



GLOBAL HEALTH CENTRE POLICY BRIEF | 2021

**DISASTER PREPAREDNESS AND RESPONSE IN
INTERNATIONAL LAW:
IMPLICATIONS FOR A PROSPECTIVE PANDEMIC TREATY**

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Any views or opinions, errors or omissions in the text are the sole responsibility of the author.

This document was developed as part of the Policy Briefs series under the project on a pandemic treaty at the Global Health Centre, Graduate Institute of International and Development Studies, Geneva. The research project is supported by the Pax sapiens Foundation.

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INTRODUCTION

In the current debate on a prospective legal instrument addressing pandemic preparedness and response (PPR), the linkage to internationally accepted disaster preparedness and response regimes remains underexplored. Meanwhile, a pandemic treaty or other international legal instruments addressing global PPR would have to take into account the vast experiences and lessons stemming from this area. This policy brief therefore seeks to address the said gap by analyzing future pandemic threat from the perspective of International Disaster Response Laws (IDRL). IDRL do not constitute a comprehensive or unified legal framework.¹ Rather, it is an umbrella term for a set of treaties, non-binding UN General Assembly resolutions, declarations, codes, guidelines and protocols covering different areas and aspects of disaster preparedness and response. Although not constituting a dedicated health policy framework per se, it might be of interest in the context of a prospective treaty or other international instrument addressing health emergencies in general and pandemics in particular.

The study is divided into three thematic parts: a) risk reduction, b) mutual assistance and c) relief facilitation. The aforementioned areas have been selected for their relevance to the negotiations of a pandemic treaty or other instruments addressing global PPR. Although the three areas are closely interconnected, we think that they nevertheless deserve a separate analysis due to the type and variety of instruments and mechanisms they are covered by.

DISASTER RISK REDUCTION

Central to this policy area is the Sendai Framework for Disaster Risk Reduction 2015–2030. Although not a legally binding instrument, the Sendai Framework constitutes a widely acknowledged set of principles concerning disaster risk reduction and contains references to disasters in the context of health. It is complemented by the Bangkok Principles for the implementation of the health aspects of the Framework (Bangkok Principles).

The Sendai Framework was adopted at the Third United Nations World Conference on Disaster Risk Reduction, held from 14 to 18 March 2015 in Sendai, Japan. It draws from and replaces the Hyogo Framework for Action (2005–2015). The Sendai Framework has been endorsed by the UN General Assembly in its Resolution 69/283 and it constitutes the most up to date authoritative framework concerning disaster risk reduction.

Although not primarily focused on health issues, the Sendai Framework can still be read as providing a valuable guidance concerning disaster risk reduction in the area of health and could thus prove useful for the purposes of a prospective pandemic instrument negotiations.² The framework explicitly notes the need to strengthen country capacity for disaster risk management for health, the implementation of the International Health Regulations (IHR) and the building of resilient health systems.³

The Sendai Framework aims to achieve “the substantial reduction of disaster risk and losses in lives, livelihoods and health and in the economic, physical, social, cultural and environmental assets of

¹ David Fisher, “Law and Legal Issues in International Disaster Response: A Desk Study” (IFRC, 2007); Victoria Bannon, “International Disaster Response Law and the Commonwealth: Answering the Call to Action,” *Commonwealth Law Bulletin* 34 (2008): 843–57; Huma Haider, “International Legal Frameworks for Humanitarian Action: Topic Guide” (University of Birmingham: GSDRC, 2013), 37–38; Giulio Bartolini, “A Universal Treaty for Disasters? Remarks on the International Law Commission’s Draft Articles on the Protection of Persons in the Event of Disasters,” *International Review of the Red Cross* 99, no. 3 (2017): 1103–37.

² For example, WHO’s Health Emergency and Disaster Risk Management (EDRM) Framework acknowledges the Sendai Framework.

³ Para. 31(e) Sendai Framework.

persons, businesses, communities and countries”. The Framework therefore could be read as offering a comprehensive and inclusive approach to emergency preparedness and response which may also be applicable to pandemics.

According to the Framework, a successful prevention strategy would have to rely on “inclusive economic, structural, legal, social, health, cultural, educational, environmental, technological, political and institutional measures”. The proclaimed aim of reducing the risk of disasters is to protect persons, their property, health, livelihoods and productive assets while respecting human rights, which includes the right to development.⁴ The Framework notes that effective disaster risk reduction requires an all-of-society engagement and partnership, through empowerment and inclusive participation, with special attention paid to people most affected by disasters. COVID-19 has demonstrated the unequal effects of the pandemic, both within communities and internationally; successful risk reduction strategies thus remain essential to sustainable and inclusive development.⁵

We have identified five areas where principles and provisions enshrined in the Sendai Framework could be relevant to a pandemic treaty or similar instrument addressing global PPR.

MULTISTAKEHOLDER COORDINATION

The Sendai Framework envisages the enhancement of vertical and horizontal coordination and organizational structures with clear delineation of responsibilities and authority.⁶ The Framework prescribes for the domestic risk reduction responsibilities to be shared between relevant national authorities, sectors and stakeholders, with responsibilities delineated in accordance with the local system of governance.⁷ In the context of PPR, the need to empower local authorities and stakeholders may be particularly relevant in early detection and prevention of the spread of pathogens.⁸

ADDRESSING VULNERABILITY

According to the Sendai Framework, a multi-hazard approach to disaster risk management should take into account all different dimensions of “vulnerability, capacity, exposure of persons and assets”.⁹ The Framework further underscores that the assessment and mitigation of risk should take into consideration factors such as sex, age, disability and be supported by policies addressing sustainable development, food security, health and safety and climate change.¹⁰ COVID-19 has demonstrated that groups traditionally defined as “vulnerable”¹¹: women, children, persons with disabilities, older persons, indigenous peoples and migrants, have been affected by the crisis in diverse ways. A comprehensive approach to addressing vulnerability and resilience in PPR is needed. The question of vulnerability should not be taken as a binary distinction, but could take into consideration a variety of socio-economic factors and determinants of health.

⁴ Para. 19(c) Sendai Framework.

⁵ Para. 19(h) Sendai Framework.

⁶ Para. 27 Sendai Framework.

⁷ Para. 19(b)&(e) Sendai Framework.

⁸ Para. 19(f) Sendai Framework.

⁹ Para. 23 Sendai Framework.

¹⁰ Para. 19(g)&(h) Sendai Framework.

¹¹ Para. 36 Sendai Framework.

INTERNATIONAL COOPERATION

Another important point raised by the Sendai Framework concerns the capacity of developing countries to implement efficient risk reduction programmes, which can be enhanced by means of international cooperation. The international support could take form of capacity building assistance, provision of resources, training programmes and investment, particularly in the domains of risk modelling, assessment, monitoring and early warning systems.¹² It could also include investment in scientific research, technology transfer on concessional and preferential terms and the sharing of non-sensitive data and of good practices to enable flows of skills, technology and know-how.¹³ In particular, the availability of materials and technologies protected by IP laws may prove essential in ensuring effective preparedness and response towards the ongoing and future public health crises.¹⁴ In the context of PPR, this has been highlighted in the ongoing debate about patent waivers at the WTO. International partnerships and North-South cooperation in particular are crucial to risk reduction strategies, which could also include the area of health.¹⁵ While a successful risk reduction strategy would require investment in capacity building in developing countries, such investment would represent a fraction of the costs of a post-disaster response to a global pandemic.

RECOVERY AND REBUILDING

The principle of “Building Back Better” enshrined in the Sendai Framework reflects the situation that may be faced by drafters of a pandemic treaty or other instruments addressing global PPR. It is important to promote inclusive economic and social recovery and to incorporate disaster risk management mechanisms in the recovery and rehabilitation processes.¹⁶ Besides being public health emergencies, the pandemics also represent social and economic crises that depend on pre-existing structural conditions.¹⁷ Effective disaster risk reduction strategies in the area of health will therefore depend on inclusive social and economic recovery which takes into account the principles mentioned above.

THE HEALTH CONTEXT

As the Sendai Framework is not a legally binding instrument, its success ultimately depends upon implementation by states.¹⁸ The Bangkok Principles provide guidance for the implementation of health-related aspects of the Sendai Framework.¹⁹ The Principles promote systematic integration of health into national disaster risk reduction policies. They stress the importance of a whole-of-government, whole-of-society approach with an important role for vulnerable groups. The Principles advocate for people-centered public and private investment in emergency and disaster risk reduction, including in health facilities and infrastructure. Last but not least, they promote coherence in development of policies, legal frameworks, regulations, and institutional arrangements in relation to disaster risk reduction, health,

¹² Para. 25, 34 & 38 Sendai Framework.

¹³ Para. 25(c)-(i) & 40 Sendai Framework.

¹⁴ Para. 25(h) Sendai Framework.

¹⁵ Para. 38-46 Sendai Framework.

¹⁶ Para. 33 Sendai Framework.

¹⁷ Austin Liu, “The Social and Economic Response to the COVID-19 Pandemic”. Briefing Note. Global Health Centre, The Graduate Institute of International and Development Studies. Published on 18 May 2021. Available at <https://www.graduateinstitute.ch/sites/internet/files/2021-06/noteliuaustin.pdf> Accessed 04.11.2021.

¹⁸ In that regard, see: IFRC, “Guidance on Law and Public Health Emergency Preparedness and Response (Pilot Version)”, 2021.

¹⁹ Bangkok Principles for the implementation of the health aspects of the Sendai Framework for Disaster Risk Reduction 2015-2030.

SDGs, climate change adaptation and other relevant areas. A pandemic treaty would present an opportunity to embrace principles enshrined in the Sendai Framework and its Bangkok Principles in the context of one of the most pressing global health challenges of our days.

MUTUAL ASSISTANCE

Another set of issues pertinent to a pandemic treaty or other instrument addressing global PPR concerns mutual assistance clauses found in multilateral treaties. Mutual assistance clauses tend to involve formal rules on initiation and termination of assistance and provisions concerning the reduction of regulatory barriers. The Nuclear Accidents Convention²⁰ and the Tampere Convention²¹ address the obligations and modalities of provision of mutual assistance in the event of a disaster. Treaty stipulations on the provision of mutual assistance or technical assistance involve formal rules concerning invitation and termination of assistance and reduction of regulatory barriers concerning visas, work permits and customs.²²

The Nuclear Accidents Convention allows parties to request assistance in the event of a nuclear disaster. Art. 2 of the Convention provides that the party requesting assistance shall specify the scope and type of assistance required and provide the assisting party with information necessary to establish whether the request for assistance can be met. The assistance may be bilateral or, if requested, may involve international coordination through the International Atomic Energy Agency (IAEA). Notwithstanding the nature and scope of assistance, Art. 3 of the Convention stipulates that the overall direction, control, co-ordination and supervision of assistance within its territory shall remain the responsibility of the requesting state.

Under the Convention, the assisting state's choice of personnel to supervise the provision of assistance should be consulted and the assistance itself conducted in cooperation with the appropriate authorities of the requesting state. The requesting state shall in turn provide, to the extent of its capabilities, local facilities and service for the proper and effective administration of assistance. It should ensure the protection of personnel, equipment and materials of the assisting state. Such measures are discussed in detail in the next section. According to Art. 11 of the Convention, the requesting state or the assisting party can at any time, after appropriate consultations and by notification in writing, request the termination of assistance.

The Tampere Convention contains similar modalities of provision of telecommunications assistance. The Convention defines "disaster" as: "a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long-term processes".²³ The Convention further defines "health hazard" as a sudden outbreak of an infectious disease, such as an epidemic or pandemic or other event which poses a significant threat to human life or health and which has the potential to trigger a disaster. Art. 4 of the Convention stipulates that a State Party to the Convention may request telecommunication assistance from any other State

²⁰ IAEA Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (1986).

²¹ Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operation (1988).

²² Haider, "International Legal Frameworks for Humanitarian Action: Topic Guide", 37–38; Bannon, "International Disaster Response Law and the Commonwealth: Answering the Call to Action"; David Fisher, "Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: A Comparative Analysis," *International Review of the Red Cross* 89 (2007): 345–72.

²³ Art. 1 Tampere Convention.

Party either directly or through the operational coordinator. The scope and type of assistance required should be specified and the State Party to which the request is directed shall promptly notify the requesting Party whether it will render assistance.

Telecommunications assistance under the Tampere Convention shall be provided with the final consent of the requesting State Party; the Convention does not interfere with the right of a State Party to direct, control, coordinate and supervise such assistance within its territory. The assistance can be terminated at any time by the requesting State Party through a notification in writing, followed by consultations between the Parties to conclude the assistance. Interestingly, the Tampere Convention also envisages situations where the request for assistance may be directed towards non-State entities and international organizations and where the same conditions apply. Finally, when possible and in conformity with their domestic law, State Parties to the Convention shall reduce or remove regulatory barriers to the use of telecommunication resources for disaster mitigation and relief (discussed in more details in the next section on relief facilitation).

It is also worth mentioning other multilateral conventions which include mutual assistance clauses. The Industrial Accidents Convention²⁴ features a mutual assistance provision and includes Annex X which outlines the modalities for provision of assistance. The Prevention of Major Industrial Accidents Convention²⁵ and Chemical Weapons Convention²⁶ also include arrangements for the provision of international assistance, but remain limited in their scope to specific types of disasters or accidents.²⁷

If the pandemic treaty or a similar instrument addressing global PPR were to include a mutual assistance clause, the conventions and definitions mentioned in this section may constitute relevant examples of how such provision(s) could be framed, either in the treaty itself or in possible future protocols and guidelines supplementing the treaty.

RELIEF FACILITATION

In this section, we begin by outlining the measures to reduce or eliminate regulatory barriers for the provision of relief contained in multilateral treaties. Subsequently, we move to address the best practices in the facilitation of relief outlined by the IDRL Guidelines²⁸ issued by the IFCR.²⁹ Finally, we discuss the ILC's³⁰ Articles on the Protection of Persons in the Event of Disaster.

MEASURES TO REDUCE OR REMOVE REGULATORY BARRIERS IN MULTILATERAL TREATIES

Several multilateral conventions address the need to reduce or to remove regulatory barriers for the facilitation of relief. The aforementioned Nuclear Accidents Convention and the Tampere Convention both feature provisions concerning the facilitation of transit and affording personnel of the assisting party the necessary privileges, immunities and exemptions from taxation, duties and other charges.³¹ The ownership of equipment, property and materials provided in the course of assistance should

²⁴ United Nations Economic Commission for Europe's Convention on the Transboundary Effects of Industrial Accidents (1992).

²⁵ International Labour Organization's Convention 147 on Prevention of Major Industrial Accidents (1993).

²⁶ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993).

²⁷ Bannon, "International Disaster Response Law and the Commonwealth: Answering the Call to Action", 846.

²⁸ Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance (2007).

²⁹ The International Federation of Red Cross and Red Crescent Societies.

³⁰ International Law Commission.

³¹ Arts. 8 & 9 Nuclear Accidents Convention; Art. 5 & 9 Tampere Convention.

remain unaffected; they shall be exempted from customs charges and returned upon termination of assistance.³² Other multilateral treaties also address the need to facilitate relief. The 1990 Istanbul Convention on Temporary Admission and the 1999 Kyoto Convention on the Simplification and Harmonization of Customs Procedures both include annexes which address the need to expedite customs clearance for relief consignments.

BEST PRACTICES IN THE FACILITATION OF RELIEF

In the absence of a single comprehensive legal framework for disaster relief, the 30th International Conference of the Red Cross and Red Crescent adopted the IDRL Guidelines. Although not legally binding, the guidelines were deemed necessary to a) cut down red tape which restricts the movement of equipment and people during relief operations and b) to improve quality of measures and coordination with some international providers. To achieve these objectives, the guidelines draw from multiple international instruments, such as the United Nations General Assembly Resolutions 46/182³³ of 1991 and 57/150 of 2002, the Measures to Expedite International Relief of 1977, to provide a framework for best practices in the area of international disaster relief and initial recovery assistance.

The IDRL Guidelines are primarily focused on strengthening the capacity of the affected state to receive relief through provision of minimum legal facilities to the assisting state and international capacity building.³⁴ They attribute primary role to the domestic actors, while international disaster assistance remains complementary to domestic measures.³⁵ The Guidelines advocate for the coordination between national authorities and international providers to be made conditional upon minimum standards of humanity, neutrality and impartiality, as well as minimum standards of quality and coordination in relief goods, personnel and programmes.³⁶

The disaster relief can only be initiated with the consent of the affected state.³⁷ Upon a decision to admit assisting actors on the territory of the affected state, it is important to grant assisting entities at least a temporary domestic legal status and an authority to operate on the affected state's territory in order to ensure effective provision of relief.³⁸ Information concerning domestic laws and regulations should be conveyed to assisting actors to facilitate relief operations.³⁹

It is recommended by the IDRL guidelines that legal facilities accorded to assisting actors include facilitation or waving of visa and work permit requirements, expedited procedures for temporary recognition of relevant professional qualifications and facilitation of access, transit and movement within the disaster-affected area while respecting safety standards.⁴⁰ It is also recommended for the goods and equipment to be exempted from all customs duties, taxes and tariffs, as well as export and import restrictions. Importantly from public health perspective, this includes reduction of restrictions concerning the import and export of approved medications and medical equipment.⁴¹

³² Art. 3 Nuclear Accidents Convention; Art. 5 Tampere Convention.

³³ The resolution establishes conditions for provision of international of assistance, calls for cooperation with humanitarian IGOs and NGOs and establishes the position of the Emergency Relief Coordination tasked with leadership and coordination in ensuring access to emergency relief.

³⁴ Art 1 & 9(2) IDRL Guidelines.

³⁵ Art. 3 IDRL Guidelines.

³⁶ In that regard, see: the Code of Conduct of the Red Cross and Red Crescent Movement and NGOs in Disaster Relief and the Sphere Humanitarian Charter and Minimum Standards in Disaster Relief.

³⁷ Art. 10 IDRL Guidelines.

³⁸ Art. 20 IDRL Guidelines.

³⁹ Art.10(3) IDRL Guidelines.

⁴⁰ Art. 16 IDRL Guidelines.

⁴¹ Art. 18(3) IDRL Guidelines.

It is important for the prospective pandemic treaty or other instruments addressing PPR to address modalities of assistance in order to minimize chaos and disruption caused by a public health emergency. The IDRL Guidelines provide some of the best practices in the area, but, as a “soft” instrument, the effectiveness of the guidelines is ultimately dependent on their implementation by states.

PROTECTION OF PERSONS IN DISASTERS

The International Law Commission in its Articles on the Protection of Persons in the Event of Disaster has sought to address the failure of states to seek or to receive assistance. Art. 10(1) of the Articles stipulates that “the affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control”. Art. 11 further provides that “to the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors”. While the ILC’s commentaries derive these duties from the primary responsibilities of states under international human rights, the extent to which these provisions reflect customary law remains unclear.⁴²

CONCLUSIONS

Having surveyed some of the frameworks and multilateral conventions applicable to the disaster preparedness and response, we are able to distill some conclusions.

In the area of disaster risk reduction, we have identified thematic areas which may be of interest for the purposes of prospective negotiations of a pandemic treaty or other instrument addressing global PPR. These areas include multistakeholder coordination (both horizontal and vertical), the focus on vulnerable groups, international coordination, inclusive recovery and rebuilding and the need for effective implementation of the aforementioned principles when preparing for a responding to a pandemic. A prospective pandemic treaty would constitute an opportunity to include and acknowledge a “whole-of-government, whole-of-society” approach to public health emergencies enshrined in the Sendai Framework and embraced by the WHO.

The paper also underscores the modalities of provision of mutual assistance in relevant multilateral conventions. While the extent to which a pandemic treaty would address mutual assistance as part of PPR remains uncertain, the scope of provisions contained in aforementioned conventions could inform negotiators of such a treaty or a similar instrument.

Effective assistance and disaster relief are dependent on facilitating measures and capacities of affected states. Several multilateral conventions provide for a reduction or elimination of regulatory barriers in the event of a disaster. International legal instruments addressing global PPR could draw from such provisions and experiences. This would also be important from the point of view of coherence and complementarity of international law applicable to health emergencies.

Last but certainly not least, the measures discussed in this paper will inevitably have to touch upon the question of equity. The provision and delivery of aid involves power relations that can be addressed by creation of appropriate legal frameworks. International rules will have limited success unless imbued with enough flexibility to accommodate for different structures and style of domestic responses. It remains important to work directly with lower-resourced states to strengthen their domestic capacity to

⁴² Telec, “Challenges to State Sovereignty in the Provision of International Natural Disaster Relief”, 283–84.

receive health emergency assistance according to agreed standards, based on trust and transparency. The success of any such solutions will depend on the design and capacity of a pandemic treaty or other instruments on global PPR to address a range of systemic inequalities between the high and lower income states, a critical issue facing global health in the 21st century.



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