command and Coordination

In the actual deployment of rescue and relief operations, one practical issue, especially at the initial stage, is how to effectively coordinate activities already initiated locally along with rescue and relief activities extended by other States.[98] It would be ideal if rescue and relief operations are subject to a single command structure with centralized capacities and authority for assessment and decision-making.

At the very least, foreign rescue teams need support and advice from local agencies, for on the spot guidance and familiarisation with local conditions and

[96] Disaster Emergency Committee, *Haiti Earthquake Facts and Figures*, London, 2015.

[97] ILC, above note 14, para. 254.

[98] IFRC, *A Desk Study*, above note 41, Ch. 8; IFRC, *Guidelines*, above note 90, part III.

circumstances.[99] Any such governmental assistance team should in principle be subject to its respective command and instructions.

International rules and guidance can provide for or raise awareness on the need for efficient coordination, especially immediately after the outbreak of a natural disaster. When an affected State is severely deprived of its functions as a result thereof, as in the case of the 2011 Haiti earthquake, international organisations or agencies mandated by such organisations may supplement local agencies in coordinating assistance activities.[100] In the case of the Haiti Earthquake, the local headquarters for UN Peacekeeping operations which had been stationed there played a significant role in coordination.[101]

An experimental text proposal for addressing potential issues in rescue and relief operations coordination is as follows: (a) a foreign rescue and relief assistance mission shall coordinate its functions and tasks with the host State's government authorities, and, if possible, with agencies on the ground in charge of disaster response, and (b) when a locally-based agency is unable to plan and manage rescue and relief operations, local headquarters designated by the United Nations Security Council or appropriate international organisations may coordinate rescue and relief operations.

Self-sufficiency and Cost-sharing.

Another issue which can seriously impact practical operations is the allocation of supporting resources and costs between the affected and the assisting States. This is the case in any type of natural disasters especially when the affected State itself is relatively well-resourced and capable of financial disbursement.[102]

The 2011 East Japan earthquake showed that even well-prepared States like Japan could lack adequate resources for large-scale disasters which have significantly destroyed infrastructure and resulted in exponential suffering.[103] Existing international rules and guidance vary as to which parties are responsible for material and financial burdens.[104]

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[99] IFRC, *A Desk Study ibid*, 24; Centre, above note 82, 4.2, 4.3.

[100] Disaster Emergency Committee, above note 96.

[101] OCHA, *Guidelines and Methodology*, above note 6, A4.

[102] IFRC, *A Desk Study*, above note 41, 24.

[103] Centre, above note 82, 2.1.

[104] IFRC, *Analysis of Law in the European Union pertaining to Cross-Border Disaster Relief*, British Institute of International and Comparative Law, 2010, VII; Inter-American Convention to Facilitate Disaster Assistance, 1438 UNTS 245, 16 October 1996, Art. XIV; ASEAN Agreement on Disaster Management and Emergency Response, 26 July 2005, Art. 24, available at http://agreement.

It is submitted that the principle of self-sufficiency and cost-bearing on the part of the assisting State should be provided as a general rule, with varying applications if needed, especially in the context of well-resourced countries. Assistance operations are offered by foreign States with voluntary humanitarian intentions. The affected State is a victim and suffering from unexpected disasters for which no negligence or responsibilities are owed to it. In addition, responsibilities are assumed by the affected State in actual rescue and relief operations under the territoriality principle.

In legal terms, foreign assistance should be complementary to the affected State's own efforts, based upon sovereignty. It would be irrational if the assisting State replaced the local agencies' operations by requesting support and costs, such as water, food, fuel, shelter, transport and language interpreting, which can be assisted by, for instance, the sending State's foreign office experts.

There are cases, in which the assisting State is the sole provider for certain technical skills, such as the ground handling of freight at airports.[105] Costs should also in principle be owed by the assisting State. The affected State may at any time voluntarily offer reimbursement for costs of its own will, depending upon their resources and administrative capacities. Based upon these examinations, possible texts addressing the issue are as follows: (a) the assisting State shall provide, or procure, to a reasonable extent, without impeding the needs of locally affected people, food, water, fuel, shelter, and support services such as translation and on the ground guidance; and (b) the assisting State shall bear the costs of rescue and relief operations conducted by its teams, unless the affected State offers payment or reimbursement for all or part of such costs.

Regulatory Facilitation

Sovereign States' domestic laws and regulations may create impediments to the implementation of assistance operations.[106] There are occasional international rules and guidelines addressing such impediments.[107] It would indeed be irrational for affected States to owe material and financial costs for implementing assistance

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asean.org/media/download/20190702042042.pdf#search=%27ASEAN+Agreement+disaster+management+emergency+response%27.

[105] IFRC, *A Desk Study*, above note 41, Ch. 14.

[106] IFRC, *Guidelines*, above note 90, part V; Yoshi Kodama, "The Implications of International Rescue and Relief Operation for Domestic Regulatory Regimes: Lessons from the 2011 East Japan Earthquake", *Journal of International Humanitarian Action*, Vol. 6:1, 2021.

[107] IFRC, *Model Act for the Facilitation and Regulation*, Geneva, 2013, Ch. VI; IFRC, *A Desk Study*, above note 41, part III.

operations. Thus, the affected State should eliminate regulatory and institutional impediments on payments by the assisting State, at least.

In addressing deregulatory arrangements, the affected State should not be forced to relax or modify its domestic regulations, given the lack of sufficient resources and infrastructure in the aftermath of natural disaster outbreaks in its territory. It will thus be practical to use language such as "should" or "endeavour to" along with modifiers such as "within its residual capacities" or "to a feasible extend," rather than using "shall", which implies strict legal obligations.

Entry and Departure

The prompt and timely arrival of rescue teams is crucial at the initial stage of rescue and relief operations, given the urgent need to save lives. Rescue teams are generally composed of aid workers, rescue dogs, and medical doctors, as well as other supporting members. The teams are transported either by airplanes, ships or land vehicles, thus, pilots or drivers should also be admitted simultaneously.

Therefore, the prompt initiation of rescue operations consists of (1) entry of personnel, (2) entry of rescue dogs, and (3) entry clearance of transport means (airplanes, ships, and land vehicles). The issue of medical qualifications will be discussed later in this section.[108]

On immigration procedures for aid personnel, there are a number of international rules and guidelines stipulating either visa exceptions (requiring passports or identification cards only), or the issuance of special visas.[109] Visa exceptions are traditionally seen in military status-of-forces agreements, which may provide a model template for the entry of civilian assistance workers.[110] Such treatment will facilitate the entry and departure of aid personnel.[111]

In actual urgent situations, however, special visa or identification card requirements are still cumbersome and insufficient, given the need for immediate and rapid life-saving activities. Immigration rules need, on the other hand, the proper control of incoming foreign nationals, preventing the entry of unacceptable categories of persons, such as former criminals, or those who intend to conduct commercial activities while disguised as tourists.

In order to strike a balance between the urgent need for rescue operations and the prevention of illegal entry, the affected State may admit rescue workers and pilots as well as other members of a rescue team on the list of personnel, with names

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[108]Below note 119.

[109]IFRC, *Guidelines*, above note 90, 16; IFRC, *A Desk Study*, above note 41, 10.1.

[110]NATO/SOFA, above note 36, Art. 3.

[111]IFRC, *A Desk Study*, above note 41.

and identification numbers for identifying entrants. Such a list may be provided by the embassy or consular office of the assisting State situated in the affected State. The list may include members of their missions, such as rescue workers, drivers, interpreters, medical doctors, support staff, and so on.

This was the practice in the initial stage of the 2011 East Japan earthquake for purposes of expediting immigration procedures.[112] If the affected State has some concerns, it may request from the assisting State's embassy the provision of passport data and additional information, after the passing of the initial rescue phase, which is normally the first seventy-two hours.

For the entry of transport vehicles like airplanes or ships carrying rescue teams and initial aid materials, diplomatic or consular notice describing the composition of teams can also be relied on. Categories and numbers of airplanes or vehicles may be written and sent from the embassy or the consular office to the affected State's relevant agency or local headquarters for international coordination. Such data may be described as "C-17, registration number: AA1, quantity: two" for instance.

The entry of land vehicles may also entail the issue of car registration and driving licenses, which will be discussed later in this section. These measures for simplification may also be adopted for transit cases where rescue teams briefly stay *en route* to the affected State.[113]

On the entry of rescue dogs, which is crucial for saving people's lives, similar procedural prioritisation can be considered. Without pre-established domestic deregulatory frameworks or inter-governmental arrangements, there could be difficulties in modifying substantive requirements of vaccination and veterinary proofs. There should be room, however, for expediting documentation requirements. For instance, delayed presentation of veterinary certificates through the relevant embassy or consular office may be accepted, as well as the fast-track screening process for rescue dogs' entry at an airport.

The above elements are addressed in the following textual proposal: (a) the affected State should admit, expedite immigration procedures, and facilitate the departure of members of foreign rescue and relief teams and their means of transportation, based upon a list provided by the embassy or consular office of the assisting State indicating the names and identification numbers of such members or means of transportation; (b) the same treatment should be extended by a transit State when such rescue and relief teams or means of transportation have the affected State

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[112] Centre, above note 82.

[113] IFRC, *Model Act*, above note 107, Ch. VIII.

for their destination; and (c) the affected State should expedite procedures for admitting foreign rescue dogs for assistance operations in the affected State.

Aid Materials

In international practice, emergency aid materials are treated with less pecuniary burdens and procedural impediments.[114] A number of international frameworks stipulate the waiver of customs duties, taxes and charges, as well as simplified procedures, as seen in the 1973 Kyoto Convention on customs procedure simplification, the 1990 Istanbul Convention on temporary importation, as well as the 1998 Tampere Convention on telecommunication equipment, as an advanced sectorial arrangement.[115]

One may consider better simplification and acceleration of procedures, given urgent need and lacking administrative capacities following the outbreak of large-scale natural disasters. As in the case for expediting immigration procedures, a list of emergency aid materials with the name of items and quantities can be provided by the embassy or consular office of the assisting State, for admission to fast-tracked customs clearance.

Customs clearance for personal belongings carried by aid workers could also potentially be problematic. Such goods should be handled through *expost* regulations on drugs and other prohibited items, including punitive measures in case of violations. Thus, aid workers carrying arms and drugs should be punished after their entry, taking into account the need to expedite entry procedures for rescue and relief teams. The application of domestic criminal law and regulations will be discussed later in this section.[116]

The bigger issue relates to non-tariff regulatory impediments, especially upon specific items which are subject to heavy regulatory requirements and endorsement processes, such as in the case of food, pharmaceutical products and medical equipment. General directions given should be founded on a balance between regulatory requirements and an urgent need to save lives.

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[114]IFRC, *A Desk Study*, above note 41, Ch. 9.

[115]International Convention on the Simplification and Harmonisation of Customs Procedures, as amended, Customs Cooperation Council, later World Customs Organisation, 1974, revised 1999, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A106025; Convention on Temporary Admission, 817 UNTS 313, 26 June 1990; Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operation, 2296 UNTS 5, 18 June 1998.

[116]Below note 121.

On the issue of standards and cross-border recognitions, there should ideally be internationally-established standards, either legally-binding agreements or recommendatory guidelines in each area. In emergency situations, the assisting State may guarantee the satisfaction of international standards for specific products, thus self-inspection and self-authorisation by the assisting side should be accepted by the recipient State.

Another issue relates to the adaptation of materials to local needs and conditions. Heavy and thick blankets are not suitable for tropical countries. Prescriptions for medicine may also differ, depending on the needs and physical characteristics of local patients. Ideally, draft work for international standards in each area should take care of such different local conditions. If not, demand and supply match-making should be engaged at the initial phase of relief operations between the affected and assisting States. This would not be practical nor timely in an emergency. Thus, inter-governmental pre-arrangements are needed, along with the harmonisation of specifications for aid-related equipment, such as pallet transport at airports.

It is important for the application of regulatory measures to be on a non-discriminatory basis—that is on a most-favoured nation and national treatment basis—which will provide assisting agencies with clear perspectives on the quality and specifications of materials to be imported.

On the basis of these arguments, a possible textual proposal is as follows: (a) the affected State should exempt customs duties, taxes, and charges upon the importation of materials for rescue and relief operations, as well as expedite customs procedures, based upon a list of materials describing their contents and quantities provided by the embassy or the consular office of the assisting State; and (b) the affected State should expedite the importation of materials for rescue and relief operations, in accordance with international standards on a non-discriminatory basis, based upon the list of materials provided by the embassy or the consular office of the assisting State.

Domestic Transport

The use of land vehicles for transporting rescue teams and aid materials is vital for expediting assistance operations with seamless movement and activities. The international community has already established mutual recognition of vehicle registrations and driving licenses, under the 1949 Convention on Road Traffic with a fairly wide scope of contracting parties.[117]

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[117]Convention on Road Traffic, 125 UNTS 3, 19 September1949, Ch. V.

The treaty stipulates the recognition of foreign registration and licenses for "non-commercial" purposes, which should be interpreted as including transport for rescue and relief operations.[118] If such interpretation creates difficulties or ambiguity, one may consider an inter-State framework for applying *mutatis mutandis* the rules under the 1949 Convention on Road Traffic to disaster rescue and relief activities.

A possible textual proposal based upon these considerations is as follows: the affected State should authorize the free access and movement of land vehicles and drivers for rescue and relief operations, in accordance with the Convention on Road Traffic signed in Geneva in 1949.

Medical Qualifications

Rescue and relief operations require medical treatment, including primary life-saving and surgical resuscitation, thus medical doctors as well as supporting personnel should be included in rescue and relief teams. On the other hand, medical professional qualifications are generally subject to most regulated domestic frameworks, given its serious implications upon human lives and security.[119]

Since there is no internationally-established unified qualification system or mutual recognition arrangement for medical professionals, acceptance of foreign doctors in emergency cases is made on a case-to-case basis, depending on which the assisting State is and the scope of activities. The issue is whether to limit such activities to primary life-saving treatments or include surgical operations, and to restrict to the assisting State's own nationals or emigrants. North American customary law allows reference to Samaritan laws for medical professions, mitigating the lack of qualifications for humanitarian urgent needs.[120] It may be difficult to prove that customary international law has analogous established rules.

Based upon these considerations, a possible textual proposal is as follows: the affected State may authorise the qualification of foreign medical doctors for rescue and relief operations, within specified scopes for treatments and patients.

If in the future standardized international medical qualifications are established, the text may be strengthened as follows: the affected State should authorize the qualification of foreign medical doctors for rescue and relief operations, in accordance with international standards, based upon a list of such medical doctors provided by the embassy or the consular office of the assisting State.

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[118] *Ibid.*, Art. 24.

[119] IFRC, *A Desk Study*, above note 41, 10.2.

[120] *Ibid.*, Ch. 13,3.3.

Civil and Criminal Jurisdiction[121]

Aid workers are engaged in dangerous operations, which may cause derivative destruction of local facilities in the course of search operations, as in the case of traffic accidents occurring when a rescue team is in an affected area.[122] Unlike military personnel, civilian aid workers do not benefit from immunities from the host State's domestic laws and regulations.[123]

It will be reasonable for an assisting State to cover costs and risks on behalf of its own aid workers, from the point of view of rational cost allocations between the assisting State and the receiving State.[124] It will also be reasonable to save individual workers from risks of legal liabilities as long as it is not from their willful acts or grave negligence, in order to ensure their motivation for engaging in dangerous operations. One may well consider the waiver of civil liabilities will respect to civilian aid workers. The assisting State will substitute such workers in the course of civil legal procedures for damages and compensation.

Based upon these arguments, a possible textual proposal is as follows: (a) the affected State may exempt foreign rescue and relief workers from civil liabilities which arise from their functions,[125] and (b) the assisting State may substitute its rescue and relief workers in handling claims for civil liabilities raised by a third party.

For military personnel, based upon standardized practice under status of forces and visiting forces agreements, the following formula can be set out, deriving from immunities under customary international law: members of military units shall not be subject to any proceedings for the enforcement of judgements given against

[121]There may be blurring distinction between civil and criminal procedures in legal practical, such as the unifying procedures of civil damages and criminal litigations in some legal systems. Here, the argument follows traditional distinction between civil and criminal procedures, as is seen in NATO/SOFA, above note 36, Arts. 7 et 8; Tampere Convention, above note 112, Art. 5(a); Inter-America Convention, above note 101, Art. XI.

[122]IFRC, *A Desk Study*, above note 41, 3.1.5.

[123]NATO/SOFA, above note 36, Art. 8.5, g; Giulio Bartolini, "Attribution of Conduct and Liability Issues arising from International Relief Missions; Theoretical and Pragmatic Approaches to Guaranteeing Accountability", *Vanderbilt Journal of Transnational Law*, Vol. 48, 2015, p. 1029.

[124]IFRC, *A Desk Study*, above note 41, 24.

[125]This civil liability may be limited by adding, for instance, "in the course of rescue and relief operations," as is seen in status-of-forces agreements. NATO/SOFA, above note 36, Art. 8. It can be also considered to add a caveat, "except for those caused by willful acts or grave negligence," as seen in the Inter-American Convention to Facilitate Disaster Assistance, above note 101, Art. XII, b, and the ASEAN Agreement on Disaster Management and Emergency Response, above note 101, Art. 12.

him or her in the receiving State in a matter arising from rescue and relief operations.[126]

If there is a pre-arranged inter-governmental framework on these matters, the text may be reinforced as follows: (a) the affected State should waive civil liabilities pertaining to foreign rescue and relief workers, arising from their activities during rescue and relief operations, except for those caused by willful acts or grave negligence; and (b) the assisting State should substitute its rescue and relief workers in handling claims for injuries or damages raised by a third party, arising from their activities during rescue and relief operations, except for those caused by willful acts or grave negligence.

On the criminal dimensions, there will be no justification for civil workers to be immune from criminal allegations and a subsequent litigation process in the host State, consistent with territorial sovereignty. As for current customary international law, it will be difficult to prove the existence of progressive rules and practice for exempting civilian rescue and aid personnel from criminal litigation.[127] On the other hand, it will be reasonable to ensure consular access and support for persons suspected of the commission of a crime, as part of consular protection for foreign nationals in the host State.[128]

A general textual proposal can thus be made as follows: the assisting State should have a right of access and assistance, including the provision of legal counsel and translation services, for its rescue and relief workers who are arrested or are in custody for criminal offences under the relevant law and regulations of the receiving State, for activities committed during rescue and relief operations.

For military personnel, the following language can be included, borrowing from the United Nations Law of the Sea Convention[129] on the treatment of warships: "nothing in this instrument affects the immunities of military units and personnel under customary international law."[130]

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[126]NATO/SOFA, *ibid.*, Art. 8, g.

[127]ASEAN Agreement, above note 104; Arab Cooperation Agreement Regulating and Facilitating Relief Operations, Arab League Decision No 39, 3 September1987. *Contre*: Tampere Convention, above note 115, Art. 5; Inter-American Convention, above note 106, Art. XII.

[128]Vienna Convention on Consular Relations, 596 UNTS 261, 24 April 1964, Art. 5 (i). Cf. NATO/SOFA, above note 35, Art. 7, 9.

[129]United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982, Art. 32.

[130]"instrument" here refers to a hypothetical international document like a treaty, an agreement, or, if non-legally binding, guidelines, which incorporate proposed provisions in this section.

Conclusions

Despite the substantial contribution of foreign military units and personnel, especially in the initial rescue operations, in the aftermath of a large-scale natural disaster, international frameworks and guidelines generally take a restrictive approach to their involvement as a whole. The 2006 Oslo Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (revised in 2007) provides the principle of "last resort" for military involvement, by which military units are deployed when there is no alternative to civilian humanitarian organisations.

The origins of "military minimalism" in disaster rescue and relief operations are considered as follows: the traditional legal distinction between war and peace situations; a policy stance that military involvement will lead to intrusion into the host State's sovereignty, contrary to neutrality and impartiality; and a perception that the presence of foreign military units will invite external or internal belligerent entities, thus exposing local populations to the risk of military conflict.

However, these arguments do not reflect the current need for and practice favouring the involvement of military units and personnel in disaster rescue/relief operations. Principles more suitable for the current practice can be summarized as follows: first, foreign military units and personnel shall be engaged on the basis of a host State's consent; second, foreign military units and personnel shall coordinate with local and third countries' rescue/relief teams; third, self-sufficiency for basic subsistence and conditions shall be ensured by the sending State; fourth, foreign units should, in principle, be unarmed, given the humanitarian nature of their operations; and fifth, foreign units are duty-bound to respect local laws and regulations.

Rules on military immunities under customary international law are vague and ambiguous. Rules have crystallized through the synthesis and re-interpretation of cases that have since accumulated, including domestic judgments and inter-governmental arbitration awards. The early national case of the Schooner Exchange decided by the United States Supreme Court in 1812, contained the rationale for the State sovereignty doctrine that exempts military forces from a host nation's jurisdiction, based on the need for completing their missions by applying their own armed forces discipline.

Commentaries since the judgment appear to favour a restrictive application thereof from the viewpoint of respecting sovereignty. This may have been caused by the development of the restrictive approach to State immunity in general, the traditional legal distinction between peacetime and wartime situations, as well as policy judgments to refrain from military involvement overseas. Currently, there is at least a "diplomatically referable basis" in inter-governmental practice, for

upholding the immunity of military forces from enforcement jurisdiction in on-duty or *inter se* cases.

Foreign rescue and relief operations are frequently engaged by military and civilian personnel cooperating with each other. Thus, it is reasonable for both military and civilian personnel to be treated equally to promote operational efficiency and prioritize life-saving in an effective manner. Unlike military units or personnel, however, civilian rescue and aid workers are not exempt from local judicial procedures. It is worth considering legislative frameworks providing for joint rules in treating civilian aid workers in a similar manner as military personnel, as far as practicable, in their treatment before local civil and criminal procedures.

Table 1. Possible Guidelines for Foreign Military Disaster Rescue and Relief Operations.

PRINCIPLES
ONE CONSENT BY THE RECEIVNG STATE In accordance with mandate by the host State, respecting sovereignty, territorial integrity, and political independence: taking care of neutrality and impartiality.
TWO COORDINATION WITH LOCAL OPERATIONS In terms of geographical zoning and information-sharing. Command is reserved for the sending forces.
THREE SELF-SUFFICIENCY FOR BASIC SUBSISTANCE Not affecting local needs and economy. No cost-burden on affected local regions.
FOUR NO ARMS IN PRINCIPLE IF ADMITTED, ONLY FOR SELF-PROTECTION In emergency, protection of third parties, including civilian rescue workers and local inhabitants, in accordance with local laws and regulations as well as international arrangements.
FIVE RESPECT FOR LOCAL LAWS AND REGULATIONS Military immunities in accordance with established international law as well as standard practice.