CORA Cork Open Research Archive
Cartlann Taighde Oscailte Chorcaí

Title	An analysis of soft law applicable to humanitarian assistance: relative normativity in action?
Authors	Cubie, Dug
Publication date	2011-01-11
Original Citation	Cubie, D. (2011) 'An analysis of soft law applicable to humanitarian assistance: relative normativity in action?', Journal of International Humanitarian Legal Studies, 2(2), pp. 177-215. https://doi.org/10.1163/187815212X624238
Type of publication	Article (peer-reviewed)
Link to publisher's version	10.1163/187815212X624238
Rights	© 2011, Dug Cubie. This is an open access paper distributed under the terms of the CC BY 4.0 license. - https://creativecommons.org/licenses/by/4.0/
Download date	2026-11-03 20:43:39
Item downloaded from	https://hdl.handle.net/10468/18007



UCC
University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

MARTINUS NIJHOFF PUBLISHERS *International Humanitarian Legal Studies 2 (2011) 177–215* brill.com/ihls

INTERNATIONAL HUMANITARIAN LEGAL STUDIES

An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?

Dug Cubie*
University College Cork, Ireland
110223288@umail.ucc.ie

Abstract
There is limited binding international law specifically covering the provision of humanitarian assistance in response to natural and human-made disasters. Yet a variety of authoritative soft law texts have been developed in the past 20 years, including the UN Guiding Principles on Internal Displacement, the Red Cross Red Crescent Code of Conduct and the Sphere Project's Humanitarian Charter and Minimum Standards in Disaster Response. While such 'non-binding normative standards' do not carry the weight of international law, they play an essential role in the provision of humanitarian assistance albeit subject to their limited enforceability *vis-à-vis* intended beneficiaries and to their voluntary application by humanitarian actors. Notwithstanding a lack of legal compulsion, certain non-binding normative standards may directly influence the actions of States and non-State actors, and so obtain a strongly persuasive character. Analysis of texts that influence the practice of humanitarian assistance advances our understanding of humanitarian principles and performance standards for disaster response. As the International Law Commission debates draft articles on the Protection of Persons in the Event of Disasters, such non-binding normative standards are crucial to the development of an internationally accepted legal framework to protect victims of disasters.

Keywords
Disasters; humanitarian assistance; soft law; relative normativity; non-binding normative standards

> Resolutions, as the sociological and political expression of trends, intentions, wishes, may well constitute an important *stage* in the process of elaborating international norms; in themselves, however, they do not constitute the formal *source* of new norms.[1]

* LL.B (Hons) Dundee, LL.M (International) Cantab. Ph.D candidate, University College Cork, Ireland and IRCHSS Government of Ireland Scholar. Mr. Cubie has worked for over 10 years in refugee protection and humanitarian assistance for intergovernmental and non-Governmental organisations, including the United Nations High Commissioner for Refugees, the International Organization for Migration and the Irish Red Cross.

[1] P. Weil, 'Towards Relative Normativity in International Law?' 77 *AJIL* 413 (1983), at 417.

© Koninklijke Brill NV, Leiden, 2012 DOI 10.1163/187815212X624238

Introduction

The multiplicity of potential sources of information and authoritative statements that plagues so many aspects of international law is no less prevalent in humanitarian responses. Indeed, the international framework surrounding the provision of humanitarian assistance[2] and the protection of persons[3] following natural and human-made disasters contains few explicitly binding normative obligations, but a wealth of non-binding resolutions, guidelines and minimum standards.

Natural and human-made disasters consistently cause huge devastation globally, with over 180,000 deaths and nearly US$100 billion in damage to property and infrastructure every year.[4] Over 290 million people were affected by natural or human-made disasters in 2010 alone,[5] and the March 2011 Japanese earthquake and tsunami killed thousands and initially displaced

---

[2] Humanitarian assistance is not defined in any major humanitarian or human rights law instrument. The OECD defines humanitarian assistance as that: "designed to save lives, alleviate suffering and maintain and protect human dignity during and in the aftermath of emergencies. […] Humanitarian aid includes: disaster prevention and preparedness; the provision of shelter, food, water and sanitation, health services and other items of assistance for the benefit of affected people and to facilitate the return to normal lives and livelihoods; measures to promote and protect the safety, welfare and dignity of civilians and those no longer taking part in hostilities and rehabilitation, reconstruction and transition assistance while the emergency situation persists." See, http://www.oecd.org/site/dacsmpd11/glossary.htm (last accessed 7 August 2012).

[3] "Protection" encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of international human rights, refugee and humanitarian law. Protection involves creating an environment conducive to respect for human beings, preventing and/or alleviating the immediate effects of a specific pattern of abuse, and restoring dignified conditions of life through reparation, restitution and rehabilitation. See, OCHA, *Glossary of Humanitarian Terms in relation to the Protection of Civilians in Armed Conflict* (2003).

[4] Estimated annual average statistics based on years 2001-2010. Information compiled from the International Disaster Database, Centre for Research on the Epidemiology of Disasters, http://www.emdat.be (last accessed 7 August 2012). It should be noted that there is considerable variation in the impact of natural disasters on a yearly basis. The total deaths from natural disasters for 2008-2010 were: 235,000 deaths in 2008, 10,655 deaths in 2009 and 390,300 deaths in 2010. See: E. Ferris and D. Petz, *A Year of Living Dangerously: A Review of Natural Disasters in 2010*, Brookings-LSE Project on Internal Displacement, April 2011, at 7-8.

[5] E. Ferris and D. Petz, *ibid.*, at 6. See also: D. Guha-Sapir, F. Vos, R. Below and S. Ponserre, *Annual Disaster Statistical Review 2010: The numbers and trends*, Centre for Research on the Epidemiology of Disasters (CRED), Université catholique de Louvain – Brussels, Belgium, May 2011.

440,000 people.[6] In many cases there is a swift and impressive response – in 2008 an estimated US$7 billion was provided globally in humanitarian assistance including food, shelter and medical care.[7] Yet despite international law recognising a limited right to humanitarian assistance for civilians in armed conflicts in the 1949 *Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War*,[8] there is no consensus on whether a right to humanitarian assistance following natural or human-made disasters currently exists in international law. To date, there are no binding international treaties covering the right to humanitarian assistance for civilian populations, or even a codified body of law regulating access to and delivery of humanitarian assistance following such disasters.

Nevertheless, several non-binding international documents have clearly stated a right to humanitarian assistance does exist.[9] Notably, the *Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief* asserts that "the right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries",[10] and representatives of the Red Cross have

---

[6] IFRC, *Japan Earthquake and Tsunami Information Bulletin No. 3*, 15 March 2011, http://www.ifrc.org/docs/appeals/11/JPeqIB3.pdf (last accessed 7 August 2012).

[7] *The State of the Humanitarian System: Assessing Performance and Progress – A Pilot Study*, Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP), January 2010, at 19.

[8] 973 UNTS 286 (entered into force 21 October 1950). Article 49 confers limited rights to accommodation, hygiene, health, safety and nutrition during transfers or evacuations of civilians by an Occupying Power; Article 55 confers rights to food and medical supplies for civilians under an Occupying Power; Article 56 covers medical services; while Articles 59-63 cover relief schemes, consignments and relief deliveries for civilian populations and access for humanitarian agencies. For an analysis of legal provisions relating to relief for civilian populations in armed conflict settings, see: K. Mackintosh, *The Principles of Humanitarian Action in International Humanitarian Law*, Humanitarian Policy Group Report 5, Overseas Development Institute, March 2000.

[9] See, *Guiding Principles on the Right to Humanitarian Assistance*, San Remo Institute of International Law, 1993, Principle 1: "Every human being has the right to humanitarian assistance in order to ensure respect for the human rights to life, health, protection against cruel and degrading treatment and other human rights which are essential to survival, well-being and protection in public emergencies". *Guiding Principles on Internal Displacement*, UN High Commissioner for Human Rights, 1998, Principle 3(2): "Internally displaced persons have the right to request and to receive protection and humanitarian assistance from [national] authorities".

[10] Principle 1. The Code of Conduct was jointly published by the International Federation of Red Cross and Red Crescent Societies (IFRC) and the International Committee of the Red Cross (ICRC) in 1994.

recently highlighted the importance of international human rights law, customary law and the growing number of soft law instruments, such as the Code of Conduct, to support the argument that international law recognises a right to humanitarian assistance.[11]

International human rights law already obliges States to protect a range of rights that are equally applicable in the event of natural or human-made disasters, including the rights to life,[12] health and medical services,[13] and an adequate standard of living.[14] Specialised multilateral treaties also provide rights of direct relevance for humanitarian assistance operations, including those in the *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations*[15] and the *Framework Convention on Civil Defence Assistance*.[16] However, there is an increasing awareness of the need to provide greater clarity on the international regulation and operation of humanitarian assistance, as reflected in the current work of the International Law Commission (ILC) developing draft articles on the *Protection of Persons in the Event of Disasters*.[17] Therefore, this article attempts to provide an overview of key non-binding international resources currently influencing global debates on the provision of humanitarian assistance in non-armed conflict settings, i.e. following natural or human-made disasters.

This article will not undertake a detailed analysis of the conceptual basis of 'soft law'[18] *per se*, however few issues challenge the classical architecture of

---

[11] D. Fisher, 'The Right to Humanitarian Assistance' in *Incorporating the Guiding Principles on Internal Displacement into Domestic Law: Issues and Challenges*, Walter Kälin *et al* (eds.), ASIL & Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No. 41 (2010), at 51-52.

[12] Article 3, Universal Declaration of Human Rights (1948), GA Res. 217A (III), 10 December 1948; Article 6, International Covenant on Civil and Political Rights (1966), 999 UNTS 171 (entered into force 23 March 1976).

[13] International Covenant on Economic, Social and Cultural Rights (1966), 993 UNTS 3 (entered into force 3 January 1976), Art. 12.

[14] Universal Declaration of Human Rights, *supra* note 12, Art. 25; International Covenant on Economic, Social and Cultural Rights, *supra* note 13, Art. 11; Convention on the Elimination of Discrimination Against Women (1979) 1249 UNTS 13 (entered into force 3 September 1981), Art. 14.

[15] Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (1998), 2296 UNTS 5 (entered into force 8 January 2005).

[16] Adopted by the International Civil Defence Organisation on 22 May 2000, following the 11th World Conference on Civil Defence (1998).

[17] See Chapter VII of the *Report from the 62nd Session of the ILC* (A/65/10) and references to previous ILC reports and documents on the protection of persons in the event of disasters.

[18] Even the phrase 'soft law' is fraught with contradictions. László Blutman provides a comprehensive description of the terminological challenges the phrase raises, but also recognises that

international law, or provoke such staunch defenders and detractors, the way that the concept of soft law does. As Weil stated in his seminal article on relative normativity in international law: "[a] system builder by vocation, the jurist cannot dispense with a minimum of conceptual scaffolding."[19] Therefore, this article will commence with a minimal level of conceptual scaffolding on the concept of soft law before proceeding to examine various texts of relevance to humanitarian assistance following natural or human-made disasters, and finally analysing how these documents can inform the development of an international legal framework relating to the provision of such assistance.

1. Relative Normativity as a Conceptual Framework

A. Binary Approach to International Law

The phrase 'soft law' has been attributed to Lord McNair, author of the influential text *The Law of Treaties*,[20] although his original intention may have been to distinguish between *lex lata* and *lex ferenda*.[21] Legal positivists, such as Prosper Weil, emphasise the binary nature of 'law/non-law' and argue that the international legal system is predicated on a normative system of identifiable legal rules which are enforceable in an international court or tribunal.[22] In such a system there is no place for 'soft' law – either a rule is legally enforceable and therefore 'law', or it is not legally enforceable and therefore is 'not law'. Some authors would go so far as to claim that the concept of soft law is itself detrimental as it diminishes the value placed on law in its proper sense.[23] However, even within this binary system, positivist legal theorists have proposed various classifications of soft law in an attempt to break down the

---

without an accepted theory that replaces the concept of 'soft law', even authors arguing against the terminology or concept are forced to fit within the classical definition and criteria of international law: L. Blutman, 'In the Trap of a Metaphor: International Soft Law', 59(3) *ICLQ* 605 (2010), at 609.

[19] Weil, *supra* note 1, at 440.

[20] A.D. McNair, *The Law of Treaties* (1961).

[21] J. Klabbers, 'The Redundancy of Soft Law', 65 *Nordic Journal of International Law* 167 (1996), at 173, n.32.

[22] See Weil, *supra* note 1, at 414, n.7. However, even legal positivists generally accept that non-binding texts constitute important evidence of the existence of consensus among States regarding particular rules or practices, e.g. I. Brownlie, *Principles of International Law* (6th ed., 2003), at 3-4.

[23] See J. Klabbers, 'The Undesirability of Soft Law', 67 *Nordic Journal of International Law* 381 (1998).

variety of international actions that directly or indirectly influence international law. Indeed, the International Court of Justice itself has on several occasions accorded weight to soft law principles and texts, including elementary considerations of humanity[24] and UN General Assembly Resolutions.[25]

In a robust attack on soft law, Jean d'Aspremont presents the difference between what he calls a '*soft instrumentum*' and a '*soft negotium*'.[26] A *soft instrumentum* is when parties agree to produce an instrument that is not a treaty or binding declaration. In other words, the form taken is not recognised as a formal source of binding legal obligations under international law.[27] In contrast, a *soft negotium* is a legally binding instrument that does not contain binding normative commitments, for example due to their vague or restricted nature. While rejecting the basis or relevance of a *soft instrumentum* to the creation of international norms, d'Aspremont argues that parties under international law are entitled to create legally binding documents that are not comprised of normative content, i.e. a *soft negotium*. This is reflected in Article 2(1)(a) of the Vienna Convention on the Law of Treaties, which defines a 'treaty' as: "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". An international legal act does not have to be normative to be legally binding on the State parties to the instrument.

More recently, László Blutman[28] advanced a similar point, positing a separation of soft law into two forms: (I) norms that do not appear in the form of

---

[24] Judgement (Merits), *Corfu Channel Case* (*UK* v. *Albania*), ICJ, 9 April 1949, p. 22.

[25] Advisory Opinion, *Legal Consequences for States for the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ, 21 June 1971, p. 50.

[26] J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' 19(5) *EJIL* 1075 (2008). See also, A. D'Amato, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont' 20(3) *EJIL* 897 (2009); and J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D'Amato' 20(3) *EJIL* 911 (2009).

[27] The classical sources of international law set out in Article 38(1), Charter of the International Court of Justice are: a) international conventions; b) international custom, as evidence of general practices accepted as law; c) general principles of law recognised by civilised nations; d) judicial decisions and teachings of the most highly qualified publicists of various nations, as subsidiary means for determination of rules of law. This is supplemented by the Preamble of the Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331 (hereinafter 'VCLT') which recognises the "ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations."

[28] Blutman, *supra* note 18, at 606. Blutman refers to these two forms of soft law simply as "soft law (I)" and "soft law (II)".

a legal source recognised by international law but which are of some relevance; and (II) norms that appear in the form of a formal legal source recognised by international law but which are not enforceable owing to their generality, vague normative content or subjective nature. Blutman focuses on the first of these two forms of soft law, and categorises this form of soft law into three groupings[29]:

a. **Non-binding decisions of international organisations and bodies**, which include: non-obligatory decisions relating to extra-organisational relations; guidelines; programmes; declarations; directives; opinions; programmes of action; and recommendations.
b. **Bilateral or multilateral non-obligatory agreements and declarations created by States**, such as: communiqués; declarations of intent; joint final declarations; final acts of summits; non-binding political, technical and other understandings; and recommendations adopted by international conferences.
c. **Recommendations passed by non-governmental organisations (NGOs)**.

While recognising the normative impact soft law may have on State practice through international relations, politics and sociology, Blutman argues that political, moral or technical obligations should not be confused or collated with international legal obligations. Yet he also highlights that 'non-legal' rules may influence the actions of States to a greater extent than binding international obligations.[30] By extension, this point would hold particularly true in newly developing areas of international law, such as the legal framework for the provision of humanitarian assistance which is not yet based on binding international treaties or a codified body of law.

B. Normative Hierarchies

On the international stage all States are equal, even if one can argue that in reality some are more equal than others. However, since the Treaty of

---

[29] *Ibid.*, at 607-608.
[30] *Ibid.*, at 612:

> The fact that soft law is not a legal norm does not mean that political, moral or other requirements would not be for some reason more compelling than a legal rule. As opposed to the legal consequences arising from violation of a legal norm, there can be non-legal restraints that urge States in a more effective way (even more than the legal norms) to comply with non-legal rules.

Westphalia in 1648, State sovereignty and voluntarism of action by States[31] have been core concepts in the classical view of international law.[32] Yet international law is an elusive target and, as debates surrounding soft law exemplify, even determining what constitutes 'law' at an international level is a complex task. Weil argued strongly against the concept of soft law, and coined the phrase 'relative normativity' in a pejorative sense to describe the blurring of the normative threshold between law and non-law in the international legal system.[33] By definition, such a blurring of the normative threshold entails the creation of a hierarchy of norms, whereby within the body of international law different legal obligations are ascribed with a different legal weight. This article does not intend to challenge the argument that a relative hierarchy exists within accepted international law norms ('hard law'), for example *vis-à-vis jus cogens* norms and obligations *erga omnes*[34] or in respect to the Charter of the United Nations.[35] However, as Dinah Shelton notes: "[…] while the concept [of *jus cogens*] is widely supported in the literature, sometimes to an abusive extent, state practice and judicial opinions have been slow to recognize or give legal effect to assertions of such norms."[36] Furthermore, even if one accepts that a hierarchy exists between internationally accepted legally binding norms,

---

[31] The requirement of consent to the creation of internationally binding legal norms by States.

[32] These concepts are specifically referenced in the Preamble to the VCLT: "*Noting* that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised" and "*Having in mind* the principles of international law embodied in the Charter of the United Nations, such as the principles of […] sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force."

[33] Weil, *supra* note 1, at 415.

[34] Despite codifying the superior status of *jus cogens* norms through Articles 53 and 64, the VCLT does not specify which norms have such a status. It is generally accepted that they include: the right to life and prohibition of arbitrary deprivation of life; prohibition against genocide; freedom from torture or cruel, unusual and degrading treatment; prohibition on illegal use of force; and prohibition against slavery. Obligations *erga omnes*, i.e. obligations of a State towards the international community as a whole, are generally accepted to include the prosecution of piracy, slavery, genocide and torture. See D. Shelton, 'Normative Hierarchy in International Law' 100 *AJIL* 291 (2006). For an overview of domestic enforcement of *jus cogens* norms, see W. Aceves, 'Relative Normativity: Challenging the Sovereignty Norm through Human Rights Litigation' 25 *Hastings Int'l & Comp. L. Rev.* 261 (2001-2002).

[35] See Article 103, UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

[36] Shelton, *supra* note 34, at 292. Shelton further argues that, in practice, the real question is securing States' compliance with obligations they have agreed to, e.g. in the UN Charter or Geneva Conventions, than imposing *jus cogens* obligations on dissenting States, at 304-305.

one must still navigate the debate on the relative status of various international norms within such a hierarchy.[37]

Notwithstanding debates on the existence or content of a hierarchy within accepted international legal norms; even if soft law is accepted as 'non-law', resolutions and declarations by States, international organisations, and other non-State actors can strongly influence State practice which, in turn, can lead to the creation of legally binding norms. As a result, academics such as Charney[38] have challenged the classical view of international law and argued for an expanded view of international law-making, stressing that pronouncements of multilateral forums play an important part in the process of norm creation at the international level. In this line of argument, the end products of multilateral forums, such as declarations and resolutions, substantially advance and formalise the international law-making process. Therefore, a rule can become part of international law through positive support by the majority of the international community as evidenced by decisions taken at international forums, publication in written form and notice being provided to the international legal system of the rule's existence.[39] Yet even such an expanded view of the sources of international law still primarily refers to sources that emanate from the international legal system itself, such as UN General Assembly Resolutions, intergovernmental regional forums and specialised agencies of the international community. When examining the rights and responsibilities surrounding humanitarian assistance, one has to include a

---

[37] For more on positions taken regarding the hierarchy of norms within 'hard law', see, T. Meron, 'On a Hierarchy of International Human Rights' 80 *AJIL* 1 (1986); U. Fastenrath, 'Relative Normativity in International Law' 4 *EJIL* 365 (1993); M. Koskenniemi, 'Hierarchy in International Law: A Sketch' 8 *EJIL* 566 (1997); J. Weiler and A. Paulus, 'The Structure of Change in International Law or Is there a Hierarchy of Norms in International Law?' 8 *EJIL* 545 (1997); and J. Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law' 8 *EJIL* 583 (1997).

[38] J. Charney, 'Universal International Law', 87 *AJIL* 530 (1993), at 544:

> [M]ajor developments in international law often get their start or substantial support from proposals, reports, resolutions, treaties or protocols debated in [multilateral] forums. There, representatives of states and other interested groups come together to address important international problems of mutual concern. Sometimes these efforts result in a consensus on solving the problem and express it in normative terms of general application. At other times, the potential new law is developed through the medium of international relations or the practices of specialized international institutions and at later stages is addressed in international forums. That process draws attention to the rule and helps to shape and crystallize it.

[39] *Ibid.*, at 544-547.

much wider range of texts, including guidelines and minimum standards developed by non-State actors, humanitarian organisations and influential policy-setting and research institutions.

Irrespective of the provenance of soft law sources, it follows that if some soft law sources can directly influence State practice, such sources also have a greater (non-legal) weight. This suggests a hierarchy within non-law sources, in addition to the differentiation between law/non-law and an internal hierarchy within accepted international legal norms. For example, Walter Kälin, former Representative of the UN Secretary-General on Internally Displaced Persons, described the *Guiding Principles on Internal Displacement* as "hard standards even if they are still not hard law".[40] In this case, it is hard to deny the existence of relative normativity within the international legal system. Klabbers has described the question to be faced by international lawyers as such:

> The problem with law […] is that descriptive things tend to take on normative meaning, or more accurately: descriptive categories sooner or later transform into normative categories […] [A]cademic international lawyers […] training consists of transforming practice into norms; so it almost inevitably follows that whatever descriptions we come up with, tend to become normatively relevant.[41]

To put it another way, international law faces an inflationary tendency whereby non-law becomes soft law, soft law becomes hard law, and certain customary and treaty norms become *jus cogens*.[42] This can be seen as a positive reflection of the progressive development of international law, if one accepts there is a benefit of legal certainty for individuals and the international community resulting from the creation of binding international legal rules.[43] However, this can also mask the fact that non-legal standards may be complied with by States and non-State actors, on the basis of political, moral or technical

---

[40] W. Kälin, 'How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework', presentation at Roundtable Meeting, Ralph Bunche Institute for International Studies, 19 December 2001, at 8:

> Whether or not a normative framework for the treatment of internally displaced persons is or becomes a reality, is much more dependent on the actual acceptance and use of the Guiding Principles than on their legal form. To the extent that the Principles achieve that level of authority, they become hard standards even if they are still not hard law.

[41] Klabbers, *supra* note 23, at 385.

[42] Shelton, *supra* note 34, at 322.

[43] See the Preamble, VCLT: "*Believing* that the codification and progressive development of the law of treaties […] will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations".

considerations, and not on the basis of legal rules. This distinction between legal obligations which demand compliance and compliance based on non-legal considerations further complicates the elucidation of what rules or standards should be applied in the provision of humanitarian assistance. The International Federation of Red Cross and Red Crescent Societies argues that a right to humanitarian assistance, as a specific human right in itself, exists through binding obligations already existing upon States through international humanitarian law, human rights law, and refugee law, as well as soft law sources and consistent State and humanitarian organisation practice of providing humanitarian assistance.[44]

Over the past 35 years a wide range of non-binding resolutions, guidelines and minimum standards have been developed by States, international organisations and NGOs to ostensibly improve the efficiency and effective delivery of humanitarian assistance. Therefore, one must question the interplay and relative importance of humanitarian obligations that States comply with for non-legal reasons, for example due to domestic or international politics, humanitarian values, international relations or self-interest, and legal obligations originating in international law.

It may be that soft law relating to humanitarian assistance constitutes an important *stage* in the process of elaborating international norms,[45] as a means of supplementing existing international law obligations or interpreting existing norms. Shelton explains this function of soft law as: "part of an increasingly complex international system with variations in forms of instruments, means, and standards of measurement that interact intensely and frequently, with the common purpose of regulating behavior within a rule-of-law framework".[46] On this basis, soft law relating to humanitarian assistance can be seen as a tool for humanitarian actors to base their actions upon in the absence of binding international rules or a developed international normative framework. Yet if this is the case, how does one measure the weight to be placed on a particular soft law source? Should a value be placed on the content of a document, or on the form and process of its adoption? Are there soft obligations that run parallel to soft law or can a hard obligation be teased from a soft law source? Through an analysis of key internationally authoritative texts, I intend to argue that certain non-binding normative standards can be identified which play an essential role in the provision of humanitarian assistance, albeit on the

[44] Fisher, *supra* note 11, at 48.
[45] Weil, *supra* note 1, at 417.
[46] Shelton, *supra* note 34, at 320.

basis that these standards do not carry the weight of international law; which implies that subject to the voluntary application of these standards by humanitarian actors their enforceability *vis-à-vis* the intended beneficiaries of that humanitarian assistance remains limited.

2. Non-Binding Normative Standards of Humanitarian Assistance

A. Terminology

In recognition of the conceptual and terminological difficulties which the phrase 'soft law' creates,[47] I propose to use the term 'non-binding normative standards' to refer to the range of guidelines, recommendations and minimum standards relating to humanitarian assistance[48] developed at operational, policy and political levels by States, humanitarian agencies and international organisations. Blutman has argued: "If a rule meets the criteria for law, then it should be called 'law'. If, however, the rule is not binding – as soft law has been described to be – then it should not have law anywhere in its name".[49] So while 'non-binding normative standards' may not roll off the tongue as smoothly as 'soft law', this term is intended to reflect the strongly persuasive value one must place on certain documents which cannot be classified as internationally legally binding norms in themselves and which are not enforceable from a judicial perspective.

'Non-binding normative standards' should therefore be seen as encompassing Blutman's concept of 'soft law (I)', i.e. norms that do not appear in the form of a legal source recognised by international law but which are of some relevance, and d'Aspremont's '*soft instrumentum*', i.e. instruments that are not a treaty or binding declaration. In other words, 'non-binding

---

[47] Blutman, *supra* note 18, at 606-607.

[48] There can be similar conceptual and terminological difficulties with "humanitarian assistance". There is no single definition of "humanitarian assistance", although it is increasingly recognised that "assistance" encompasses more than merely material assistance, and so includes a wide range of activities that protect the rights of those affected by disasters. See: E. Ferris and C. Stark, 'Incorporating Protection into Humanitarian Action: Approaches and Limits', paper presented at IFI-UNRWA International Conference, American University of Beirut, Lebanon, 8 October 2010, http://www.brookings.edu/papers/2010/1104_unrwa_ferris.aspx (last accessed 7 August 2012).

[49] Blutman, *supra* note 18, at 610. Although Blutman proposes the phrase "a rule of the game" for non-obligatory rules that are habitually complied with, I believe this phrase detracts from the serious nature of life saving activities such as the provision of humanitarian assistance.

normative standards' refer to authoritative norm creating texts and practices which are not 'law' in the sense of creating enforceable obligations on actors, but which may directly influence international law through the creation of consistent practices and consensus within the international community. For the purpose of this present article, I am restricting the scope of this phrase to documents that have influenced humanitarian norms and practice, although such terminology may be of relevance to other branches of international law which similarly rely heavily on soft law texts.

B. Inter-disciplinary Nature of Humanitarian Assistance

The mere words 'Pompeii', 'Krakatoa' or 'Chernobyl' conjure up scenes of death and destruction; such is the social and cultural impact of massive natural or human-made disasters. It would therefore be strange if international law did not have a position on how States and the international community should respond to such disasters. Indeed, the Swiss philosopher and jurist Emer de Vattel made the following, oft-quoted, observation in 1758:

> […] when the occasion arises, every Nation should give its aid to further the advancement of other Nations and save them from disaster and ruin, so far as it can do so without running too great a risk […] if a Nation is suffering from famine, all those who have provisions to spare should assist in its need, without, however, exposing themselves to scarcity. […] To give assistance in such dire straits is so instinctive an act of humanity that hardly any civilised Nation is to be found which would refuse absolutely to do so.[50]

International lawyers cannot deny that the legal or moral basis of obligations arising from natural or human-made disasters is of a recent nature. However, despite this, there is an extremely limited body of international law which directly deals with such disasters – there is no recognised *lex specialis* for disasters. One need only compare this to the level of academic and judicial examination of obligations that are due in armed conflict, or the broad corpus of law relating to the protection of individual human rights to realise that a legal lacuna exists. This may be logical considering the origins of modern international law following the cataclysm of World War II and the Holocaust, events that understandably focused the world's attention on the need to regulate the use of force and how political forces within States treated their own citizens.

---

[50] E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, text of 1758, Books I-IV, Vol. iii, at 114.

Nevertheless, the international community as a whole has examined the issue in extensive detail. Disasters are key subjects of study for meteorologists, geophysicists, geologists, civil engineers, medical personnel, fire and rescue services, urban planners, insurance brokers and educators to name just a few. Additionally, one can examine disasters on a thematic basis, covering their impact on the elderly, children, and disabled or from a gender perspective, or by examining impacts at a physical, commercial or financial level. Furthermore, international relations, politics and development studies all play a fundamental role in the development of norms relating to humanitarian assistance. In reality few frontline humanitarian responders at a disaster will be lawyers. So, by necessity, when determining the rights and responsibilities due during humanitarian response operations, international lawyers cannot focus solely on legal sources of information but must consider a wide range of other resources that are available.

Therefore, following the thesis that 'soft law' does not create binding obligations, but that inter-disciplinary non-binding normative standards exist which directly influence the actions of State and non-State actors I will now examine a selection of authoritative international texts relevant to the conduct and operation of humanitarian assistance following natural and human-made disasters.[51] Such documents may have been created to address general or specific political, operational or technical issues that the provision of humanitarian assistance involves, or may enunciate fundamental humanitarian principles. While the key texts have been split into two categories, it should be noted that there is overlap between the categories in specific documents, for example UN General Assembly Resolutions have elaborated humanitarian principles but also contain specific technical arrangements for funding and co-ordination mechanisms. Furthermore, the texts examined were created for different purposes, by different actors – some originated as internal rules for humanitarian actors, such as the *Principles and Rules for Red Cross and Red Crescent Disaster Relief*; while others were developed by States or through inter-agency fora such as the Inter-Agency Standing Committee. Such diversity of origin and purpose may influence the normative weight that can be ascribed to a particular text, which is examined in Section 5 below.

---

[51] The range of thematic, bilateral and regional documents relating to disaster risk reduction, civil defence and humanitarian assistance are too numerous to analyse in this current paper. For an excellent overview, see, IFRC, *Law and Legal Issues in International Disaster Response: A Desk Study*, 2007; and *Secretariat Memorandum on the Protection of Persons in the Event of Disasters*, 60th Session of the ILC (11 December 2007, A/CN.4/590).

3. Elaboration of Humanitarian Principles

A. UN General Assembly Resolutions

The international community has recognised the need to regulate international humanitarian assistance since the League of Nations adopted the *Convention and Statutes Establishing an International Relief Union* in 1927. Unfortunately, while in existence until 1967, the International Relief Union was never fully effective.[52] Yet the importance played by international emergency aid continued to be highlighted both by States and international organisations.[53] In particular, the UN General Assembly has produced a series of recommendations regarding the co-ordination of UN emergency humanitarian assistance,[54] the safety and security of humanitarian personnel,[55] and the transition from relief to developmental activities following natural disasters.[56]

Two key General Assembly Resolutions for advancing international understanding of humanitarian assistance are Resolution 2816 (XXVI) from 1972[57] and Resolution 46/182 of 1991.[58] Resolution 2816 (XXVI) followed a request by the General Assembly to the Secretary-General in 1970 for a report on the implementation of interim arrangements put in place in 1965[59] authorising

---

[52] For a history of the International Relief Union, see, P. MacAlister-Smith, 'The International Relief Union: Reflections on the Convention Establishing an International Relief Union of July 12, 1927', 54 *Tijdschrift voor Rechtsgeschiedenis* 364, 1986.

[53] Important early initiatives regarding the provision of humanitarian assistance include the *Model Rules for Disaster Relief Operations* (UNITAR, 1982) which focused on practical and logistical aspects of relief operations between States, and the 1984 draft UN *Convention on Expediting the Delivery of Emergency Assistance*. While ultimately unsuccessful in developing a multilateral binding treaty, this can be seen as the modern starting point for the body of normative resolutions, guidelines and minimum standards aimed at improving the effectiveness and co-ordination of international humanitarian assistance operations. State sovereignty, i.e. respect for the territorial integrity of a State and the principle of non-intervention, was reportedly one of the stumbling blocks to the adoption of the draft Convention. See, IFRC, *supra* note 51, at 27-28.

[54] See Resolutions entitled *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, most recently GA Res. 65/133, 3 March 2011.

[55] See Resolutions entitled *Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel*, most recently GA Res. 65/132, 1 March 2011.

[56] See Resolutions entitled *International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, from Relief to Development*, most recently GA Res. 65/264, 21 June 2011.

[57] *Assistance in Cases of Natural Disaster and other Disaster Situations*, GA Res. 2816 (XXVI), 10 January 1972.

[58] *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res. 46/182, 19 December 1991.

[59] *Assistance in Cases of Natural Disaster*, GA Res. 2034 (XX), 7 December 1965.

the Secretary-General to utilise UN funds for emergency aid following natural disasters.

With the winding down of the International Relief Union in 1967, and in recognition of the need for mechanisms within the UN for disaster relief, Resolution 2816 (XXVI) established the Office of the UN Disaster Relief Co-ordinator with a broad mandate to lead the UN response to natural and other disasters. Working in co-operation with governments, the Disaster Relief Co-ordinator had the power to mobilise, direct and co-ordinate the relief activities of inter-governmental and non-governmental humanitarian agencies following a request for assistance from a stricken State. The Disaster Relief Co-ordinator was also authorised to receive contributions to UN disaster relief operations and assist governments of affected countries to assess and prioritise relief needs. The Resolution further advised governments to establish disaster contingency plans, appoint national disaster relief co-ordinators, establish stockpiles of emergency supplies, provide training, and improve national disaster warning systems. Crucially, this was the first UN Resolution to urge governments to consider the domestic legal arrangements required to facilitate the receipt of aid, and expressly highlighted the need for overflight and landing rights, and privileges and immunities for humanitarian staff. Nevertheless, while Resolution 2816 (XXVI) established a range of measures to facilitate humanitarian assistance, the primary focus was on operational modalities for the international community to provide assistance to a stricken State, without any reference to the rights of individuals affected by disasters.

The changing international context, not least the end of the Cold War, prompted a renewed focus on the provision of humanitarian assistance in the 1990s. Significantly, Resolution 46/182 of 1991 on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations systematically developed the international framework for humanitarian assistance.[60] Building on the framework established by Resolution 2816 (XXVI), Resolution 46/182 elaborated a series of Guiding Principles covering the rationale and modalities for the provision of humanitarian assistance, while also revising and strengthening the UN system for disaster response co-ordination and the funding of emergency appeals.

Key fundamental principles established include the primary role of the affected State in co-ordination and provision of humanitarian assistance within its territory; the requirement to respect sovereignty and territorial integrity and to obtain the consent of affected States for any international

---

[60] E. Tsui *Analysis of Normative Developments in Humanitarian Resolutions since the Adoption of 46/182*, UNOCHA (2009), at 6.

humanitarian assistance; and that humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality. By setting out such Guiding Principles, Resolution 46/182 presented a clear blueprint for understanding the conceptual and practical boundaries for the provision of humanitarian assistance. Yet Resolution 46/182 remained primarily focused on the national and international responses to disasters, rather than enunciating the rights of individuals affected by disasters. While the Guiding Principles recognise the cardinal importance of humanitarian assistance for victims of disasters, it is notable that this is not worded in rights-based language.

Nevertheless, Resolution 46/182 represented an advancement of the international operational framework for disaster response, by focusing on disaster risk reduction, preparedness, relief operations and follow-on developmental activities. While reaffirming a State's primary responsibility to provide assistance, the Resolution ensures the UN and its specialised agencies play a central role in relief operations. This role was secured by strengthening the Office of Disaster Relief Co-ordinator,[61] and establishing an Inter-Agency Standing Committee comprised of UN agencies, the international Red Cross Red Crescent Movement, International Organization for Migration and other relevant non-governmental organisations. To facilitate consistent and predicable funding streams, Resolution 46/182 provides for improved funding mechanisms through the establishment of the Central Emergency Revolving Fund (CERF) and the Consolidated Appeals Progress (CAP).

The consistent focus of the General Assembly on humanitarian assistance, particularly following natural and human-made disasters, highlights the importance governments place on the effective delivery of aid.[62] Yet the approach taken consistently prioritises offers of humanitarian assistance by States and humanitarian agencies, rather than focusing on the right to assistance for affected individuals. It has been argued that a key component of the framework established by Resolution 46/182 is the applicability of the Guiding Principles on all actors involved in humanitarian assistance.[63] However, when considering the normative value of General Assembly

---

[61] Following the UN reform process in 1997, the Office of the Disaster Relief Co-ordinator was merged with other UN bodies responsible for complex emergencies to create the Office for the Co-ordination of Humanitarian Affairs (UNOCHA).

[62] For an overview of Resolutions relating to humanitarian assistance since 1965, see: A. Katoch, 'International Natural Disaster Response and the United Nations', in IFRC, *International Disaster Response Laws, Principles and Practice: reflections, prospects and challenges* (Geneva: 2003).

[63] Tsui, *supra* note 60, at 13.

Resolutions relating to humanitarian assistance, we must recognise that it is generally accepted that General Assembly resolutions and recommendations have no binding force.[64] By enunciating conceptual and operational issues such as sovereignty and State consent, and reaffirming the principles of humanity, neutrality and impartiality, the Guiding Principles provide a useful base for the development of an international legal framework for humanitarian assistance. However, Resolution 46/182 does not provide sufficient guidance on the appropriate balance between rights-holders and duty-bearers in disaster settings and one must look to other non-binding normative standards to find detailed consideration of the rights involved from the perspective of those affected by a disaster.

B. Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief

While initially established in 1869 to assist victims of warfare, the international Red Cross Red Crescent Movement[65] has long been at the forefront of response to natural and human-made disasters. The *Principles and Rules for Red Cross and Red Crescent Disaster Relief*, the internal rules for Red Cross Red Crescent relief operations, were originally concluded in 1969 at the 21st International Conference of the RCRC Movement.[66] Since then, they have been revised and updated on five occasions, most recently in 1996. As an agreed text of the RCRC Movement, they contain fundamental principles of the Red Cross, including the right to offer and receive humanitarian assistance and a corresponding duty to assist victims of disasters, and stress the primary responsibility of national authorities to prevent and respond to disasters.[67]

---

[64] For two early studies of General Assembly Resolutions see: F. Blaine Sloan, 'The Binding Force of a "Recommendation" of the General Assembly of the United Nations', 25 *BYIL* 3 (1948) and D. Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations', 32 *BYIL* 97 (1955-1956).

[65] The "International Red Cross Red and Crescent Movement" encompasses the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and 186 national Red Cross or Red Crescent Societies. Hereinafter "the RCRC Movement".

[66] 'Resolutions adopted by the 21st International Conference of the Red Cross, Resolution XXIV: Principles and Rules for Red Cross Disaster Relief', 104 *IRRC* 625-631 (1969).

[67] Art. 2.1: "The Red Cross and Red Crescent in its endeavour to prevent and alleviate human suffering, considers it a fundamental right of all people to both offer and receive humanitarian assistance. Hence it has a fundamental duty to provide relief to all disaster victims and assistance to those most vulnerable to future disasters." Art. 3.1: "Prevention of disasters, assistance to victims and reconstruction are first and foremost the responsibility of the public authorities."

However, the *Principles and Rules* primarily relate to internal co-ordination and regulation of the component parts of the RCRC Movement. Therefore, reflecting the increasing focus by humanitarian actors on accountability and participation of affected populations in the late 1980s, the French Red Cross Society introduced a proposal in 1991 to develop common standards for relief agencies responding to humanitarian crises.[68]

The resultant *Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief*[69] expressly states that it is not a legally binding document, and is presented for guidance as a voluntary code for internal enforcement by humanitarian agencies. Moreover, as the title clearly articulates, the obligations in the text are addressed to the RCRC Movement and NGOs only, not to States.[70] Yet, since its adoption in 1994, the Code of Conduct has become a key reference for both governmental and non-governmental humanitarian actors. The European Commission's Humanitarian Aid Department requires endorsement of the Code of Conduct as a condition for funding, while the UK inter-agency Disasters Evaluation Committee uses the Code of Conduct as the basis for evaluation of humanitarian responses by its constituent members.[71] Furthermore, empirical research conducted in 2004 found that 70% of respondents from humanitarian agencies viewed the Code's articles as binding principles.[72]

The Code of Conduct commences with a statement of the humanitarian imperative:

> The right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries. As members of the international community, we recognise our obligation to provide humanitarian assistance wherever it is needed.

---

[68] D. Hilhorst, 'A Living Document? The Code of Conduct of the Red Cross and Red Crescent Movement and NGOs in Disaster Relief', Research paper produced for the conference Ten Years Code of Conduct: Principles in Practice, Disaster Studies Wageningen University (2004), at 5. See also, RRN Network Paper 7, 'Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief', Relief and Rehabilitation Network, Overseas Development Institute (1994).

[69] Hereinafter "the Code of Conduct".

[70] Although the Code of Conduct does include Annexes with recommendations addressed to governments of affected countries, donor governments and inter-governmental organisations.

[71] D. Hilhorst, 'Dead or Alive? Ten Years of the Code of Conduct for Disaster Relief', Humanitarian Exchange Magazine, Issue 29 (2005).

[72] Hilhorst, *supra* note 68, at 36. Although, considering the disproportionate number of large donor organisations which are signatories of the Code of Conduct, it is unclear whether such a high proportion of local implementing partner agencies would also consider the Code of Conduct as constituting binding principles.

It then articulates nine further fundamental principles of humanitarian assistance including: the requirement of independence from governmental foreign policies; provision of aid based on need; non-discrimination; and delivery of aid free from political or religious conditionalities. As such, the Code of Conduct mirrors the fundamental principles of the RCRC Movement,[73] although is not a direct replication of the RCRC Movement's principles which place neutrality and impartiality as fundamental operational and conceptual tenets of the RCRC Movement.

While the Code of Conduct has gained significant authority and recognition since it was created,[74] it has not yet gained universal recognition. In addition to the 186 national Red Cross or Red Crescent Societies which are signatories to the Code of Conduct, 490 humanitarian organisations based in 62 countries have formally signed the Code.[75] However, analysis of these 490 organisations highlights that 64% come from Europe and a further 12% from the Americas. Less than 1% of signatory organisations come from the Middle East or North Africa, and a mere 4% come from Sub-Saharan Africa. The remaining 20% of signatories come from the Asia-Pacific region, primarily Australia, Japan and New Zealand. This may reflect the balance of donor agencies to local organisations recognised as undertaking humanitarian work, but appears to run counter to Principle 6 of the Code itself which states: "All people and communities – even in disaster – possess capacities as well as vulnerabilities […]. Where possible, we will work through local [non-governmental humanitarian agencies] as partners in planning and implementation, and co-operate with local government structures where appropriate." The figures therefore imply that large (Western) international humanitarian agencies, despite being signatories to the Code of Conduct, do not require their local partner organisations to also be signatories to the Code. Moreover, there has been no significant change in the regional breakdown of signatories since 2004. At that time, there were 289 signatories to the Code of Conduct, with a regional split of Europe: 68%, Americas: 10%; Africa: 5%; and Asia: 10%.[76]

Despite the uneven geographic base of signatories, the Code of Conduct retains a key status in identifying fundamental principles of humanitarian action. This stems not least from the status of the RCRC Movement as the oldest humanitarian agency in the world, and recognition of the consistently

---

[73] The Fundamental Principles of the RCRC Movement are: Humanity, Impartiality, Neutrality, Independence, Voluntary Service, Unity, and Universality.

[74] For interconnections between non-binding normative standards in disaster response, see section 4.A below on the Sphere Handbook and explicit references to the Code of Conduct.

[75] Figures as of August 2011. Information from http://www.ifrc.org/Global/Publications/disasters/code-of-conduct/codeconduct_signatories.pdf (last accessed 7 August 2012).

[76] Hilhorst, *supra* note 68, at 6.

high level of expertise that it brings to disaster response operations and theory. Furthermore, International Conferences are held every four years to bring together the global members of the RCRC Movement, and all State signatories to the Geneva Conventions. At the 26th International Conference in 1996, representatives of 143 governments, 166 Red Cross Red Crescent Societies, the ICRC and IFRC endorsed the revised *Principles and Rules for Red Cross and Red Crescent Disaster Relief* and the *Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief*.[77] Despite their non-legal status, such broad recognition and acceptance of these documents at a conference of the stature of the RCRC International Conference provides a sound basis for placing considerable weight on the principles enunciated in them.[78]

C. UN Guiding Principles on Internal Displacement

While international refugee law is based on the 1951 *Convention relating to the Status of Refugees*,[79] the rights and protection available to persons displaced within a country's borders are covered by the *UN Guiding Principles on Internal Displacement*.[80] The Guiding Principles set out 30 principles to be applied to situations of internal displacement, covering protection from displacement

---

[77] Y. Sandoz, 'Editorial: Some Reflections on the 26th International Conference', 36 *IRRC* 3 (1996).

[78] Bugnion has argued:

> when States party to the Geneva Conventions take part in the Movement's International Conferences; they are represented by delegates with sufficient powers for them to participate in the debates and to vote in accordance with the instructions of their governments; these delegates therefore legitimately represent the States whose official position they put forward; the participation of government delegates gives the International Conferences an element of public authority which cannot be disregarded by international law.

F. Bugnion, 'Red Cross Law', 35 *IRRC* 491 (1995), at 492. Bugnion further argues: "resolutions [of an International Conference] are essentially recommendations or exhortations. But it would be quite wrong, as a consequence, to see them as having no legal significance", at 515.

[79] Convention relating to the Status of Refugees (1951), 189 UNTS 137 (entered into force 22 April 1954).

[80] United Nations, Commission on Human Rights, *The Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2 (1998). The Guiding Principles were drafted, at the request of the Commission on Human Rights, by a group of international legal experts convened by the Representative of the UN Secretary-General on Internally Displaced Persons. They were subsequently revised in 2004, and have been widely welcomed and endorsed by organs of the UN including the Secretary-General, the General Assembly and the Security Council, as well as specialised UN agencies including UNHCR, UNICEF, UNOCHA and UNHCHR.

ab initio; protection of fundamental rights during displacement; provision of humanitarian assistance to internally displaced persons (IDPs); and durable solutions of return, resettlement or reintegration. The original request from the Commission on Human Rights to the Representative of the UN Secretary-General on Internally Displaced Persons in 1996 was to develop "an appropriate framework […] for the protection of internally displaced persons". However, as noted by commentators,[81] the requests from the General Assembly and Commission on Human Rights were careful to avoid the term "legal" when referring to the development an appropriate framework.

International refugee law requires an individual who has fled their country of nationality or habitual residence to have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.[82] However, the Guiding Principles on Internal Displacement are intended to provide protection to people forced to flee their homes as a result of, or in order to avoid, the effects of armed conflict, situations of generalised violence, violations of human rights, or natural or human-made disasters.[83] As such, they avoid some of the definitional problems faced by UNHCR and national authorities in the refugee determination process, and provide protection to a broad range of people forced to move internally within a country.

By expressly including victims of natural or human-made disasters, the Guiding Principles provide a detailed framework for the provision of assistance to those displaced by disasters, and have been held up as an important source for a right to humanitarian assistance.[84] Principle 3(2) states: "Internally displaced persons have the right to request and to receive protection and humanitarian assistance from [national] authorities. They shall not be persecuted or punished for making such a request." This is complemented by a right for international humanitarian organisations and other appropriate actors to offer their services in support of IDPs. Such offers should not be arbitrarily refused by the competent national authorities.[85] This represents a balancing of State sovereignty with humanitarian imperatives. Roberta Cohen, one of the principal drafters of the Guiding Principles, has stated that a philosophical foundation behind the principles was the concept of sovereignty as responsibility. This concept ensures that the primary responsibility

---

[81] Kälin, *supra* note 40; and R. Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting', 10 *Global Governance* 459 (2004).

[82] Convention relating to the Status of Refugees, *supra* note 79, Art. 1A(2).

[83] Guiding Principles on Internal Displacement, *supra* note 80, Introduction, Paragraph 2.

[84] See Fisher, *supra* note 11, at 48.

[85] Guiding Principles on Internal Displacement, *supra* note 80, Principle 25(2).

for the welfare and safety of IDPs rests with the national government, but that the international community has a corresponding obligation to provide humanitarian assistance and protection if a national government is unable to fulfil their responsibilities.[86]

Despite the normative format of the Guiding Principles, they are not an international treaty, so do not carry the binding force that the 1951 Refugee Convention does. In his Preface to the annotated version of the Guiding Principles in 2008, Walter Kälin, Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons states:[87]

> These Principles, although not a binding legal instrument, have […] gained considerable authority. The Heads of State and Government assembled […] for the September 2005 World Summit unanimously recognized them as an "important international framework for the protection of internally displaced persons", and the General Assembly has not only welcomed "the fact that an increasing number of States, United Nations agencies and regional and non-governmental organisations are applying them as a standard" but also encouraged "all relevant actors to make use of the Guiding Principles when dealing with situations of internal displacement".

It has been argued that this wide-spread acceptance by States stems from the fact that the Guiding Principles represent a restatement of existing international law, rather than creating new rights for IDPs.[88] Indeed, at least 20 States have adopted national laws or policies based on the Guiding Principles,[89] and as such they represent the clearest normative framework to date for the protection of individuals affected by natural disasters. Yet it may be hard to replicate the process that led to the creation of the Guiding Principles, whereby a group of international legal experts were convened by a Representative of the Secretary-General rather than through the usual deliberative procedures of

---

[86] Cohen, *supra* note 81, at 466. Francis Deng, the first Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons, was central in developing the concept of "sovereignty as responsibility", originally in the context of conflict management in Africa. See: D. Rothchild *et al, Sovereignty as Responsibility: Conflict Management in Africa*, Brookings Institution Press (1996).

[87] W. Kälin, *Guiding Principles on Internal Displacement: Annotations*, ASIL & Brookings-Bern Project on Internal Displacement, Studies in Transnational Legal Policy, No. 38 (2008), at vii. (Document references omitted).

[88] Response from the Representative of the UN Secretary-General on Internally Displaced Persons, Francis M. Deng, to Questions Posed by the Delegate of Algeria, Third Committee of the General Assembly, 12 November 2001, as quoted in Cohen, *supra* note 81, at 473-474. See also: H. Entwisle, 'Tracing Cascades: The Normative Development of the UN Guiding Principles on Internal Displacement', 19 *Geo. Immigr. L.J.* 369 (2004-2005), at 384.

[89] R. Cohen, 'Reconciling R2P with IDP Protection', Brookings-LSE Project on Internal Displacement, March 2010, at 8. Available at: http://www.brookings.edu/research/articles/2010/03/25-internal-displacement-cohen (last accessed 7 August 2012).

the General Assembly, International Law Commission or Security Council. In sensitive areas that relate to the balancing of sovereignty and individual rights, such as explicit rights to humanitarian assistance as currently being debated by the International Law Commission, States may be wary of endorsing international norms that they have limited influence drafting and which may not reflect existing law. As Walter Kälin has observed: "where the Guiding Principles were met with resistance, it was not because of their content but because of a suspicion that they might be binding regardless of all assertions to the contrary".[90]

4. Application of Humanitarian Performance Standards

A. Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response

Following the massive international responses in the early 1990s to the conflicts in Somalia, the former Yugoslavia and particularly in Rwanda, non-governmental humanitarian agencies recognised that donor governments were increasingly examining the need to regulate aid agencies. The possibility of external regulation coincided with many NGOs' own desire to promote performance and accountability for their actions, and led a coalition of humanitarian NGOs and the RCRC Movement to propose quality standards in relief activities.[91] However, the project proposal for what became the Sphere Project, detailed the principal challenge they faced:

> To elaborate technical standards […] without reference in any way to the rights or aspirations of the assisted beneficiaries and claimants risks becoming a self-serving exercise concerned more with agencies' accountability to donors, than the rights of people affected by disaster. We therefore believe that any set of 'industry' standards must first be prefaced by a set of "consumer rights"; a beneficiaries or claimants charter, which highlights what, *under existing international law and declarations*, a person should have a "right" to in a humanitarian crisis.[92]

Perhaps unsurprisingly considering the variety of organisations that provide humanitarian assistance, this dual mandate to create both industry standards

---

[90] Kälin, *supra* note 81, at 7.

[91] P. Walker and S. Purdin, 'Birthing Sphere', 28(2) *Disasters* 100 (2004), at 101-102.

[92] As quoted in: J. Darcy, 'Locating Responsibility: The Sphere Humanitarian Charter and Its Rationale', 28(2) *Disasters* 112 (2004), at 117. (Emphasis added).

and consumer rights was controversial. Some organisations were concerned that minimum standards would be difficult to implement in practice, except in camp-like settings where humanitarian agencies were fully responsible for the provision of basic services.[93] Others were concerned with the fundamental principle of setting standards. Most notably, while Médecins sans Frontières (MSF) engaged in drawing up technical standards, they disagreed with the overall approach taken. After the production of the *Humanitarian Charter and Minimum Standards in Disaster Response* (known as the 'Sphere Handbook'), MSF decided not to participate in subsequent training and dissemination activities. Their stated concern was that technical standards, while important, did not address the fundamental lack of political will to protect victims of conflict and natural disasters which humanitarian agencies often faced.[94]

Despite these debates, by drawing on existing international law and a diverse range of guidelines, the Sphere Handbook provided the first comprehensive set of standards and indicators for the provision of humanitarian assistance. A trial version of the Handbook underwent field testing in 1998, with the first edition published in 2000. It was subsequently revised and updated in 2004, and a third edition was launched in April 2011. The revised format of the Handbook[95] follows the previous versions while strengthening the priority given to humanitarian and protection principles. The Handbook now contains four key interconnected sections: the Humanitarian Charter, Protection Principles, Core Standards and Minimum Standards.

The bulk of the Handbook is comprised of the Core Standards and Minimum Standards. The Core Standards refer to common process standards applicable across all thematic and technical sectors. These include: participation by beneficiaries; co-ordination and collaboration; assessment and design of programmes; and key competences for humanitarian workers. Detailed sector-specific Minimum Standards, with corresponding key indicators and suggested activities, are then elaborated in four areas: water supply, sanitation and hygiene promotion; food security and nutrition; shelter, settlement and non-food items; and health.

---

[93] For a recent analysis of the Sphere Handbook in protracted refugee settings, see: L. McDougal and J. Beard, 'Revisiting Sphere: New Standards of Service Delivery for New Trends in Protracted Displacement', 35(1) *Disasters* 87 (2011).

[94] J. Tong, 'Questionable Accountability: MSF and Sphere in 2003', 28(2) *Disasters* 176 (2004), at 177.

[95] The 2000 and 2004 editions of the Handbook were entitled *Humanitarian Charter and Minimum Standards in Disaster Response*. All subsequent references are to the 2011 edition: The Sphere Project, *Humanitarian Charter and Minimum Standards in Humanitarian Response*, April 2011.

However, preceding the operational and technical standards, are the Humanitarian Charter and Protection Principles. While only five pages long, the Humanitarian Charter forms the conceptual underpinning of the Handbook by drawing on international humanitarian law, human rights and refugee law to assert that civilians affected by natural or human-made disasters or armed conflict have a right to life with dignity, and therefore a right to protection and assistance. The Charter continues by asserting that an individual's right to life entails the right to have steps taken to preserve life where it is threatened, and a corresponding duty on others to take such steps. Implicit in this is the duty not to withhold or frustrate the provision of life-saving assistance.[96] The subsequent Protection Principles are intended to operationalise those rights, although the Handbook takes a limited approach by setting out basic protection principles, while recognising that specific humanitarian agencies have more expansive protection mandates.[97]

The Humanitarian Charter centres around three overarching principles: the right to life with dignity; the right to receive humanitarian assistance; and the right to protection and security. However, the Charter is explicit in recognising that these rights are not formulated in the same terms under international law, and while they reflect international law, they ultimately derive their force from the fundamental moral principle of humanity.[98] The Charter therefore exceeds existing international law by invoking the general principles of humanity and the humanitarian imperative, although humanitarian agencies are expected to act in accordance with the principles in the Charter and the RCRC Code of Conduct.[99] This expansive view of the relevant legal obligations was one of the original concerns regarding the Sphere Project raised by organisations which questioned the legal validity of the Charter. For them, the Charter contained an arbitrary selection of articles of international law, mixed soft law and hard law, and did not clearly state who was responsible for respecting the rights outlined in the Charter.[100] So what status should be accorded to the Handbook? While inspired by international law, the 2011 edition states: "The Sphere Handbook is a voluntary code and a self-regulatory tool for

---

[96] *Sphere Handbook*, 2011 edition, at 20-22.

[97] *Ibid.*, at 29-33. The four Protection Principles are: avoid causing harm; ensure access to impartial assistance; protect people from violence; and assist with rights claims, access to remedies and recovery from abuse.

[98] *Ibid.*, at 20-21.

[99] *Ibid.*, at 24. Unlike the Code of Conduct, the Sphere Handbook is not a signatory text, so humanitarian agencies do not have to make express decisions to become signatories to the Humanitarian Charter and Minimum Standards.

[100] C. Dufour *et al*, 'Rights, Standards and Quality in a Complex Humanitarian Space: Is Sphere the Right Tool?', 28(2) *Disasters* 124 (2004), at 126.

quality and accountability […] [t]he Sphere Project has consciously opted for the Handbook not to be prescriptive or compliance-orientated, in order to encourage the broadest possible ownership of the Handbook".[101]

Although there is no homogenous 'humanitarian sector', reflecting the widely divergent mandates and approaches of humanitarian agencies, arguably the Handbook represents the majority consensus of humanitarian workers in the sectors covered. The development of the Humanitarian Charter and Minimum Standards, and subsequent revisions, comprise the input of over 400 organisations from 80 countries.[102] Additionally, many donors, including governments and UN agencies, require organisations to commit to the "Sphere standards" to access funding opportunities.[103] Yet the Handbook aims to marry a traditional needs-based approach to humanitarian assistance (Core Standards and Minimum Standards) with rights-based approaches established on individual protection and entitlement (Humanitarian Charter and Protection Principles). The success of this division has been questioned as while rights-based approaches provide a platform to appeal to political actors, this "cornerstone" of the Handbook has been underutilised by humanitarian actors in negotiations over access and relief provision.[104] Nevertheless, the 2011 edition now contains not just a reference to the right to humanitarian assistance, but bases the underlying approach taken by the Handbook on this previously unacknowledged influence. If this expansion of the rights contained in the Handbook now represents the consensus view of the majority of humanitarian actors, despite the non-binding sources relied upon, this creates a strong body of international practice which may directly influence international law.[105]

---

[101] *Sphere Handbook*, *supra* note 96, at 8.

[102] For more on the 2011 Sphere Handbook, see: http://www.sphereproject.org/silo/files/what-is-new-in-the-sphere-handbook-2011-edition.pdf (last accessed 7 August 2012).

[103] McDougal and Beard, *supra* note 93, at 90.

[104] Darcy, *supra* note 92, at 118-119. Although this may reflect the fact that the Humanitarian Charter is explicitly based on moral and ethical grounds, not just legal principles.

[105] Of equal importance for an international normative framework for humanitarian assistance, the Sphere Project should also be credited with its inter-agency co-operative approach and emphasis on complementary normative standards, such as the RCRC Code of Conduct and 2006 Inter-Agency Network for Education in Emergencies *Minimum Standards for Education in Emergencies, Chronic Crises and Early Reconstruction*. The Sphere Project was also a key driver of the Humanitarian Accountability Project, which developed the *Standards in Accountability and Quality Management*. By introducing core principles of accountability into humanitarian actions, with verifiable benchmarks and indicators, the HAP Standards provide an important tool for the practical application of humanitarian principles. Furthermore, the compliance mechanisms within the HAP Standards provide an example of humanitarian agencies voluntarily committing themselves to uniform standards, notwithstanding the non-legal source of the

B. IFRC Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance

The *Principles and Rules for Red Cross and Red Crescent Disaster Relief* and the *Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief* are directed at the co-ordination and delivery of humanitarian assistance by the RCRC Movement and non-governmental humanitarian actors. However, national Red Cross and Red Crescent Societies also act as auxiliary services to a State's emergency capacities, so the International Federation of Red Cross and Red Crescent Societies (IFRC) has worked closely with governments to assist them in developing their national disaster-preparedness and response plans.[106]

The IFRC initially established the International Disaster Response Laws, Rules and Principles (IDRL) programme in 2001 to provide technical assistance, capacity building and research on the legal regulation of disaster response.[107] Then in 2003, States parties to the Geneva Conventions and the RCRC Movement adopted the Agenda for Humanitarian Action at the 28th International Conference. This Agenda included the IFRC's commitment to "identif[y] any outstanding needs in terms of the legal and regulatory framework and the development of models, tools and guidelines for practical use in international disaster response activities".[108] The IFRC has subsequently undertaken research and consultations to determine potential gaps in the international legal regulatory framework for the provision of disaster relief,[109] culminating in 2008 with the publication of the *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*.

The IDRL Guidelines are premised on the fact that many countries do not have specific laws regulating access and delivery of international relief, and

---

obligations accepted by member agencies. For more information on the HAP Standards, see: http://www.hapinternational.org (last accessed 7 August 2012).

[106] IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva: 2008), at 3. Hereinafter 'the IDRL Guidelines'.

[107] 'IDRL Factsheet', http://www.ifrc.org/PageFiles/53419/idrl-fact-sheet-en.pdf (last accessed 7 August 2012).

[108] Final Goal 3.2 of the 28th International Conference of the Red Cross and Red Crescent, December 2003, point 3.2.6.

[109] Publications of relevance include: H. Fischer, *International Disaster Response Law: A Preliminary Overview and Analysis of Existing Treaty Law*, IFRC (Geneva: January 2003); IFRC, *International Disaster Response Laws, Principles and Practice*, *supra* note 62; IFRC, *Law and Legal Issues in International Disaster Response*, *supra* note 51.

that developing national legal frameworks in the immediate aftermath of a major disaster does not lend itself to effective rules and regulations.[110] Therefore, the IDRL Guidelines are aimed at State authorities to assist them in developing their domestic legal preparedness for disasters. As such, the Guidelines provide a practical approach to legal issues to be addressed in disaster relief. They are centred squarely on the affected State's response, setting out their primary responsibility for disaster risk reduction, relief and recovery assistance, and that assistance by other humanitarian actors should only be initiated with the consent of the State and in principle on the basis of an appeal by the State.[111] Reflecting the operational nature of the IDRL Guidelines, they continue by elaborating eligibility requirements for the granting of legal facilities to humanitarian actors by affected States, and a range of practical and logistical areas where States should review their own national laws to ensure that humanitarian assistance is not unnecessarily delayed or restricted. Such areas include: granting of visas for international relief personnel; ensuring relief goods and equipment are exempt from customs duties, taxes and tariffs; reducing legal and administrative barriers to importation of telecommunications equipment and medical supplies; and ensuring vehicles involved in humanitarian response are able to transit and enter affected and neighbouring States.[112]

The purpose of the IDRL Guidelines is therefore to assist governments, and to promote disaster planning and preparation through a pro-active approach to examining national laws that may unintentionally hinder relief operations. As such, they can be seen as a continuation of the approach taken by Resolution 2816 (XXVI) which first called on governments to examine their own domestic legal arrangements for disaster response, and the 1982 UNITAR Model Rules for Disaster Relief Operations which provided a framework for governments to adapt based on their own national requirements. In light of this, it is perhaps not surprising the very first words of the IDRL Guidelines are: "These Guidelines are non-binding". By setting out a series of recommendations to governments on minimum quality standards and legal facilities humanitarian actors require to undertake their work effectively, the IDRL Guidelines do not attempt to expand our existing understanding of international law or create new rights and obligations for States.[113] Unlike a document such as the Sphere

---

[110] IDRL Guidelines, *supra* note 106, at 4-5.

[111] *Ibid.*, Introduction, point 1.1, at 10, and Part III: Initiation and termination of international disaster relief and initial recovery assistance, point 10.1, at 14.

[112] *Ibid.*, Part V: Legal facilities for entry and operations, points 16-24, at 16-19.

[113] Point 1.4 states the IDRL Guidelines are "not intended to recommend any changes to, or affect the meaning and implementation of, any existing international law or agreements", at 10.

Handbook, the IDRL Guidelines fall squarely into the category of 'technical guidelines'. Even the terminology used within the Guidelines reflects this, with the initial "core responsibilities" of States and humanitarian actors being set out, rather than "core principles" of humanitarian action.

Notwithstanding the technical nature of the IDRL Guidelines, as a source of non-binding normative standards they rank highly in their persuasive value. Not only are the Guidelines directed at States themselves, but 194 States and the international RCRC Movement formally adopted the Guidelines at the 30th International Conference of the Red Cross and Red Crescent in November 2007. While recognising the non-binding nature of the Guidelines, States formally accepted the importance of the Guidelines and furthermore encouraged all governments to make use of them to strengthen their national legal, policy and institutional frameworks for disaster preparation and response. Such recognition has continued, most recently in General Assembly Resolution 65/264, which encourages Member States and regional organisations to take further steps to strengthen their operational and legal frameworks for international disaster relief, taking into account the IDRL Guidelines.[114]

Nevertheless, in 2009 the IFRC noted that only a handful of new laws had been adopted on the basis of the IDRL Guidelines and that there was an uneven level of engagement from regional organisations, although over 24 national review processes had been commenced or were planned.[115] By the end of 2010, the IFRC had established eight national technical assistance projects, with negotiations for projects in a further eight countries. The IFRC has also drafted a model act to assist States in implementing the IDRL Guidelines, which will be presented at the 31st International Conference in November 2011.[116] Such activities are likely to strongly influence the development of national and regional legislation on disaster response, although a key debate at the international level remains the interplay between rights-based and technical approaches to humanitarian assistance.

---

[114] *International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, from Relief to Development*, GA Res. 65/264, 21 June 2011.

[115] IFRC, *The Right Aid at the Right Time: Progress Report on the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva: November 2009), at 13-14.

[116] IFRC, *International Disaster Response Law, Rules and Principles (IDRL) Programme: Annual Report 2010*, 31 May 2011, http://www.ifrc.org/PageFiles/86951/MAA0000410ar.pdf (last accessed 7 August 2012), at 5.

C. IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters

The Inter-Agency Standing Committee (IASC) was established in 1992, pursuant to Resolution 46/182, as an inter-agency forum for co-ordination, policy development and decision-making for UN and other humanitarian agencies, under the direction of the UN Emergency Relief Co-ordinator. The IASC's role was reaffirmed in Resolution 48/57[117] as the primary mechanism for inter-agency co-ordination, when it was requested to take action on policy issues related to humanitarian assistance and on formulating a coherent and timely UN response to humanitarian emergencies. The IASC is comprised of nine specialised agencies of the UN,[118] with standing invitations to a further nine organisations representing UN, inter-governmental and non-governmental organisations.[119]

Drawing on the linkages between disasters and internal displacement, the IASC requested the Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons to draft a set of operational guidelines on human rights and natural disasters. The Operational Guidelines were initially published in 2006, while a pilot Field Manual was published in 2008 to provide the human rights background underpinning the Guidelines and operational steps on how they could be best implemented.[120] The final revised version was published in January 2011 as the *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters*.[121]

---

[117] *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res. 48/57, 14 December 1993.

[118] The full members are: FAO, UNOCHA, UNDP, UNFPA, UNHABITAT, UNHCR, UNICEF, WFP and WHO.

[119] The standing invitees are: ICRC, ICVA, IFRC, InterAction, IOM, UNHCHR, SCHR, Office of the Special Rapporteur on the Human Rights of Internally Displaced Persons, and the World Bank.

[120] Inter-Agency Standing Committee, *Protecting Persons Affected by Natural Disasters: IASC Operational Guidelines on Human Rights and Natural Disasters*, Brookings-Bern Project on Internal Displacement, June 2006; and Inter-Agency Standing Committee, *Human Rights and Natural Disasters: Operational Guidelines and Field Manual on Human Rights Protection in Situations of Natural Disaster*, Brookings-Bern Project on Internal Displacement, pilot version March 2008.

[121] The final version of the Operational Guidelines incorporates the Field Manual's practical approach by providing examples of activities that agencies can consider to ensure they respect and promote the human rights of victims of natural disasters, and includes the entire text of the original Operational Guidelines. Unless otherwise stated, all references are to the 2011 publication: Inter-Agency Standing Committee, *IASC Operational Guidelines on the Protection of Persons*

The Operational Guidelines are intended to provide practical advice to intergovernmental and non-governmental humanitarian agencies to implement a human rights-based approach to humanitarian assistance following natural disasters. From a conceptual basis this ensures that those affected by disasters are viewed as "individual rights-holders who can claim rights from particular duty-bearers rather than simply being passive beneficiaries and recipients of charity".[122]

The Operational Guidelines cover four categories of human rights applicable in natural disaster settings:

(A) Protection of rights related to protection of life; security and physical integrity; and the protection of family ties in the context of evacuations.
(B) Protection of rights related to the provision of food; health; shelter; and education.
(C) Protection of rights related to housing, land and property; and livelihoods.
(D) Protection of rights related to documentation, free movement in the context of durable solutions for IDPs; re-establishment of family ties, expression and opinion; and elections.

The 2006 Operational Guidelines and 2008 Field Manual originally posited a hierarchy of rights, stating that priority during the initial emergency phase following a natural disaster should be given to the rights to physical security, integrity, and basic necessities of life, over and above other economic, social, cultural, civil or political rights.[123] While maintaining four categories of rights, the 2011 version of the Operational Guidelines clearly states: "The structure of these Guidelines thus does not suggest any hierarchy among relevant rights but rather helps to quickly identify those rights that are primarily relevant during a given phase of a disaster". It is now suggested that users may wish to limit themselves to consulting the rights in the first two chapters (A and B) during the immediate emergency phase of an operation, before turning to the other sections of the Operational Guidelines later.[124]

---

in Situations of Natural Disasters, Brookings-Bern Project on Internal Displacement, January 2011 (hereinafter 'the Operational Guidelines'). Of note is the terminology "protection of persons", which mirrors the language used in the ILC's draft articles on the *Protection of Persons in the event of Disasters* and the *UN Guiding Principles on Internal Displacement*.

[122] *Operational Guidelines*, *ibid.*, at 2.

[123] *Operational Guidelines and Field Manual*, 2008, *supra* note 120, at 7-8.

[124] *Operational Guidelines*, *supra* note 121, at 9-10. Such an approach reflects the reality of emergency operations, whereby various types of assistance will need to be provided at different phases of the response. The universality, indivisibility, inter-dependence and inter-relations of human rights are reaffirmed in the Guidelines, at 10.

As a normative framework, the Operational Guidelines only cover human rights in natural disasters, and expressly exclude armed conflicts and human-made disasters. International human rights treaties including the Universal Declaration on Human Rights and the International Covenants on Civil and Political, and Economic, Social and Cultural Rights form the basis of the human rights obligations in the Operational Guidelines.[125] Yet, like other non-binding normative standards, the Operational Guidelines exceed the strict confines of international law and are "informed by and draw on existing standards and policies pertaining to humanitarian action, and human rights guidelines on humanitarian standards in situations of natural disaster".[126] The inter-linkages between internal displacement and natural disasters are reflected in Guideline A.1.5 which states that all persons displaced due to natural disasters should be covered by the Guiding Principles on Internal Displacement. Furthermore, the principles set out in the Operational Guidelines are tied to other non-binding texts, such as the Sphere Handbook and the RCRC Code of Conduct, by requiring the Guidelines to be interpreted as consistent with and complementing such texts.[127] Of note though is that the 2006 and 2008 versions of General Principle VI specifically stated that the Operational Guidelines should be applied together with other relevant Codes of Conduct, Guidelines and Manuals. This statement has been removed from the 2011 version. However, reflecting the increasing emphasis placed on standards by humanitarian actors, the list of relevant codes of conduct, guidelines and manuals annexed to the Guidelines has increased from 20 documents in 2008 to 43 documents in 2011.

Despite the references to other non-binding normative standards for humanitarian assistance, the Operational Guidelines have been criticised for both a responsibility gap and a participation gap.[128] As with many non-binding normative standards, there is no accountability or compliance mechanism built into the Operational Guidelines, so while they are intended to provide concrete guidance to humanitarian staff, it is not possible to verify whether or not agencies are abiding by the principles laid down. Additionally,

---

[125] *Ibid.*, at 8-9.

[126] *Ibid.*, at 8-9.

[127] *Ibid.*, at 9. The 2008 Field Manual included an annex analysing the commonalities and disparities between the Operational Guidelines and the Sphere Minimum Standards. This annex has been deleted from the 2011 version.

[128] E. Ferris and D. Paul, 'Protection in Natural Disasters', paper submitted to *Protecting people in conflict and crisis: Responding to the challenges of a changing world*, Refugee Studies Centre, University of Oxford, in collaboration with the Humanitarian Policy Group at the Overseas Development Institute, University of Oxford, 22-24 September 2009, at 36.

there has been criticism that there was not sufficient participation by communities affected by natural disasters in the process of developing the original Operational Guidelines and Field Manual.[129]

Arguably, the 2011 version has strengthened the human rights-based approach and consistently highlights the primary responsibility of national authorities to respect all human rights of persons affected by natural disasters. The current version, however, has also removed references to the right of those affected by natural disasters to request and receive protection and assistance from their governments.[130] This runs counter to the 2011 edition of the Sphere Handbook which has for the first time included the right to receive humanitarian assistance as an overarching principle of the Humanitarian Charter. The implications of an inter-governmental organisation such as the IASC removing a specific reference to the right to protection and assistance, and corresponding impact on the approach taken in the ILC draft articles on the Protection of Persons in the Event of Disasters, remain to be seen. Yet the convergence of protection terminology between the IASC and the ILC may indicate that a human-rights based approach will be included in the draft articles, alongside technical and operational rules to facilitate international disaster response operations.

5. Relative Normativity of Non-Binding Normative Standards of Humanitarian Assistance

Even if one accepts the confines of a positivist, binary approach to international law, a wealth of informative and authoritative texts on disasters and the provision of humanitarian assistance have originated out with the international legal system. Notwithstanding the lack of legal force behind such documents, non-binding normative standards can possess moral, ethical, political or persuasive value, potentially greater than that of formal legal texts. So how does one ascribe a particular weight to a specific text? As Charney has highlighted, an expanded view of norm creation in international law should include sources that emanate from the international legal system, such as deliberations and declarations of multilateral forums, as these constitute an

---

[129] *Ibid.*, at 36.

[130] "Those affected by natural disasters have the right to request and receive such protection and assistance from their governments. The main duty-bearers, thus, are the governments and administrations of the countries concerned." *Operational Guidelines*, 2006, *supra* note 120, at 10; and *Operational Guidelines and Field Manual*, 2008, *supra* note 120, at 7.

important stage in the crystallisation of international norms.[131] But even this does not address the range of governmental, inter-governmental and non-governmental normative standards in the area of humanitarian assistance. Therefore, I propose the following expansion of Blutman's soft law (I) categories[132] as a basis for analysing non-binding normative standards relating to the provision of humanitarian assistance:

1. **Inter-governmental assertions as expressions of the views of the international community** (whether as resolutions, declarations, programmes of action etc.). International bodies such as the UN, and regional bodies like the Council of Europe or African Union, provide an opportunity for groups of States to develop consensus positions. In determining the extent of consensus on the views expressed in documents such as *GA Resolution 46/182*, consideration should be given to the voting record in bodies like the General Assembly, Security Council or ECOSOC, as well as dissenting statements made by States and how such Resolutions and Declarations change over time.
2. **Agreements and recommendations accepted by States through diplomatic conferences and summits**. The formal acceptance of texts, in whatever format, by representatives of governments at international diplomatic conferences and summits provides strong political weight to such texts. For example, the *IDRL Guidelines* were formally accepted by States at an International Conference of the RCRC Movement and expressly state that they represent the international responsibilities of States, thereby helping to elaborate the international consensus on rights-holders and duty-bearers. However, the actual content of such documents should be examined carefully – while the *RCRC Code of Conduct* was adopted by States at the 26th International Conference of the RCRC Movement, the rights and responsibilities it contains relate to non-governmental organisations, not specifically States themselves.
3. **Guidelines and minimum standards established by specialised bodies and representatives of the UN**. As agencies mandated by the international community to represent and protect specific groups, such as children by UNICEF or refugees by UNHCR, specialised bodies and representatives of the UN play a fundamental role in the development of international norms. The authority of the *Guiding Principles on Internal Displacement* results not least from the process of their drafting and subsequent use by

[131] Charney, *supra* note 38, at 544.
[132] See footnote 28 and corresponding text above.

States and humanitarian agencies themselves. Similarly, the IASC represents a broad spectrum of UN, inter-governmental and non-governmental agencies. Therefore, the *Operational Guidelines on the Protection of Persons in Situations of Natural Disasters* provide an influential companion to general principles contained in other international texts.

4. **Widely accepted guidelines and minimum standards developed by non-State actors**. The importance of non-governmental organisations and other non-State actors in providing humanitarian assistance has increased markedly in the past 20 years. As experts in the provision of humanitarian assistance, the development and acceptance of general principles and minimum standards by consortia of NGOs and non-State actors, such as the *Sphere Handbook* and the *RCRC Code of Conduct*, represent not just operational but normative standards that thousands of humanitarian actors voluntarily commit to adhere to. Considering the wide range of different guidelines and standards produced by non-governmental sources, the weight to give such normative standards should be predicated on an examination of the extent of acceptance or signatories to a specific document (including the geographic and sectoral breakdown of signatories), the acceptance or references made to the document by States (for example in funding or evaluation processes, or in official statements in UN or regional bodies), and the form and language used in the document (for example does it proclaim to present a description of international legally binding rights and responsibilities, or does it utilise aspirational language?).

This categorisation does not assume a hierarchy between these four groups, and the origin of a particular text does not automatically provide it a particular status. While one could assume that texts which originate from governmental or inter-governmental sources are likely to hold greater sway with governments themselves; other key features for establishing the relative weight to be ascribed to a particular text need to be examined before a determination can be made.

For example, cross-cutting these four categories is the extent of recognition for specific standards or principles across a broad range of different States, institutions and organisations. The inter-governmental IASC Operational Guidelines expressly cross-reference other non-governmental standards including the Sphere Handbook and the RCRC Code of Conduct. There is also cross-referencing between non-governmental texts, for example the Sphere Handbook cross-references the Code of Conduct. Meanwhile, State representatives often refer positively to documents produced by non-State actors, such as support given to the IDRL Guidelines by representatives to the Sixth Committee of the General Assembly regarding the ILC programme of

work on the protection of persons in the event of disasters,[133] or the stipulation that agencies be signatories of the RCRC Code of Conduct to receive ECHO funding. Through such cross-referencing, key non-binding normative standards build upon previous documents, thereby creating a body of internationally authoritative norms for humanitarian assistance, while simultaneously strengthening the normative value of the original documents through the repeated endorsement of the principles contained therein.[134]

However, it is clear that the influence non-binding normative standards for humanitarian assistance have on actual State and humanitarian actors' practice can vary. The 1993 San Remo Institute of International Law *Guiding Principles on the Right to Humanitarian Assistance* have not been expressly internalised by States; while other texts have, such as the UN *Guiding Principles on Internal Displacement*. This may act as an additional indicator of the status texts are ascribed by humanitarian actors, and by States themselves. For non-binding normative standards to directly impact humanitarian practice, ultimately humanitarian actors need to view that they should be complied with either for legal or non-legal reasons. Such compliance may, paradoxically, consequently increase the normative value that should be placed on a particular text, but unless the international community agrees binding international legal principles and standards, such compliance remains in the non-legal, and so non-legally enforceable, sphere.

Conclusion

In any discussion of soft law, some may argue against a strongly State-centric approach to the development of international norms and standards; yet allowing access for humanitarian assistance remains almost exclusively in the domain of the receiving State. If a State is reluctant to accept international assistance, such as occurred during Cyclone Nargis in Myanmar in 2008, the international community is faced with the options of not providing humanitarian assistance, or seeking to persuade the affected State through diplomatic

---

[133] See, Summary record of the 22nd meeting of the Sixth Committee of the UNGA, A/C.6/64/SR.22, 8 February 2010, Statement by Nuala Ní Mhuircheartaigh (Ireland).

[134] See: D. Caron, 'The Importance and Challenge of the Difference Between Principles and Rules in International Law', Closing Plenary Address, 2011 International Law Association Asia-Pacific Regional Conference, *Contemporary International Law Issues in the Asia Pacific: Opportunities and Challenges*, 29 May – 1 June 2011, Taipei, Taiwan, Republic of China, at 8. Available at: http://works.bepress.com/david_caron/118/ (last accessed 7 August 2012).

or military means. In the absence of forcible humanitarian intervention to assist the victims of natural or human-made disasters, humanitarian agencies are required to address requests for access to State authorities through appeals based on humanitarian principles. Nevertheless, I would not agree that soft law "cannot be defended in the context of international law" or that "as a vague, redundant and unfounded notion, its use may not be justified".[135] From a technical perspective, but also from the standpoint of promoting a common understanding of fundamental principles, non-binding normative standards have an important role to play in the crystallisation of new international norms that are accepted by both State and non-State actors. For those attempting to provide international humanitarian assistance and protection to persons affected by disasters, the wider recognition and acceptance that an agreed body of humanitarian principles and performance standards have at an inter-State level, the stronger their persuasive value when appeals for access to victims need to be made.

As the ILC debates the possibility of creating a legally binding international Treaty on the Protection of Persons in the Event of Disasters, State representatives will have to determine to what extent they are willing to potentially limit their own State sovereignty in pursuit of binding international rules surrounding humanitarian assistance. Will an explicitly human rights-based approach be taken, reflecting the stance of the IASC and the protection-oriented approach of the UN Guiding Principles on Internal Displacement, or will a more technical and operational approach take precedence? Moreover, will the international community decide to use a *soft instrumentum*, along the lines of the Guiding Principles on Internal Displacement and Resolution 46/182, to further elaborate the fundamental principles of humanitarian responses; or will they develop a *soft negotium* without specific binding normative commitments being required from States?

Indeed, the current work of the International Law Commission may end up as simply another stage on the road to the creation of international norms for the protection of persons affected by disasters. While an extensive range of authoritative non-binding normative standards are available to direct their work, it remains to be seen how the international community intends to regulate the provision and delivery of humanitarian assistance and where any new norms will be placed in the pantheon of international law. Nevertheless, it is clear that there is a growing consensus that a right to humanitarian assistance following natural and human-made disasters, and the concomitant

---

[135] Blutman, *supra* note 18, at 606-607.

responsibilities this entails on States, is in the process of crystallisation. Non-binding normative standards, including those emanating from non-State sources, have been crucial in advancing our understanding of the fundamental principles involved in the construction of the emerging international framework for the protection of persons affected by natural and human-made disasters. What is now required is an international consensus on how best to ensure that agreed fundamental principles and performance standards for the delivery and acceptance of humanitarian aid are effectively implemented and followed by State and non-State humanitarian actors, whether through the creation of new binding international obligations or through the internalisation of those agreed principles and standards by humanitarian actors themselves.