The Implementation of the International Norms on Disaster Response in Indonesia

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Abstract

This article aims to analyze the ineffective implementation of the international norms on disaster responses within the Indonesian legal system where Indonesia is labeled as the most disaster - prone country examined from recent disaster events between 2006 and 2012. It focuses on the issues, namely: (1) why the existing Indonesian laws and regulations on disaster responses have been ineffective to implement the international norms in this field; (2) relevance of the ASEAN Regional Agreement for Disaster Management and Emergency Assistance (AADMER) in the Indonesian legal system, particularly, regarding the management of disaster responses; and (3) finding out problems, challenges and opportunities of the implementation of those international norms within the Indonesian legal system which contributes to the future development on disaster response in Indonesia as an example to the South East Asian countries dealing with legal gaps, legal vacuum, legal overlap and legal conflict to implement the aforementioned norms. It then draws recommendations for a better implementation by strengthening and minimizing the root causes of the legal gaps, legal overlapping and legal conflicts on the disaster responses by harmonizing the national laws and regulations which are based on the binding international norms at the tactical level of implementation.

Key words: Disaster response, Mitigation, Legal gap, Legal overlap; Legal conflict

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I. Introduction

This article aims to critically examine Indonesia's compliance to the international norms on its disaster responses by analyzing the effectiveness of the implementation after the Government had passed the Disaster Management Law Number 24 of 2007 (hereinafter the Law) on April 26, 2007.[1] The Law incorporates both internationally binding[2] and non-internationally binding norms on disaster response.[3] An in-depth analysis on the Law's application to

1. This law was issued on 26th, April 2007, State Gazette No. 66 of 2007. It consists of 13 chapters and 85 articles and it changes many pre-existing regulations on disaster response, *e.g.* Presidential Decree Number 28 of 1979 for the Formation of the Natural Disaster Management Coordinating Board, Presidential Decree Number 3 of 2001 relating to the National Coordinating Board for the Management of Disaster and Refugee, and Epidemics Law Number 4 of 1984. Due to the Aceh Tsunami tragedy on December 26, 2004, the Law was relatively easy to pass between the Government and the House of Representatives in response to the national and international scrutiny of the Indonesian disaster response laws and regulations. The Law was followed by the Government Regulation Number 22 of 2008 regarding the Financial Arrangement of the Disaster Management on 28 February 2008 and Government Regulation Number 23 of 2008 regarding the Role and Function of International Organizations on Disaster Management on February 28, 2008, State Gazette No. 43 and 44 of 2008.

2. The only international binding norm is adopted from the ASEAN Regional Agreement for Disaster Management and Emergency Assistance (AADMER) signed on July 2005, ASEAN 2006. This Agreement has been ratified by all ten Members States and it came into force on December 24, 2009. It has become the first international legally-binding norm on disaster response in the world, applicable to the South East Asian countries. All ten ASEAN Member States are obliged to implement the AADMER in their national development process either by passing laws and regulations or by guaranteeing concrete actions and initiatives to be implemented from 2010 to 2015 in order to achieve the ASEAN vision of disaster resilient nations and safe communities by 2015, as stated in the ASEAN Press Release of 2010.

3. The international non-binding norms are strewn or scattered in forms of numerous international instruments such as in resolutions, guidelines, statement of principles, criteria and declarations developed by international organizations such as the United Nations through United Nations General Assembly (UNGA) Resolutions A/Res/46/182 of 1991 and A/Res/57/150 of 2002; international humanitarian agencies such as the Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP), the Development Assistance Committee of the OECD (OECD-DAC Criteria), and the Humanitarian Accountability (HAP); and by the International Law Applicable to Disaster (the IDRL) developed from various sets of international instruments regulating customs, industrial accidents, nuclear emergency, civil defense, food and aid, sea or air transport, telecommunication, and satellite imaging. *See* David Fisher, *Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: A Comparative Analysis*, 89 Int'l Rev. Red Cross 345, 353-354 (June 2007), *available at* http://www.icrc.org/eng/assets/files/other/irrc_866_fisher.pdf.

several disaster responses between 2007 and 2012 will display the implementation of the Law at the domestic level.[4]

This article is structured into four main parts of discussion. First, some basic legal concepts of the compliance and implementation mechanisms of those norms at the national level will be discussed in order to give an appropriate and proper basic understanding upon the matter. Second, there will be an in depth discussion into the main rationales and of the importance of the Law from both political and legal point of views. Third, it will be explained how the Law has been implemented by the local governments to their communities who were affected by several disaster events between 2007 and 2011. The indicators of compliance which originated from the economic, social and cultural rights will also be critically examined. Finally, this article will conclude the lessons learned and provide future recommendations for better compliance mechanisms and effective implementation of those norms through the Law.

II. Basic Legal Concepts

Relevant concepts derived from the theories established by international law,[5] political decentralization[6] and management of natural resources,[7] are used to gain better overviews of compliance and of effective implementation within the Indonesian legal and political point of views after the Law had

4. Benton J. Heath, *Disaster, Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission*, 43 N.Y.U. J. Int'l L. & Pol. 419, 446 (2011).

5. The theories of dualism and monism in international law explains the legal relationship between international law and municipal law and how they interact each other by revealing two concepts of either incorporation or transformation systems of the domestication of international law into the municipal law. *See* Malcolm Shaw, *International Law* 129-32 (6th ed., Cambridge Univ. Press 2008).

6. John Friedman, *Empowerment: The Politics of Alternative Development* 5-20 (Blackwell Publ'g 1992).

7. M. Baiquni & R. Rijanta, Konflik Pengelolaan Lingkungan dan Sumber Daya Dalam Era Otonomi dan Transisi Masyarakat (2007) (unpublished paper)(Indon.); Presentation Material on International Workshop on Natural Resources Management, Ashby Jacqueline, Dir. of Research Int'l Ctr. for Tropical Agric., Alternative Approaches to Managing Conflict in the Use of Natural Resources (May 1998), *available at* http://info.worldbank.org/etools/docs/library/97605/conatrem/conatrem/documents/Ashby-Ppt.pdf.

passed.

The compliance of a State to an international norm is determined by two mechanisms, i.e. domestication process[8] and its effective implementation at the national level.[9] Legally speaking, a domestication process is defined as a national legal process giving legal effect to an international law within a national legal system by approval, signatory, ratification or by a mutually agreed means, applying either the transformation or the incorporation systems.[10] Although this terminology is still debatable,[11] it is commonly understood as "a change of State conduct or behavior in accordance with international law in its domestic affairs".[12] The internal consideration for this change is mainly due to its own survival, values, economic position and domestic politics.[13] In line with these definitions, Black defines a norm as "a fundamental truth or doctrine, as of law; a comprehensive rule or doctrine which furnishes a basis or origin for others; a settled rule of action, procedure, or legal determination".[14] Thus, for the purpose of this article, an international norm on disaster response is best described or understood as "a standard evidence-based and representing a sector-wide consensus the on best practices in humanitarian response".[15] In the least, this article freely defines the domestication and compliance of international norms on disaster responses, as the national legal process gives a binding legal effect to a set of comprehensive international rules, actions, procedures or legal determinations applicable

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8. Markus Burgstaller, *Theories of Compliance with International Law* 85 (Martinus Nijhoff Publisher 2005).
9. David Otley, *Performance Management: A Framework for Management Control System Research*, 10 Mgmt. Acct. Res. 363-82 (1999); Eric G. Flamholtz *et al.*, *Toward an Integrative Framework of Organizational Control*, 10 Acct., Org. & Soc'y 35-50 (1985), *available at* http://aux.zicklin.baruch.cuny.edu/tkdas/publications/flamholtz-das-tsui_aos85_control_35-50.pdf.
10. Shaw, *supra* note 5; *Compare* Indon. Const. 1945 art. 11 *with Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168, 244 (Austl.).
11. Andrew Guzman, *How International Law Works, A Rational Choice Theory* 22 (Oxford Univ. Press 2008).
12. *Id.*
13. Anthony Wetherall, Normative Rule Making at the IAEA: Codes of Conduct 75 (2005) (unpublished paper).
14. Black's Law Dictionary 1159 (6th ed. 1990).
15. Sphere Project, *The Sphere Project: Humanitarian Charter and Minimum Standard in Humanitarian Response* 4 (2011 ed., Prac. Action Pub. 2011).

to disaster responses. It will also cover how Indonesia shall implement the norms by changing certain behaviors and conducts of their disaster responses.

Under Article 11 of the Indonesian Constitution of 1945 (hereinafter referred to as the "Constitution"), domestication of international law is guided by the means of ratification with acknowledgement of the reservation and declaration.[16] It mainly applies to an international treaty or a convention having the characteristics of an internationally binding norm.[17] In this process, the incorporation system is the acceptable method of domestication similar to the practice of the Netherlands and most other constitutional systems.[18] Legally, it becomes binding and enforceable at the national level and therefore, compliance is a must.[19] In a very practical way, according to the Constitution's requirement, individuals, the State apparatus and judicial organs are obliged to avoid ignorance, skepticism and the absence of implementing legislations. They are to make the legislations practical and effectively accepted as indicators of an effective implementation of the ratified international conventions within the Indonesian legal system.[20]

On the other hand, the domestication process to the non-binding international norms remains unclear since there are two common practices causing different implementations at the national level.[21] First, the government and

16. It is prescribed that the President –with the endorsement of the House of the Representatives—may declare war, enter into peace treaty or declare to be bound by a treaty or make international agreement with other States. The Constitution has been amended four times; the First Amendment on 19 October 1999, Second Amendment on 18 August 2000, Third Amendment on 10 November 2001 and the Fourth Amendment on 10 August 2002.

17. Article 3 of the International Treaty Law No. 24 of 2000, which entered into force on October 23, 2000. This law replaces the previous practices toward international treaty initially regulated in the Presidential Letter Number 2826/HK/1960 concerning International Treaties with Other Countries, issued on August 22, 1960.

18. Pieter Van Dijk & Bahiyyih G. Tahzib, *Symposium on Parliamentary Participation in the Making and Operation of Treaties: Parliamentary Participation in the Treaty-Making Process of the Netherlands*, 67 Chi.-Kent L. Rev. 413, 416-17 (1991).

19. Law 24 of 2000 on International Treaty art. 9, 10 (24/2000) (Indon.).

20. *See* the extensive arguments by George H. Aldrich, *The Law of War on Land*, 94 Am. J. Int'l L. 42 (2000), *available at* http://users.polisci.wisc.edu/kinsella/Law%20of%20War%20on%20Land.pdf ; Marco Sassoli & Antoine A. Bouvier, Int'l Comm. of the Red Cross, *How Does Law Protect in War?: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* 256-57 (Int'l Comm. of the Red Cross 1999); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 Am. J. Int'l L. 78, 81 (1995).

21. Ibrahim R., Status Hukum Internasional dan Perjanjian Internasional di Dalam Hukum Nasional (Permasalahan Teori dan Praktek) (2009) (unpublished paper) (Indon.).

the House of Representatives will usually pass a new law fully or partly by adopting a treaty, agreement, declaration and/or a resolution which has not been entered into force. If this law adopts a whole norm, it has a binding character similar to the binding international norms. However, if this law only adopts it partially, its effective implementation will result with some legal questions.[22] These questions emerge because partial norm addoption usually results in differences in application, widens legal gaps, increases legal vacuum, opens up legal overlapping in terms of authorities and responsibilities and creates legal conflicts between the duty bearers and right holders.[23] For example, Indonesia partially adopted the norms on international crimes for genocide and crimes against humanity under the Rome Statute of the International Criminal Court,[24] when the Government and the House of Representatives decided to pass the Human Rights Tribunal Law Number 26 of 2000 on November 20, 2006 for the prosecution of gross violations of human rights in East Timor that was committed between April and June of 1999.[25] The Rome Statute was not a binding norm when the Law was passed, creat-

22. For example, the decision of the Indonesian Constitutional Court No. 012/PUU-III/2005 regarding the Request of the Judicial Review of the State Budget Law No. 36 of 2004. The Indonesian Constitutional Court decided that the term "free education" only refers to primary education. A question rose on whether or not the Indonesian Government was bound by the General Comment of the Human Rights Committee on the Economic, Social and Cultural Rights (the ICESCR), the Human Rights Committee, General Comment 3, Article 2, para. 1, *Implementation at the National Level* (Thirteenth Session, 1981), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HR1/GEN/1/Rev.1 at 4 (1994), and General Comment, Human Rights Committee, General comment 13, Article 14, para. 3 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994). *See* University of Minnesota Human Rights Library, *available at* http://www1.umn.edu/humanrts/gencomm/hrcomms.htm (last visited Nov. 15, 2011).

23. *See id.*

24. Opened for signature July 17, 1998, 37 I.L.M. 999 and it came into force on July 1st, 2002.

25. For example Prosecutor v. Abilio Soares, Case No. 01/PID. HAM/Ad. Hoc.2002/ph. JKT. PST, Judgment (Ad Hoc Human Rights Trib. For East Timor) (Aug. 7, 2002), former governor of East Timor was found guilty and sentenced to 3 years imprisonment; Prosecutor v. Herman Sedyono, Case No. 03/Pid. B/HAM AD HOC/2002/PN, Judgment (Indon. Ad Hoc. Trib. for East Timor) (Aug. 15, 2002) and Prosecutor v. Timbul Silaen, Case No. 02/PID HAM/Ad Hoc/PN JKT PST, Verdict (Indon. Ad Hoc. Trib. for East Timor) (Aug. 15, 2002). Both of them were later acquitted due to inappropriate evidence, judgment on Aug. 15, 2008.

ing the aforementioned legal problems on the prosecution of the alleged perpetrators.[26] As a result, many of them were acquitted as it was very difficult to prove beyond a reasonable doubt the fulfilling elements of criminality of the crimes against humanity by the pre-existing national criminal procedure laws.[27] This weakness remains unclear and needs to be resolved.[28]

Second, the international non-binding norm is usually adopted directly by a state apparatus when the recourse to positive laws are ineffective; and questions arise such as, how rehabilitation, compensation and relocation are determined in the development process.[29] Indeed, the norm resolves ambiguity and fills the gaps at a very practical level.[30] The Indonesian Constitutional Court endorses that such norms must be taken by the Government to resolve urgent needs requiring immediate actions in forms of principles, code of conducts, statements or guidelines especially when accountability and legitimacy are under public scrutiny.[31] In simple terms, this process reflects and becomes the best way to take action or vice versa.[32] It is very interesting, however, that the Indonesian Supreme Court has been silent to this practice although it implicitly affirms.[33] Consequently, the aforementioned legal questions remain

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26. Paper presented at the Justice and Accountability Symposium in Melbourne University, Heribertus Jaka Triyana, The Prosecution of the Perpetrators at the Timor Leste Ad Hoc Tribunal for Committing Gross Violations of Human Rights in Timor Leste (Feb. 13, 2003).

27. *Id.* at 7.

28. Heribertus Jaka Triyana, *The Application of International Standards for Fair Trial for Prosecution of Gross Violations of Human Rights in the Indonesian Criminal Proceedings*, 1 Asia L. Q. 105 (2009), *available at* http://www.klri.re.kr/uploadfile/AK21/ALQ_200901_06.pdf.

29. The Court Decision, *supra* note 22 ¶ 3 of the consideration, the Court ruled that "… Government shall act in accordance to the basic principles of good governance and allocate appropriate budget for sustainable development process agreed by the House of the Representatives and shall be directed to those who are entitled to in terms of fulfillment of international obligations to its own nationals."

30. Ibrahim, *supra* note 21, at 3.

31. N. Ismail., *Konflik Pemanfaatan Tanah Antara Pemda dan Masyarakat: Studi Kasus Pembangunan Pariwisata Parangtritis* (Gadjah Mada Univ. 2000) (Indon.).

32. *Compare* I.B.R. Supracana, Int'l Disaster Response Law, Riles and Principles, Programme of the Int'l Fed'n of Red Cross and the Red Crescent Societies 75 (2006) (unpublished paper) *with* Whetherall, *supra* note 13, at 71.

33. The Indonesian legal system has two judicial review bodies: the Indonesian Constitutional Court whose function is to interpret and/or to decide case based on different implementation between a law and the Constitution, and the Indonesian Supreme Court which may to interpret and/or to decide conflict of implementation amongst laws. *See* Ibrahim, *supra* note 21, at 12.

unclear within the Indonesian legal system.

The passing of the Law reflects both domestication processes and successfully combines them through three distinguished features, which are as follows.[34] First, it has entirely incorporated the internationally binding norms of the ASEAN Agreement for Disaster Management and Emergency Assistance (AADMER) in its philosophical and general frameworks of legal drafting in its preamble and chapters. This domestication process affirms its proactive regional framework for cooperation,[35] coordination,[36] technical assistance[37] and resource mobilization in all aspects of a disaster response.[38]

Second, the non-binding international norm has been partially incorporated into its extensive articles and in their annex of explanations. Furthermore, this adoption has inspired the issuance of the Government Regulations Number 22 and 23 of 2008 with regards to the financial support and management

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34. Preamble of the Law: "(a). … the Indonesian development process shall be based on sustainable protection from disaster;… (b). … the Indonesian geographic locations, environmental deterioration and demographic increase will hinder the Indonesian development goals; and (c.)…realizing that existing rules and regulations on disaster management do not fit with current development in terms of lack of coordination, low quality and accountability, wide gaps between national and international law on disaster management, and strengthening institutional framework and planning for disaster prevention, mitigation, preparedness, relief and recovery… it is necessary to pass this Law…."

35. Chapter VI of the Law prescribes the role and functions for effective cooperation between international humanitarian institutions and the Government in disaster management in Article 28 and 30. Effective coordination in mitigation, emergency and reconstruction and rehabilitation are specifically stipulated in Article 33. In Article 30, consent and appeal-based cooperation have been set to foster national and international cooperation of disaster management.

36. Chapter IV of the Law regulates effective coordination between national, regional and local disaster management institutions whose functions are extensively set in Articles 10 to 27. Effective coordination in mitigation, emergency and reconstruction and rehabilitation are specifically determined in Article 33.

37. Chapter IX of the Law prescribes technical assistance in terms of supervision in the making of all disaster-friendly policy management in all sustainable development processes. Article 71 determines that technical assistance shall be provided in: identification of threat, potential policy making disaster, exploitation activities, usage of goods and services, planning in the use of land, management of natural resources, reclamation and budget-based allocation for disaster management.

38. Chapter III of the Law regulates on resource mobilization by specifying the responsibilities and authorities among disaster management stakeholders and beneficiaries in a very rigid attribution. For example, Articles 5 and 8 states that Government and local government have primary responsibilities to assess and to guarantee the fulfillment of basic needs of the refugees and internally displaced persons during emergency phase.

and the international organizations' roles and function in disaster responses of Indonesia.[39] The United Nations General Assembly (UNGA),[40] the Hyogo Framework for Action (HFA) of 2005,[41] the Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP), the Development Assistance Committee of the OECD (OECD-DAC Criteria), the Humanitarian Accountability Partnership (HAP) and the International Law Applicable to Disasters (IDRL) have partially been adopted by the Law and by the two Government regulations.[42] Those non-binding norms would build the anatomy of preparation, mitigation, and preventive efforts set in Article 33. This Article shall be enforced by the Government led by certain principles regulated in Article 3 (2), namely, the true and meaningful participation, accountability, sustainability, relevance, effectiveness, coherence and transparency, strengthening the coordination, quality and accountability of disaster management as key indicators of success or effective implementation of the disaster responses.[43]

Finally, the said domestication processes clearly differentiates the role and function of duty bearers on the disaster responses between the central and local governments as prescribed in Article 5 and 11.[44] The primary respon-

39. Government Regulation No. 22 and 23 of 2008, *supra* note 1.

40. *See supra* note 3, ¶ 12 of the annex to UNGA Resolution 46/1982 states that the UN has a central and unique role to play in providing leadership and coordinating of the efforts to international communities to support the affected countries. This norm is adopted in the Articles 1 (26) and 30 (2 and 3) of the Law which determines that foreign international organizations may take part in disaster response with close coordination of the UN agencies with special consent and appeal based coordination with the Indonesian Government. For the clear roles and functions of international coordination, Article 1 (1) of the Government Regulation Number 23 of 2008 regarding the Roles and Function of the Foreign International Organization for the Disaster Response, foreign international organizations are defined as organizations whose functions are under the United Nations tertiary organs.

41. The HFA is adopted through basic principles applicable to disaster management in Article 3 (2) of the Law which determines that disaster management is guided by principles of prompt and precise, priority, coordination, transparency and accountability, partnership, non-discrimination and empowerment.

42. *See* Heike Spieker, *Standardization Approaches to Disaster Response* (2007) (unpublished class presentation).

43. Supracana, *supra* note 32, at 78.

44. Article 5 regulates that the central and local government have the primary responsibility on disaster response initiative; while Article 11 stipulates that the central and local disaster board have roles to be the advisor and organizing committee of the disaster management in Indonesia.

sibilities and authorities differ between the central and local governments. The former has its primary responsibilities derived from the international binding norms of the AADMER, while the latter has residual responsibilities obtained from the non-binding international norms. On the other hand, Chapter XI places them to be criminally responsible for acts of omission and/or commission on disaster management when they create potential hazards by neglecting the risks or by committing them during the development process.[45]

It can be concluded that the Law complies with the binding and non-binding international norms on the disaster response. However, its implementation still opens up imminent defects in terms of different applications, legal overlapping, legal bias, legal vacuum and legal conflicts of disaster responses due to the different compliance methods applicable in the Indonesian legal system. Furthermore, those imminent defects are worsened by the spirit of policy decentralization, placing the local governments as the focal points of the disaster responses. Arguably, the said construction determines the area, scope, aims and functions of the Law in Indonesia.[46] Hence, this writing relies on a stance that domestication and implementation of international norms on disaster responses have not changed the Indonesian conduct and behavior due to its ignorance, avoidance and skepticism to the non-binding international norms on disaster responses.[47]

III. Rationales and Importance of the Law

The Law incorporates norms with preparedness, mitigation and prevention

45. Article 75 (1) regulates the acts of omission on disaster response. It states that anyone in their official capacity who neglects or ignores potential hazards, or takes actions in the development process with high risks to cause disasters shall be criminally liable for a sentence of 3 to 6 years imprisonment. Article 76 (1) regulates on acts of commission on disaster response committed either by central and local governments. It states that everyone in their official capacities who intentionally plan and conduct development in high risk and full potential hazards shall be criminally liable for a sentence of 5 to 8 years imprisonment.

46. Heribertus Jaka Triyana & Andi Wibowo, *The Implementation of Articles 8 of the Law Number 24 of 2007 for the Community Participation on Disaster Response to the 2010 Mount Merapi Eruption in Central Java and Yogyakarta Province* (Gadjah Mada Univ. 2011).

47. Triyana & Wibowo, *supra* note 46, at 89.

as the skeleton of disaster responses and places them as its main rationales and importance.[48] Particularly, a community-based disaster risk reduction management (CBDRM) is imposed as the primary method in conducting disaster responses. It absorbs both the binding and the non-binding international norms, determining its content, aim, area and objective.[49] In its preamble, it is stated that CBDRM is a process in which at-risk communities actively engage in the identification, analysis, treatment, monitoring and evaluation of the disaster risks in order to reduce their vulnerabilities and enhance their capacities.[50]

Pursuant to the CBDRM initiative, the Law has made major improvements in reducing deficiencies in the existing national legal instruments by strengthening the coordination, quality and accountability in several distinct key features. First, Articles 34, 48 and 57 accepts prevention and mitigation as integral parts of the relief and rehabilitation process.[51] Second, it assigns roles and functions to the local government as the facilitator and collaborator rather than as the subject and resource provider.[52] Third, it takes into account the self-resilience and self-independence of communities in managing their lives within the context of their availability, acceptability, accessibility and adaptability to their living environment.[53] Fourth, the local government shall

48. Law 24 of 2007 Concerning Disaster Management pmbl. & art. 1-3 (Indon.).

49. *Id.* art. 1, 7, 8.

50. *Compare id.* pmbl. *with* Imelda Abarquez & Zubair Murshed, *Community-based Disaster Risk Management: Field Practitioners' Handbook* 14 (Zenaida Delica-Willison & Merrick Chatfield eds., Asian Disaster Preparedness Ctr. 2005).

51. These articles further empower the provisions in Article 33 determining that disaster response consists of three interrelated phases which are complementary in terms of preparedness, emergency and rehabilitation and reconstruction period. The legal rationale behind those articles is the need to strengthen the responsibilities and authorities among the government, communities and humanitarian organizations by the empowerment of the community in the disaster response. For example, Article 43 stipulates that education, training, and technical arrangements for all disaster response shall be initiated annually by government with participation of the community.

52. Article 5 states that the central and local government should act as facilitator and collaborator in all disaster response. *See also* HIVOS, *Disaster Management: Planning and Paradigm in Indonesia* (June 11, 2007); R. Permana, *Mengubah Paradigma Penanganan Bencana di Indonesia*, West Java Disaster Reduction Studies Ctr. 2-6 (June 2007) (Indon.).

53. Article 27 states that the community and every person shall be responsible for disaster response, to the best of their abilities, in reducing hazards and risks by improving social interaction, harmony, balance and environmental sustainability.

issue policies as per local needs, regarding the identification and prioritization to the most vulnerable communities, conducting of local risk assessments, existence of documents on the local coping mechanisms and expertise, facilitation to the community, establishment of the early warning system (EWS), upgrading the disaster preparation and the mitigation plans and support for resources.[54]

Arguably, all those major improvements rely much more on the AADMER. In this international binding instrument, disaster response is construed in a general scheme containing provisions on disaster prevention, mitigation, rehabilitation and on phases of reconstruction. They further enumerate responses in terms of risk identification, early warning and monitoring, prevention and mitigation, preparation and response, rehabilitation, technical cooperation and research, mechanisms for coordination, and simplified customs and immigration procedures required by Article 3.[55]

As a summary, the rationale and the importance of the Law lie on its objective goals of its legal, philosophical and sociological determinations. Indeed, the Law strengthens the Indonesian legal culture, legal infrastructure and the contents of the disaster responses within the Indonesian legal system.[56] In the end, the positive patterns of justice, purposiveness and certainty for conducting disaster responses in accordance with current developments in international norms on disaster responses are placed as the most important rationales behind the Law.[57] In doing so, the Law prescribes that all local government's decisions in the form of developmental policies, programs and projects should always consider hazard and risk identification, and uphold what is meant by a true and meaningful participation of the communities.[58]

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54. Imelda & Murshed, *supra* note 50, at 14; Cmty. Base Disaster Risk Reduction Mgmt.-2 Handout, Andrew Maskrey, *Module on Cmty. Based Disaster Risk Mgmt*., Asian Disaster Preparedness Ctr., Bangkok (1998).

55. Surin Pitsuwan, *The ASEAN Agreement for Disaster Management and Emergency Assistance*, *available at* http://www.asean.org/18441.htm (last visited Sept. 14, 2011).

56. Triyana & Wibowo, *supra* note 46, at 102.

57. *Id.* at 21.

58. S. W. Indrawati, Speech at the Pre-CGI Meeting in Jakarta: Overview of Indon.'s Medium-Term Dev. Plan 2004-2009 (Jan. 19, 2005).

IV. The Implementation of the Law between 2007 and 2011

The effectiveness of a state's compliance to international norms is difficult to be measured or determined. Thus, this article does not intend to observe whether the Law has been effective in the sense of changing the conduct or behavior of the state in accordance to the international norms on disaster response.[59] It will instead, seek for factual practices in the field after the Law was issued. For that purpose, this article will look closer to the recent events of natural disasters between 2007 and 2011, examining from both political and legal point of views.

The political point of view relies on two common considerations in shaping the government policies on disaster management.[60] Firstly, natural resources are commonly perceived as potential sources of domestic incomes in the development process in which governments often neglect to realize that, its exploitation also contributes as potential natural hazards to the vulnerability of the community.[61] Secondly, the management of natural resources forms the daily political discussions. In fact, it shapes the day to day political discussions at a very tactical level in the affected communities. Consequently, this political analysis is placed to review the strength and/or weakness patterns of the Law's compliance towards the international norms on disaster responses in Indonesia.[62] Its importance lies on a belief that local governments (provinces and districts) can promote participatory disaster resilience by creating a good living environment and strengthening community actions

59. Guzman, *supra* note 11, at 23.

60. Winarna Surya Adisubrata, *Otonomi Daerah di Era Reformasi*, UPP AMP YKPN, Yogyakarta (2008) (Indon.); R. Eman, Sosialisasi Peraturan Pemerintah tentang Pelaksanaan Penataan Ruang, [Workshop Paper on Dissemination on Spatial Planning] (Sept. 17, 2008) (on file with the Gadjah Mada University) (Indon.).

61. Quentin Grafton *et al*., *The Economics of the Environment and Natural Resources* (Blackwell Publ'g 2004); U.N.D.P., *Decentralized Natural Resources Management and Governance System, Citanduy Watershed Management* (2004).

62. Heribertus Jaka Triyana, The Implementation of the Community Based Natural Resources Management System Principle in the Political Decentralization in the Natural Disaster Management Program in Indonesia: Case Studies in the Kapuk Village, Cengkareng West Jakarta Regency, the Special Province of Jakarta and in the Kalabahi Capital City of Alor Regency, the East Nusa Tenggara Province 25-30 (2008) (thesis, Faculty of Arts, Rijks University of Gronigen).

as means for reducing vulnerability towards imminent natural hazards that could imminently disrupt their living conditions.[63] In the end, local capacities can be initiated and improved in terms of increasing their ability to cope with natural hazards.[64]

The breakdown theory of natural resources management proposed by Jacqueline and Ribot helps to expain the aforementioned considerations.[65] This theory opens an opportunity that "decentralized natural resources management system by smaller units (local governments and communities) will increase opportunity of multi stakeholder participation, contextualize roles of civil society and balance interaction among stakeholders for the natural resources management at the local level".[66] In simple terms, it is intended that those who have the biggest interests will have the biggest access to the management and enjoyment of natural resources, and in the end, this condition will strengthen their ability to cope with natural hazards, which are extensively determined in Articles 10, 27 and 33.[67]

The legal examination is directed to the Law's application founded on the rights-based approach for full realization of economic, social and cultural rights of individuals who are potentially affected by the negative impacts of natural disasters.[68] The examination focuses on how the Law contributes towards the increase of accessibility, availability, acceptability and adaptability to the management of natural resources in order to strengthen the communi-

63. Article 4 elaborates that in disaster response, the community shall be empowered to increase their protection, reduce their vulnerability, respect local customs and wisdoms, and create comprehensive communal security; Article 5 stipulates that the central and local governments must play the role of leaders in disaster response. Furthermore, Article 6 (c) states "…minimum standards for internally displaced persons shall be fulfilled in order to sustain community's ability to cope with disaster events that disrupt their life".

64. Article 7 (1) requires the formation of central and local policy on disaster response to be in accordance with international and regional norms upholding local needs, local culture and customs.

65. Jacqueline, *supra* note 7.

66. *Id.*

67. Otley, *supra* note 9.

68. UNHCR defines it as "a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promote and protect human rights". U.N. High Comm'r for Human Rights, *Frequently Asked Questions on a Human Rights Based Approach to Development Cooperation* (2006).

ties' resilience toward their vulnerability to natural hazards.[69] In the preamble of the Law, this intention is expressed by three following rationales: communities' involvement determines the sustainability of their level of initiatives for the natural disaster risk reduction; the role of vulnerable groups and individuals is central in disaster response, as it concerns their life and existence; and nobody else can understand the local opportunities and constraints better than themselves.

The human rights-based approach is firmly endorsed by imposing strict penal provisions to those who intentionally or unintentionally neglect the international norms on disaster responses, fulfilling elements of criminality of *mens rea*, *actus reus* and sanctions as set in Chapter IX (Articles 75-79).[70] Penal sanctions are imposed strictly as a repressive tool for ensuring obedience to those norms (i.e. ensuring accountability, sustainability[71] and true participation).[72] In simple terms, the Law has its own public legal determination taking into account that a disaster response is part of the public domain in upholding the law and order. This penal characteristic distinguishes the Law from the norms of disaster response practiced by other South East Asian countries, such as, Thailand, Laos, Timor Leste and the Philippines, while all of these countries also incorporate the AADMER into their laws.[73]

The assessments on factual practices can be justified to determine an individual criminal responsibility in a sense. It is imperative for the local governments to select the correct communities, make rapport building and understanding the disaster awareness, initiate participatory natural disaster risk assessment, impose community-based natural disaster risk management planning, involve the community in managed implementation, and enact monitoring and evaluation, which are all preventive steps. The failure to implement

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69. *Id.* at 36; Abarquez & Murshed, *supra* note 50, at 23.

70. Permana, *supra* note 52.

71. Article 75 (1) precscribes that everyone who initiates a development plan or strategy, unintentionally neglecting risk analysis in the development process, shall be criminally liable and may be sentenced with up to 6 years life imprisonment and fined by an amount between 300.000.000 IDR and 2.000.000.000 IDR.

72. Article 76 (1) stipuates that everyone who initiates development plan or strategy intentionally neglecting risk analysis and participation of the communities in the development process shall be criminally liable and may be sentenced with up to 6 years life imprisonment and fined by an amount between 2.000.000.000 IDR and 4.000.000.000 IDR.

73. Abarquez & Murshed, *supra* note 50, at 23.

such steps will make those local government officials face criminal prosecutions before the Law.[74] The aforementioned failures have never been grounds for any criminal proceedings yet, but they have been grounds for class actions. Such class actions have been raised by local NGOs such as, Yakkum Emergency Unit (YEU) in Yogyakarta and Yayasan Kincir in Jakarta.

Since 2007, numerous disasters such as, tsunamis, earthquakes, floods, droughts, landslides and volcanic eruptions have disrupted life of individuals, social interactions within society and living environments throughout Indonesia.[75] For example, on September 30th, 2009, earthquake with a 7.6 Richter scale magnitude devastated the West Sumatera Province and killed more than 1,100 people.[76] Between October 2nd and 3rd, 2010, the flood in the Wasior District, Wondoma Bay of the West Papua Province collapsed all infrastructure, such as, roads, hospitals, churches and schools, and killed more than 158 people.[77] Lastly, on October 26th, 2010, Mount Merapi erupted, killing 158 people and displacing more than 30,000 villagers, including the author of this article.[78] The government, NGOs and local communities are trying to recover and rehabilitate their negative impacts.[79] In Cangkringan Village, Sleman, rehabilitation of the irrigation system and the rice field paths has been conducted in order to sustain the food production the Mount Merapi's eruption severely ruined.

The political and legal assessments help reveal factual patterns of ignorance, skepticism and denial against the international norms on disaster responses, particularly to the non-binding international norms stipulated by the Law to the aforementioned disaster events.[80] Furthermore, there are no legal

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74. Permana, *supra* note 52, at.7.

75. Susanna M. Hoffman & Anthony Oliver-Smith, *Catastrophe & Culture, the Anthropology of Disaster* (School of American Research Press 2002).

76. Kompas.com, *Pakar Gempa: Pusat Gempa Padang Bukan di Zona Subduksi, available at* www.kompas.com/read/2009/10/01/09081256/pakar.gempa.pusat.gempa. padang.bukan. di.zona.subduksi (last visited Sept. 19, 2011) (Indon.).

77. Kompas.com, *Banjir Wasior: Bagaikan Tsunami Menyapu Rumah Warga, available at* http://regional.kompas.com/read/2010/10/06/06583142/Bagaikan.Tsunami.Menyapu.Rumah.Warga (last visited Oct. 27, 2010) (Indon.).

78. Elin Yunita Kristanti, *Kronologi Letusan Gunung Merapi*, Vivanews.com, *available at* http://nasional.news.viva.co.id/news/read/185183-ini-kronologi-letusan-gunung-merapi (last visited Oct. 27, 2010) (Indon.).

79. Triyana & Wibowo, *supra* note 46.

80. *Id.* at 88.

proceedings brought to the court even though there are many life casualties due to the acts of omission and/or commission committed by incumbent local authorities.[81] As a result, there are five indicators that reveal patterns of ignorance, skepticism and denial to the application of the Law. First, the Law stimulates deep legal gaps between the normative and factual applications of the norms and the mechanisms on disaster responses applicable to those events in its practical application.[82] Second, the Law contributes to a legal bias between the rights and obligations exercised by stakeholders who are responsible for disaster responses particularly, during emergency and rehabilitation phases.[83] Third, the Law tends to widen legal overlapping in terms of institutionalization of bureaucratic coordination between the central and local governments (province and district levels). This overlapping in coordination weakens the grand strategy for restoring the negative impacts of disasters to the society and its environment in the long term.[84] Fourth, the Law creates possible legal vacuums for criminal proceedings, especially on how the elements of criminality may be fulfilled by those who would be criminally liable under the existing criminal law procedure.[85] Fifth, the Law causes legal conflicts among the governments (central and locals), victims, NGOs and other entities who claim responsibility of disaster responses within their specific authorities and responsibilities.[86] Furthermore, the elaboration on the five indicators is explained as follows:

A. Deep Legal Gap between Normative and Factual Applications

It is a general understanding that the economic-driven motive of the man-

81. *Id.* at 89.

82. L. Verburg, Donor or Partnership, Does the Concept of A Real Partnership Represent the Relief and Rehabilitation Operations during Post Natural Disaster Situation, Case Studies: Aceh Tsunami 2004 and Yogyakarta Earthquake 2006 (2007) (thesis, Faculty of Arts, Rijks University of Groningen). .

83. Int'l Fed'n of Red Cross and Red Crescent Societies, *Indonesia: Law, Policies, Planning and Practices on International Disaster Response* (July 2005), *available at* http://www.ifrc.org/Global/Publications/IDRL/country%20studies/idrl-indonesia.pdf.

84. Baiquni & Rijanta, *supra* note 7.

85. Triyana, *supra* note 62, at 99.

86. Y.T. Keban, Kerjasama Antar Pemerintah Daerah Dalam Era Otonomi (2007) (unpublished paper) (Indon.).

agement of natural resources causes deep legal gaps to the application of international norms on disaster responses in Indonesia.[87] Since the initiation of political decentralization in 2000,[88] local governments have exploited natural resources as their primary sources of domestic incomes rather than perceiving them as potential natural hazards, which thus, increases the community's vulnerability and risks.[89] Within the purpose of increasing capacity building, this intention has reduced the degree of true participation from local communities as required by Article 3 of the Law.[90] As a result, the affected communities have less access to manage the natural resources as part of their daily coping mechanisms against natural hazards and risks.[91] To target huge income has become an ultimate goal in the development process.[92] Central and local governments have been neglecting the norms of true participation, accountability, sustainability, relevance, effectiveness, impact and transparency as the main principles for disaster response that should be applied in their regional development process after the issuance of the Law.[93]

In the Wasior flood case, the aforementioned problem has become an undeniable fact when the local communities had been denied participation in the management of the rainforests they were living in.[94] The limited access to information on the establishment of policies as per local needs, no identification and prioritization of the most vulnerable communities in the area of deforestation, reluctance in conducting local risk assessment, inexistence of documents on local coping mechanisms and expertise, no facilitation to the affected communities of timber production, no issuance of Early Warning System (EWS) on massive timber production, no upgrading in disaster preparedness, and the mitigation of possible forest degradation, are examples

87. Jacqueline, *supra* note 7.

88. Henning Lustermann, *Indonesia: On the Way to a Federal State?*, 42/X Mimbar Hukum (2002) (Indon.).

89. Bernadinus Steni, *Desentralisasi, Koordinasi dan Partisipasi Masyarakat Dalam Pengelolaan Sumberdaya Alam Pasca Otonomi Daerah* 12, *available at* http://www.huma.or.id (last visited July 21, 2008) (Indon.).

90. *Id.* at 30.

91. Triyana, *supra* note 62, at 101.

92. P. Susiloadi, *Konsep dan Isu Desentralisasi Dalam Manajemen Pemerintahan di Indonesia*, 3 Spirit Publik 2 (Oct. 2007).

93. Steni, *supra* note 89, at 21.

94. Kompas, *supra* note 77.

of undeniable legal gaps between the normative and factual application of international norms on disaster responses in a very practical manifestation of the Law. The District Government of Wondama pushed towards its timber production to sustain its domestic income giving less attention to the imminent and possible natural hazards to the local communities.[95] Thus, deforestation for timber production had reduced the community's ability to cope with the norms. During this event, only within one day, the destruction was so extensive in terms of life casualty, infrastructure damage and environmental degradation. The Major of the Wondama District is now under inquiry for a possible criminal prosecution even though there has been no legal investigation under the application of Article 75 of the Law.[96]

It can be concluded that the application of international norms on disaster response defects when it coincides with local development policies guided mostly by economic-driven motives.[97] This reality could be best explained by the greediness theory in the management of natural resources proposed by Billon,[98] Porto,[99] Ballentine and Nitzschke.[100] This theory states that the inappropriate management of natural resources driven by an economic motive will cause resource scarcity and environmental degradation in a very short period of time, benefiting only the few who have the biggest access to it (for instance, the local leaders and private companies). In the end, it causes a systemic environmental deterioration which increases the communities' vulnerability towards natural hazards and lessens their capacity and ability to cope.[101] The disparity between normative and factual applications is undeniably a dark legacy in the implementation of international norms on disaster

95. *Id.*

96. Cornelius Helmy Herlambang, *2.501 Pengungsi Tingggalkan Pengungsian*, *available at* http://regional.kompas.com/read/2010/10/20/16184191/2.581.Pengungsi.Tinggalkan.Pengungsian (last visited Sept. 22, 2011) (Indon.).

97. Eman, *supra* note 60.

98. Phillippe Le Billon, *The Political Ecology of War: Natural Resources and Armed Conflicts*, 20 Pol. Geography 561-84 (June 2001), *available at* sciencedirect.com.

99. João Gomes Porto, *Contemporary Conflict Analysis in Perspective (Chapter One)*, *in* Scarcity and Surfeit: The Ecology of Africa's Conflict (Jeremy Lind & Kathryn Sturman eds., Inst. for Sec. Studies 2002), *available at* http://www.acts.or.ke/dmdocuments/scarcity_chpt1.pdf.

100. Karen Ballentine & Heiko Nitzschke, *Profiting from Peace: Managing Resource Dimension of Civil Wars* (Karen Ballentine & Heiko Nitzschke eds., Lynne Publisher 2005).

101. Billon, *supra* note 98; Porto *supra* note 99; Note, *supra* note 100.

response under the Law.

B. Legal Bias between Rights and Obligation in Emergency and Rehabilitation Phases

The issuance of the relocation policy has always caused a legal bias in the exercise of rights and obligations between the government and affected community, especially, within in the emergency, rehabilitation and reconstruction phases. Legal bias always ends in a protracted tension.[102] In all the three natural disaster events discussed in this article, such tension has not been resolved yet up to this day, since the local governments initiated the said policy without proper consultation and appropriate considerations, such as, considering the economic and historical values possessed by the affected communities.[103] Under this policy, the non-binding international norms, such as a community's true, active and meaningful participation in the decision making process, as set in Article 1 (5 and 6) of the Law, have been denied due to the campaigning of the safety and security reasons of the victims or the affected communities.[104] In the end, linking the relief and rehabilitation phases have been difficult to fit with the basic communities' needs and rights in the sense of continuing future local developments. This tension is currently happening in the Central Java and Yogyakarta Special Provinces ever since the eruption of Mount Merapi.[105]

As generally understood, Article 1 (19-23) of the Law determines the roles and functions among stakeholders in a very systematic attribution, fulfilling

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102. Proceedings of the 1991 Conference, Robert L. Hodgson, Cmty. Participation in Emergency Technical Assistance Programmes: Technical Support for Refugees, Water Eng's Dev. Ctr. (1991); Minako Sakai, *Konflik Sekitar Devolusi Kekuasaan Ekonomi dan Politik: Suatu Pengantar*, 68 Antropologi Indonesia iv (2002)(Indon.); Willy Purna Samadhi, *Desentralisasi Setengah Hati: Berpindahnya "Sentralisme" ke Daerah* (2005) (Indon.); Triyana & Wibowo, *supra* note 46, at 74.

103. *Compare* Triyana & Wibowo, *supra* note 46, at 67 *with* Yakub Adi Krisanto, *Relokasi Korban Bencana: Legalistik vs. Kulturistik Historis Lereng Merapi Terhadap Rencana Relokasi*, Kompass.com, *available at* http://hukum.kompasiana.com/2011/07/10/relokasi-korban-bencana-legalistik-vs-kultural-historis-kajian-penolakan-warga-lereng-merapi-terhadap-kebijakan-relokasi/ Op (last visited June 10, 2010) (Indon.).

104. Krisanto, *supra* note 103, at 2.

105. The author of this article was involved as one of the local community's legal advisor. *See* Triyana & Wibowo, *supra* note 46, at 88.

the rights, obligations, responsibilities and authorities. A community is placed as a subject; governments are placed as the facilitators, while NGOs play a role as partners in all disaster responses. These enumerative attributions shall be implemented into six interrelated natural disaster risk reduction responses known as, "the natural disaster management program or the NDMP-cycle management" in Article 3. As HIVOS proposes, it consists of six interrelated responses, i.e. selecting the community, rapport building and understanding, participatory natural disaster risk assessment, community-based natural disaster risk management planning, community managed implementation and monitoring with evaluation.[106]

Article 3 redefines the government's functions in a very specific orientation, which relies on three main rationales. First, local governments shall be able to give better delivery service and empowerment to the people through providing better opportunities of disaster responses. Second, local governments are given significant roles in formulating necessary policies, plans and legal instruments, such as, providing financial and technical resources, coordination and linkage development, building community capacity on early warnings, preparedness, relief, rescue and shelter management. Lastly, local governments shall mainstream disaster responses into the poverty reduction strategies as a pre-requisite of the development planning process.[107]

Although they are clearly defined, most people do not have a clear understanding on the substantial and practical uses.[108] In the Mount Merapi eruption case, local governments of the Central Java and Special Province of Yogyakarta have made themselves as the most active and effective single institutions on disaster responses, in comparison to the communities' and NGO's roles and functions.[109] In such a case, the affected communities are ignored by the means of limited accessibility to the said legal construction. In Cangkringan and Umbulharjo, sub-districts of the Sleman regency, only the chief of villages were involved in the emergency and rehabilitation initiatives without giving proper access to the affected communities to play their roles in the Mount Merapi eruption. Limited access of the affected communities contributes to their low acceptability and adaptability regarding the initiation of

106. *Id.*

107. Permana, *supra* note 52, at 5.

108. *Id.* at 6.

109. *Compare* Triyana, *supra* note 62, at 59 *with* Verburg, *supra* note 82.

new policies on relocation, compensation and temporary shelter management. Based on this event, it can be concluded that elements of active, free and meaningful participation and the fair distribution of benefits from the affected communities to the natural disaster events have been taken substantially less into account. It causes a legal bias in terms of fair distribution of responsibility among the local governments, affected communities and NGOs, especially when local governments initiate and make policies, programs, and projects after a natural disaster occurs. This is the Mount Merapi eruption legacy in the application of the Law.

C. Legal Overlapping in Disaster Response amongst Institutions

Denial of responsibilities is an undeniable fact which reveals the legal overlapping of disaster response initiatives between the central and local institutions after the Law was issued, particularly, regarding the determination of the status of natural disaster events under Article 7 (1.e).[110] In the Padang, Wasior and Merapi cases, the central and local governmens blamed each other when victims, destruction and its losses were extensive and undeniably due to the failure to determine the disaster status of whether those events were local, national or international. This determination plays an important role in deciding which response should be taken. Among the considerations were reluctance and fear of foreign interference that may jeopardize the national integrity and sovereignty.[111] Consequently, the coordination led by the central and local board of disaster responses became weak and ineffective in providing immediate and prompt fulfillment of the basic needs.[112] Those institutions claim that there will be overlapping authority with central and local governments and its communities as an excuse to justify their due dela, and the lack of quantitative needs of the victims and the affected communities in that particular situations.[113]

Policy adjustment in accordance to the international norms on disaster re-

110. It states "…authority of the determination of disaster status belongs to central and local government".

111. Triyana & Wibowo, *supra* note 46, at 57.

112. *Id.* at 58.

113. *Id.* at 60.

sponse has not been introduced among the departmental institutions, local governments, NGOs, communities, the House of Representatives and the Local House of Representatives.[114] Unclear distribution of tasks and responsibilities has made it hard to assign and distribute their jobs descriptions particularly, during the preventive response.[115] For example, the Ministry of Forestry has the primary right to manage the forest resources without giving appropriate coordination on mining and on land usages located in local governmental authorities and the affected communities, according to the Forestry Law No. 41 of 1999. In this regard, it causes an overlapping of rights and obligations among the Ministry of Mining, Ministry of Home Affairs and the local governments. Natural hazards will systematically increase as like what is currently happening in Bangka Belitung and in West Papua Provinces (nickel and copper exploitation).[116] Furthermore, the overlapping authorities among those institutions may cause vertical conflicts between the governments and the local communities that practice its custom or *Adat* law in preserving and cultivating lands surrounding the Mount Merapi crater.[117] Such overlappings cast substantial amounts of doubt and overlapping claims of the disaster responses or initiatives during the process of effective coordination where they issue policies, programs and activities as disaster responses in the local levels. In the three disaster events discussed in this article, legitimacy sinks low since the norm of accountability has never been taken into account by the incumbent institutions of disaster responses in Indonesia.[118]

D. Legal Vacuum of Criminal Proceeding in Disaster Response Criminalization

Legal vacuum for the application of the Law means that there has never been any criminal prosecutions directed to those who were allegedly responsible for life casualties due to their ignorance of Article 75 of the Law. Article 75 (1) determines that “everyone is responsible for criminal prosecution and they are entitled to three years imprisonment when they neglect disaster

114. Triyana, *supra* note 62, at 67.

115. Keban, *supra* note 86, at 3-4,7 and Steni, *supra* note 89, at 4.

116. Note, *supra* note 89, at 10.

117. *Id.* at 5.

118. Triyana & Wibowo, *supra* note 46, at 45.

response norms when they are conducting their development plan initiatives". This article is written with a very broad legal determination imposing certain obligations towards policy makers at the local levels. Consequently, the head of a local government is placed as the most responsible person since he or she is the leader of the regional or local development.[119] In this article, the adoption of the non-binding international norms on disaster response such as, accountability, responsibility, carefulness and good environmental governance, is paramount to determine the obedience to the Law.

In fact, the Wasior, Padang and Merapi cases clearly display the aforementioned tendency since the Law has become ineffective as the Indonesian criminal proceedings are subject to the Indonesian Criminal Procedural Code of Law No. 8 of 1981 (*Kitab Undang-Undang Hukum Acara Pidana* or KUHAP, hereinafter referred to as the "Code"*).* In the Code, an event of natural disaster is legally construed as one of the legal excuses to exempt an individual from criminal responsibility in all criminal matters either by acts of commission or omission. Viewed from the perspective of criminal law proceedings, the formulation of Article 75 (1) adopts the accusatorial criminal proceedings that determine the material truth of violations while the Code applies the inquisitorial system.[120] Consequently, there is a disparity in the application of law causing an inevitable legal vacuum towards the implementation of the Law on disaster responses.

Statements such as that "Indonesia has failed to bring accountability for those who are responsible for life casualty and to bring justice and/or remedy for the victims of natural disaster" are still fresh in our minds and has become hot issues since no legal criminal prosecutions were brought before the court.[121] Indeed, on a separate matter, there have been criminal prosecutions directed to those who have committed crimes during the situation of natural disasters, such as, thievery, corruption and false television news during the Padang earthquake and the Mount Merapi eruption cases. In simple terms, due to the legal vacuum above, there will not be any criminal prosecutions in the coming future for those who are responsible for life casualties, losses and

119. Lustermann, *supra* note 88, at 16.

120. *Compare* Komnas HAM, Report *of the Human Rights Commission in 1999* (1999) *with* James Dunn, *Crimes Against Humanity in East Timor, January to October 1999: Their Nature and Causes* 10-15 (Feb. 14, 2001), *available at* http:www.etan.org/news/2001a/dunn1.htm (last visited Sept. 26, 2011).

121. Triyana & Wibowo, *supra* note 46, at 81

collateral damages in the events of a natural disaster in Indonesia; although the Law requires such prosecutions be made. The deterrence effect will, therefore, fail to be achieved as a manifestation of the non-binding international norms on disaster responses of the Law.[122]

E. Legal Conflicts among the Disaster Response Stakeholders

There are two forms of legal conflicts in the disaster response after the issuance of the Law, i.e. horizontal conflicts between local governments, and vertical conflicts between local governments and their communities. This can be best illustrated by the Padang, Wasior and Merapi cases. The former (horizontal conflicts) is the most imminent threat faced when those local governments integrate their local development policies separately from the local and national development.[123] The syndrome of "not in my back yard" proposed by Baiquni and Riyanta helps explain why conflicts exist between the local governments in the management of their natural resources, since they hardly take into account any sustainability and interrelatedness of natural resources available in their territories.[124] Spatial and partial concepts in the land use planning have increased their inward looking process for designing their own development strategies.[125] For example, in the case of Mount Merapi eruption, the conflict between the Central Java and Yogyakarta Special Provinces existed in terms of financial and logistical support given by the Central government.[126] This conflict also emerged between the West Sumatera and the Bengkulu Provinces when the earthquake devastated the west coast of Sumatera.

The vertical conflict deals with the ignorance and skepticism of the community's involvement in the disaster responses. It causes a systemic conflict

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122. *Id*. at 36.

123. Hari Triyana, Investasi dan Pengelolaan Ruang untuk Investasi di Daerah 6 (2011) (master thesis, Sekolah Paska Sarjana FH UGM) (Indon.).

124. Baiquni & Riyanta, *supra* note 7, at 23.

125. T. Notohadikusumo, *Implikasi Etika Dalam Kebijakan Pembangunan Kawasan*, Forum Perencanaan Pembangunan, PSPR UGM (Jan. 2008) (Indon.); Keputusan Walikota Yogyakarta Nomor 669 Tentang Rencana Aksi Pengurangan Risiko Bencana Tahun 2007-2011 (669 KEP 2007) (Indon.).

126. Triyana & Wibowo, *supra* note 46, at 99.

between the local governments and their communities. Giving less attention to the potential natural hazards and focusing on how to cope with them, such as through individual perception, knowledge of the signs of natural disaster, finding locally safe and vulnerable areas from past disaster experiences, appropriate methods of survival and social interaction as a community coping strategy, are roots of the causes of this vertical conflict.[127] Tools and techniques, in terms of the correct methodologies for intervention in conducting the community risk assessment of risk identification, risk analysis and risk evaluation conducted by local governments, are less developed unless, they fit with the local regional development plans driven by the short-term goals of economic benefits.[128] The Mount Merapi case shows of the occurrence of vertical conflict when sand (as remnants of the eruption) was being exploited by private companies through all mainstream rivers of Mount Merapi. It contributed very little to the domestic retributions, while at the same time, this activity destroyed the emergency routes for evacuation and deteriorated the capacities of the river flow to halt a possible flood of cold lava.[129] Private mining companies have earned huge profits while the affected communities have been ignored and thus earned nothing from such activity. Jealousy and a fragile mentality form the roots of social conflicts as in the Muntilan District in the Central Jawa Province. This district suffers severely from cold lava that has displaced more than 10,000 people while sand mining activities have continued to operate. Undeniably, the imminent threats of vertical conflicts between the community and its local government have been forthcoming due to environmental deterioration, jealousy and discrimination in the accessibility to the sand mining activities.[130]

V. Lessons Learned and Recommendations

Based on the previous chapter, this article proposes two recommendations to reduce the aforementioned problems of ineffectiveness in the implementation of the Law within the Indonesian legal system in the future; i.e. short

127. Triyana, *supra* note 62, at 23.

128. *Id.* at 11.

129. Triyana & Wibowo, *supra* note 46, at 23.

130. *Id.* at 25.

and long terms recommendations. They are developed from an in-depth examination of both legal and political influences for the implementation of the non-binding international norms to be made equal and more enforceable with the binding international norms on disaster responses.

As a short term proposal, an amendment of the Law is a necessary step to be taken in order to focus on three specific elements that cause legal bias, legal overlapping, legal vacuum and legal conflict of implementation at the local level. This amendment shall be advocated in conformity with equal and proportional attributions to the non-international binding norms on disaster response construed specifically in Articles 1, 8, 9 and 75.

First, the Law shall be amended by focusing on the vanishing spirit of project-based policies at the prevention, mitigation and rehabilitation phases, led by an effective control of bureaucracy at the lowest level of implementation. Local authorities shall be enlarged and given robust responsibilities for interpreting and complying with those non-binding international norms when they design and initiate their local development policies, programs and activities of disaster management. The empowerment of the local environmental governance structure, inspired by the non-binding international norms that know what it means to have true and meaningful participation and accountability, will make more fruitful the selection of correct communities and their capacities to cope with the structure, as determined by Article 1 of the Law. Indeed, this article is more inspired by the legal rationale of the anthropocentric approach in the management of natural resources rather than, the holistic approach of the disaster response as required by the AADMER.[131] Consequently in the Law, human beings are placed as the center (subject) for sustainable development process, while natural resource is placed as the object for all disaster response initiatives. This means that natural hazards and risks are mitigated by imposing certain roles and functions of human beings and governments. Advocacy shall be directed to change this existence to base on the legal rationale of the holistic approach as the main principle for the management of natural resources in disaster responses.

Secondly, Articles 8 and 9 of the Law should be revised, especially in making rapport building and understanding to initiate the disaster response plans and strategies at the local and/or the lowest level. In those articles, local gov-

131. Patricia Birnie & Alan Boyle, *International Law and the Environment* 5-7 (2d ed., Oxford Univ. Press 2002); Grafton, s*upra* note 61, at 1-4.

ernments are given duties to make indirect interactions with their communities. Indirect approach creates distance in the effective communication and socialization of disaster risk mitigations, particularly in situations of natural hazards and natural risks. The application of those articles will be more practical and functional if they are conducted directly with special attributions to the local customs and peculiarities.

Thirdly, Article 75 of the Law should be broadened in terms of its scope, area and its objective of application to avoid legal vacuums in its elements of criminality and criminal proceedings. This article fails in its application to have fair trial standards on the existing criminal proceedings of the Indonesian criminal law system. The adoption of clear criteria of ignorance, to determine guilt, beyond a reasonable doubt, against those who are responsible for the life casualties and losses, should be explicitly set to enable the substantive criminalization within natural disaster situations. Other than this attribution, a special legal phrase should be formulated and initiated to change the existing legal excuse of natural disasters revoking any individual criminal responsibility, in the Indonesian Criminal Code.

As a long term proposal, the empowerment of local governments should be advocated by contextualizing the relevance of the political decentralization aims and functions to the community's empowerment and its participation in the local development process. According to Lustermann, the Indonesian political decentralization model strongly decentralizes many aspects of the State's responsibilities. In its implementation, regional authorities have less of the original State powers than as required in a real political decentralization where they are to exercise their powers witin their own communities, particularly, in increasing the local capabilities and coping mechanisms towards the natural hazards and risks.[132] Hence, it will be more practical and fruitful if the national campaign on disaster responses raises up to bring awareness the local issues of community vulnerability, natural hazards and available coping mechanisms to the national, as well as to the local public; in order that they may help determine local development strategies and plans to minimize the disparities between the normative and factual applications.

In this proposal, the existence of policies as per local needs, identification and prioritization of the most vulnerable communities, conduct of local risk assessment, existence of documents of local coping mechanisms and exper-

132. Lustermann, *supra* note 88, at 18-19.

tise, community facilitation, establishment of early warning systems, capacity enhancement, upgrading disaster preparedness and mitigation plans, and support for resources, must, in the least, be raised up as local development strategies. At the community level, mapping correct individual perception, knowledge of natural disaster signs, knowing of locally safe and vulnerable areas from the past disaster experiences, methods of survival, and social interaction as the community coping strategy should be developed at the village level rather than at the district or province levels. As a start, village leadership and its own local wisdoms should be listed and empowered as the local coping mechanisms for disaster responses during the prevention stage. This policy should also be enlarged in terms of granting increasing access to the community for their direct participation.

VI. Concluding Remarks

This article concludes that an imbalance in the acknowledgement and ignorance to the non-binding international norms on disaster responses under the Law causes ineffective implementations of disaster responses, even though they have been domesticated into the national legislation within the Indonesian legal and political systems. It means that Indonesia has, somewhat, acted in accordance to the international standards for disaster responses, particularly, from the international binding norms on disaster responses under the AADMER, but has yet to have effectively changed the state of conduct and behavior at its lowest level of implementation on disaster responses due to the aforementioned tendencies and actual practices.

Indeed, improvements shall be initiated and advocated in two particular aspects in order to bring public awareness, since Indonesia is a country that is very prone to natural disasters at the lowest levels, rather than at the regional and central levels. Giving more space for community participation and implementing direct decision making process on the disaster responses will be made more fruitful if guided by the international norms that bring true and meaningful participation, accountability, sustainability and good environmental governance in Indonesia.

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