Despite the huge number of relevant studies on the subject, the complex analysis concerning the role of Non-State Actors (NSAs) in the international protection of human rights still poses several challenges, and no appropriate methodology seems to have been found yet, which would generally assess from a theoretical perspective the role played by those actors in contemporary international legal systems.

Nevertheless, in order to move ahead on this track, a focus on the distinction between 'subjects' and 'actors' seems to be crucial. Assuming that the second category includes the first, this would encompass both those entities formally bound by international norms and those which actively operate within the social base of the international legal order, gaining a relevant role in it by conduct and initiatives which are reflected in its (ascendant and descendant) normative processes. Therefore, a shift from the traditional concept of international legal personality setting the theoretical framework as the 'theory of actions as international law' as suggested by some scholars appears instrumental to a consistent analysis of the conduct of those actors within the International Disaster Law (IDL) domain. Even if eventual hesitations against this perspective are comprehensible, it has to be considered that IDL represents a context where theory profoundly merges with practice in disaster-related issues, the agency of non-state entities is likely to have relevant consequences on proper norms' dynamics at late-making and liability, also in the light of their capacity to carry out public-like functions in emergency situations in which the host State could temporarily fail.

In any case, to reduce the gap between theory and practice does not necessarily support the putative existence of a broader constitutional order formed by different actors in terms of factors and forces, in which public-private partnership would have a well-established role in a multi-level normative system. On the contrary, it demonstrates that 'we are dealing with a traversing process that still presents a set of challenges and institutional deficiencies.' Accordingly, in the absence of effective enforcement mechanisms, to impose international obligations on NSAs would be a
vain effort that would also weaken States’ responsibilities to ensure compliance with international law, still based on a more effective State-centred paradigm. 5

Having said that, the above-mentioned shift in the subject-actors discourse seems today not so astonishing as it might have appeared a few decades ago, and it appears as even more necessary if the emphasis is put on the respect and application of human rights, as legally recognised, in the course of disaster management activities. Without a doubt, reasoning on human rights law is reasoning on the need to promote the implementation of their core values, and this inevitably pushes to reconsider the importance of the notion of subject to foster more pragmatically on the actual scope of application of international obligations. 6

Even if the category of NGOs comprises several types of entities, the present article will focus on some major humanitarian actors involved in disaster relief – Non-Governmental Organisations (NGOs) and Red Cross/Red Crescent entities, here defined as Non-State Humanitarian Actors (NSHAs) 7  – in the light of their increasing role in international law-making (soft and hard 8) and accountability processes. As proved in the past, the authoritative role of some governmental entities appears less effective when specific fields of law pass through a phase of innovation, as was the case for Amnesty International on the development of international legal standards prohibiting torture in the 1970s, for the International Campaign to Ban Landmines (ICBL) successes in the 1990s and for the ‘crucial role’ of a group of NGOs in the negotiation of the International Criminal Court’s statute. 9

As will be demonstrated, this influential position looks even brighter for the IDL, still considered as an emerging sector of international law. The idea of this contribution is, in fact, to assess if the implementation of consistent practices by private humanitarian actors and the legitimacy that their engagement can acquire may ultimately integrate the States’ monopoly in the production and application of international norms concerning the protection of individual rights in disaster scenarios. Since the agency of NGOs in action, as proved by several projects and initiatives, where the different aspects – law-making, standard setting, compliance and accountability – blend into each other, the chapter will focus on three selected examples, each of which deals with one of those specific functions.

The role of the International Federation of Red Cross and Red Crescent Societies as (soft) law-maker and its impact on human rights protection

As generally recognised, IDL currently represents a fragmented and amorphous sector of public international law, due to the lack of a so-called ‘flagship treaty’ which would shape its general framework and determine rights and duties of all involved actors. 10 According to that, it is not possible to mention substantial examples of how the international civil society participated in a formal interstate normative process, as was the case for instance of the Ottawa Mine Ban Treaty of 1997. 11

Even so, thanks to their authoritative advocacy techniques and the incomparable expertise gained in the field, some humanitarian organisations are effectively contributing to the creation, development and interpretation of this field of law, exerting a considerable influence on its scope and dictates and thus having a direct impact on the protection of concerned peoples. One of the most significant examples of this dynamic is represented by the direct involvement of the International Federation of the Red Cross and Red Crescent Societies (IFRC) 12 within the work of the United Nations International Law Commission (ILC), which – since 2007 – is committed to a codification effort on the Protection of Persons in the Event of Disasters, recently approved in second reading after a consultation phase with States and relevant international organisations. 13
Since the preliminary phase, as evidenced by the content of a Background Study produced by the UNHCR, humanitarian law and practices are a key point of reference. Consequently, the eight reports drawn up by Eduardo Valencia-Ospina, the Special Rapporteur (SR) on the topic, clearly demonstrate his intention to closely integrate within the process, from its early stage, the most relevant humanitarian actors. In the attempt to identify the basic assumptions that should have informed the work of the ILC, the SR described how he understood to establish initial contacts with representatives of the governmental and non-governmental organizations concerned, including senior officials of the International Disaster Law Programmes of the IFRC, and how he took into account several findings of the IFRC’s research activities and documents.

In this regard, we can trace the first contribution of the IFRC, which in 2007 was committed to the publication of a set of operational guidelines for disaster response and therefore pushed for the elaboration of a distinct but complementary tool. The SR has been involved in defining the perspective of the Draft Articles, such as the one on individual protection in disaster contexts and therefore in suggesting a definite rights-based approach aimed at the identification of a specific standard of treatment to which an individual is entitled. This approach — representing among others one of the main postulates of the Project — has been clearly described by the SR who, paraphrasing the Secretary-General, reported that

a rights-based approach deals with situations not simply in terms of human needs, but in terms of society’s obligations to respond to the inalienable rights of individuals, empowering them to demand justice as a right, not as a charity, and giving communities a moral basis from which to claim international assistance when needed.

Sharing the assumptions contained in a Desk Study of the IFRC on the subject, the SR recognized that “IDRL draws on international human rights law and international law on refugees and internally displaced persons.” Another excerpt of one of the Reports described how “IFRC has suggested that a rights-based approach to the topic may be complemented by considering the relevance of needs in the protection of persons in the event of disasters. The Special Rapporteur believes that such an approach can be modified to the context and that a reasonable, holistic approach to the topic seems to require that both rights and need enter the equation, complementing each other where appropriate.” Also, in the SR’s view “a comprehensive legal framework for all actors involved in a post-disaster response would seem unnecessary, for it could overlap with work already done in the Draft Articles, such as the one on individual protection in disaster contexts and therefore in suggesting a definite rights-based approach aimed at the identification of a specific standard of treatment to which an individual is entitled.”

In the formulation of a specific duty for a State to seek assistance when its national capacity to respond to a catastrophic event is overstretched, considered as an element of the fulfilment of its primary responsibility under international human rights law, the SR once again referred to the IFRC Guidelines, which affirm that “if an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons.” Moreover, the IFRC’s Guidelines inspired the SR in expanding the notion of quality conditions in order to include coordination efforts and
the quality of personnel beyond that of the goods themselves, as well as in binding the affected State's selectivity to the respect of human dignity of the affected people, all elements with obvious repercussions on the fulness of people's rights. 23

But the consideration of the role and expertise of the IFRC has not been limited to the work of the SR. In fact, for the first time in its history, the Federation has been invited to participate to the process of analysis and comment held within the Sixth Committee of the United Nations General Assembly (UNGA), with an analogous role of that of the other member States. Among the comments expressed in that guise, the one on the purpose of the Project is particularly relevant for the present analysis, considering the Federation's appreciation of "the Commission's acknowledgement of [its] traditional approach to disaster response, which was based on needs but informed by rights." Moreover, the IFRC stated that "human rights must be considered a critical component of the regulatory framework for disaster response; in particular, humanitarian assistance was a fundamental right, as affirmed in the Principles and Rules for Red Cross and Red Crescent Disaster Relief." At the same time, not all practical problems could be solved using a rights-based approach, as the Committee acknowledged in its report. 24

Likewise, in relation to the above-mentioned "duty to seek" assistance for the affected State, the IFRC's comment presented within the sixth Committee highlighted that it strongly supported the Commission's conclusion that affected States had a duty to seek international support if their domestic capacity was exceeded. However, States were not required under general human rights law to seek assistance from any specific actor. The draft article should be intended to make it clear that States were free to respect assistance from any of the enumerated actors or from others not mentioned. 25

IFRC presented its observations on almost each of the 21 Draft Articles, which became 18 in second reading. 26 Of course not every position expressed has been reflected within the final text, as for instance the need to determine the scope of an individual right to humanitarian assistance 'plainly implied in numerous human rights instruments'. In the Federation's view, "[w]hat depended ... was the nature of such assistance and the forms it took, not having an international actor carte blanche to respond to a natural disaster without regard to domestic authorities and laws" (emphasis added). 27 In the consultation phase preceding the adoption of the final text in second reading, the IFRC made further remarks on the issues concerning the protection of human rights and human dignity, the emphasis on which has been considered as a strong element of the Project. 28 Contextually, it observed that "certain rights issues that were of frequent concern in disaster settings' could usefully be 'underlined' in order to provide additional operative specifications for the stakeholders and improve the real impact of those provisions during the operations." 29

The above reconstruction of the incisive role that the IFRC had in the codification process undertaken by the ILC is a meaningful example of how a humanitarian organisation can affect the production of international norms, by providing an "external" perspective based on its peculiar set of values and experience. In this respect, as demonstrated in relation to the issue of the existence of an individual right to humanitarian assistance, such dynamic could represent a fruitful contribution for the States, usually taking positions shaped on political considerations and national interests. At the same time, while this type of "interference" could pave the way for progressive evolutions of positive law, it can also be a source of headlong rushes and inconsistencies which could lead to dysfunctional outcomes, as demonstrated in the following paragraph.
The role of NSHAs as (aspirational) standard-setters and the risk of inconsistencies

The relationship between the law as positively stated in the black letter of the treaties and the way in which individual rights are interpreted and implemented by NSHAs, through the autonomous identification of specific standards, is an element deserving particular consideration. Their role has not, in fact, been limited to participation in traditional dynamics of codification and progressive development of international law, but it has been very active also in horizontal regulatory initiatives, the importance of which is obviously stemmed by the fact that the international legal order cannot directly address these phenomena.

As generally known, self-standard-setting is a significant function that has been widely put in practice in humanitarian-related issues since the mid-1990s, a period of rapid expansion of the sector and of the budget allocated to it. The first systematic attempt to increase the professional skills and credibility of humanitarian organisations by the establishment of common standards can be detected in the aftermath of the Rwandan crisis of 1994, which was a momentous event in this sense, highlighting all the drawbacks and weaknesses of the humanitarian system and in particular its shortcomings in terms of efficiency and accountability. For the first time, the unconditioned acceptance of the ‘good work’ done by humanitarian agencies was severely questioned.

A significant attempt to enhance the coherence and professional skills of the sector came from the Red Cross and Red Crescent Movement. In 1994 the IFRC, in collaboration with Oxfam and under the auspices of the Steering Committee for Humanitarian Response (SCHR), presented the ‘Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief’ (Code). The Code represents one of the first self-policing instruments, conceived to establish a set of written principles and rules that would have led the humanitarian personnel in disaster-response scenarios.

In this regard, it should be pointed out that the text makes no references to human rights per se, since its ethical framework is based on the seven principles of the Red Cross Movement and in particular those extrapolated by the landmark UNGA Resolution 46/182 of 1991 (namely humanity, neutrality and impartiality). In this important, as well as relatively ‘rudimentary’, instrument, the humanitarian imperatives are the underlying values and its whole text – even if the principle of impartiality implies the right of not being discriminated and the respect of culture and custom that can be connected to certain individual rights – represents the typical needs-based approach to humanitarian endeavor.

In just a few years, several initiatives took their example from the Code. Among them, the Sphere Project, established in 1997 following a wide and inclusive process which comprised some of the main non-governmental organizations active at that time, is particularly relevant for this analysis also for the importance that still has today. The ‘Sphere Handbook’, published in the current form in 2011 after three revisions and consisting of the ‘Humanitarian Charter’ and the ‘Minimum Standards in Humanitarian Response’, represents its main outcome. While the former is aimed at establishing the rights and duties of the actors involved, the latter represents the first attempt to accurately determine specific goals for each field of intervention (e.g., Water Supply, Sanitation and Hygiene Promotion; Food Security, Nutrition and Food Aid; Shelter, Settlement and Non-Food Items; Health Services) in order to guarantee a satisfactory fulfilment of the related individual rights. Accordingly, in the Humanitarian Charter (presented in 2000 as the ethical framework of the Project), the needs-based approach is distinctly integrated with a rights-based configuration, intended to be the driving lines of the humanitarian action in disaster response and the basis for verifying the impact and the quality of its performances.
This amalgam of the two approaches has not been straightforward. In fact, in the tenets of the different versions of this new ‘humanitarian manifesto’, a series of inconsistencies of both formal and substantial nature can be detected. One of the most questioned elements was contained in the text of the first editions, in which it was asserted that ‘[t]he Charter defines the legal responsibilities of states and parties to guarantee the right to assistance and protection. When states are unable to respond, they are obliged to allow the intervention of humanitarian organizations’ (emphasis added). Even if this controversial affirmation disappeared in the following editions published in 2004 and 2011, the Charter still expresses the conviction — that all people affected by disaster or conflict have a right to receive protection and assistance to ensure the basic conditions for life with dignity — underlining that the principles described in it are ‘universal, applicable to all those affected by disaster and — most surprisingly — reflected in international law’.

Furthermore, in another paragraph it includes, among the rights of the victims, the rights to protection and assistance reflected in the provisions of international humanitarian law, human rights and refugee law, outlining a legal cauldron formed instead by different regimes each of which entail specific characteristics. In particular, three rights are mentioned and underlined: the right to life with dignity, the right to receive humanitarian assistance and the right to protection and security. In illustrating the first right, it is affirmed that ‘implicit in this is the duty not to withhold or frustrate the provision of life-saving assistance’, presumably including the assistance provided by external actors. Moreover, for the Charter, ‘dignity entails more than physical well-being; it demands respect for the whole person, including the values and beliefs of individuals and affected communities, and respect for their human rights, including liberty, freedom of conscience and religious observance’.

Therefore, if compared with the positive provisions arranged by international human rights law, an amplified (and somehow distorted) conception of human rights is asserted here, with particular reference to the right to liberty, not further explained or argued, the right to humanitarian assistance, not explicitly stated in any binding instruments currently adopted by States, and to the right to protection and security, described as being ‘rooted in the provisions of international law, in resolutions of the United Nations . . . , and in the sovereign responsibility of states to protect those within their jurisdiction’ (emphasis added).

In the same text we can read that:

As the law recognises, some people may be particularly vulnerable to abuse and adverse discrimination due to their status such as age, gender or race, and may require special measures of protection and assistance. To the extent that a state lacks the capacity to protect people in these circumstances, we believe it must seek international assistance to do so.

Likewise, in the language of the Charter, ‘where the state or non-state actors are not providing such assistance themselves, [we believe] they must allow others to help do so’.

As described above, the document contains a controversial juxtaposition of well-established elements of positive law and progressive elements based on ethical considerations, thus pertaining to a blurred landscape: from a legal perspective, the simple acknowledgement of the existence of ‘moral rights’ and ‘moral duties’ appear as problematic. In this respect, the Sphere initiative can be considered as a strategy of operational standard-setting, distinct with real legal elements. Fortunately, in an official commentary on the Charter which was deemed necessary to accompany the 2011 edition, the most problematic elements emphasized above are clarified thanks to the introduction of some explanatory observations, like the one explaining that ‘[i]nternational NGOs, for their part, have formal rights and responsibilities in international law other than...’
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the right to offer assistance’ and that ‘ultimately, the basis for engagement by non-governmental agencies remains a moral rather than a legal one’. 47 This document emphasizes the ‘interplay between the legal and moral [as] a feature of the Charter’ and that the Common Principles it articulates are not found as such in international law but are based on an amalgam of legal and moral elements and have a strong basis in both. 48

Nowadays, even if the Sphere Handbook is still one of the most relevant points of reference for the humanitarian community worldwide, some doubts concerning its theoretical set-up remain. In particular, the formal link between operational standards, quantitative indicators and the connected individual rights to protect, apparently under-utilized on field, 49 could still entail the risk of defining the latter as merely instrumental to the fulfillment of professional performances, weakening their inner value. 50 In addition, its configuration could undermine the idea that the humanitarian relief activities, if successfully accomplished in a quantifiable sense, are sufficient to maintain that individual rights obligations are correctly enforced. But what about the situations in which the local authorities, or the economic or security conditions, do not allow the fulfillment of the foreseen standards? Would it be a reason to not even launch relief operations, running the risk of being labelled as unaccountable? And then, is it really possible to establish minimum standards that are universally applicable? The risk of putting the responsibilities of the territorial authorities, which from a legal perspective are the real subject of the human rights obligations, in a subordinate position must also be taken into account. 51

The alignment of the humanitarian ‘galaxy’ on the basis of shared standards and harmonized theoretical premises is undoubtedly to be considered as a positive advancement. Nevertheless, this cannot undermine the assumption that each post-disaster scenario has its own peculiarities, and thus any humanitarian activity request a specific advance analysis dealing with its overall impact on local communities and individuals, as well as with the consideration of the specific international, regional, and national legal framework, including human rights obligations. 52

Hence, the impact of any standard-setting activity is clearly connected with the existence and functioning of a monitoring mechanism of compliance. 53

The accountability of NSHAs: the rise of a ‘people-based’ compliance mechanism

Recent developments relating to the normative role of humanitarian NGOs in disaster scenarios deal with the issues of compliance and accountability from aspects which, due to the increasing heterogeneity of this category of actors in terms of capability and efficacy, have become pivotal in the last 20 years. 54

If ‘accountability’ generally refers to any ‘people-based’ compliance mechanism, we must first recognize that the legal notion of ‘responsibility’, as internationally conceived, can be properly attributed only to the activities of intergovernmental and governmental entities. 55 As far as NSHAs, we could take into consideration the State’s role in preventing (and eventually prosecuting) harmful conduct which entails the violation of the core rights of the people in its territory, on the basis of its duty to protect human rights. Nevertheless, this is not the central issue of the analysis, assuming that humanitarian organizations normally intervene in disaster scenarios with the aim of alleviating human suffering. Given this premise, the ‘accountability’ of private humanitarian entities in relief activities can be considered as being of a milder content formed by elements ranging from behavioral to procedural standards, with ill-defined responsibilities connected to the correct management of their ‘dominant position’, as regards to vulnerable people. 56 Compliance with these standards, developed in order to provide a tool for the actors themselves, as well
as for both the affected communities and monitoring agencies, it thus a basis for supervising and evaluating the humanitarian outcomes and impacts of an intervention.

Consequently, humanitarian accountability is not an inherently a univocal concept. It is a characteristic of power dynamics aimed at altering behaviors over time, the relevancy of which has to be determined by "the eye of the beholder", on the basis of the specificities of each situation.\(^56\) International law seems playing an increasing role in these dynamics, at least in reference general framework, so that increasingly we can assert that the scope of application of certain of its provisions is informally extended when relating to the humanitarian sector. In particular, and with due regard to the theoretical premises made in the introduction of the present work, human rights law seems to have gained, in the last 20 years, a "prominent role" that goes beyond the formalistic interpretation of its content, affecting the way in which the conduct of the private actors in disaster-related scenarios is addressed.

In this respect, the point of reference for accountability and compliance is currently represented by the Core Humanitarian Standard on Quality and Accountability (CHS), presented in December 2014 in Copenhagen – exactly 20 years after the Code of Conduct.\(^57\) Once again, this document is the result of the joint effort of several humanitarian policy makers and organisations, aimed at unifying the pre-existing instruments in a unique tool and endorsing new, shared, well-embedded criteria that would combine their strong points and overcome eventual inconsistencies.\(^58\)

The classic humanitarian principles still underpin the CHS, a lightweight document (twenty pages) drafted on specific commitments, each of which is supported by quality criteria, key actions and organisational responsibilities indicating how humanitarian organisations and staff should perform in order to meet them. Organisations and individuals involved in humanitarian response (that also governments, the armies and the police sector) can use it to assess the quality and effectiveness of the assistance they provide, while, on the other hand, the beneficiaries can consult it as a point of reference for what they should expect from organisations and individuals delivering humanitarian relief. Knowing what humanitarian organisations have committed to, will enable them to hold them accountable.\(^59\)

As regard to its approach, in comparison with the Code of Conduct and the Sphere Handbook, the main innovation introduced seems to be the inclusion of people-centered nature of the document. The CHS claims to be conceived from the point of view of crisis-affected communities, with the aim of empowering individuals to request appropriate assistance and to have access to a responsive complaint mechanism. Moreover, a parallel initiative currently being developed, spearheaded by the SCHR, should enable certification and verification of agencies on the base of the CHS.\(^60\)

Regarding this configuration, it is interesting to evaluate the position on human rights, generically mentioned in the introduction of the CHS, stating the intention of the humanitarian endeavour to uphold their promotion and respect. More specifically, the document is underpinned by the right to life with dignity and the right to protection and security "as set forth in international law", including the "International Bill of Human Rights".\(^61\) The latter two facets, a significant legacy of the Sphere's perspective, still appear as problematic from a strictly legal point of view. The textual references to the concept of protection and security within the core human rights instruments cover a vast spectrum of situations basically framed in a non-emergency dimension, from the protection from arbitrary arrest or detention\(^62\) to social security for working mothers,\(^63\) and which in post-disaster scenarios, while maintaining their relevance, are hard to construe (and thus enforce) as unitary rights.

Apart from that, and unlike the Sphere Humanitarian Charter, the theoretical background is stated very briefly, and is limited to the recognition of the "humanitarian International Humanitarian..."
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Law, International Human Rights Law and International Refugee Law) setting the overall legal
standards relating to the protection of persons involved. Moreover, the respective legal respons-
bilities between public and private entities are outlined in a clearer and more consistent way:
those who apply the Core Humanitarian Standard recognize the primary responsibility
of states and other relevant authorities to protect and assist those affected by disasters
or armed conflicts within their territories. Humanitarian action should not undermine
these responsibilities, indeed, whenever possible, it should complement them. 64

Having said that, it seems worthwhile to note that, in this new humanitarian policy tool,
other particular right is mentioned, and no explicit connections between operational issues and
the corresponding right is established instead. General references to individual rights are fore-
seen by Key Action 3.6, which calls upon actors to ‘identify and act upon potential or actual
unintended negative affects in a timely and systematic manner, including in the areas of
people’s safety, security, dignity and rights’ and in the fourth commitment, aimed at guarantee-
ing that ‘Communities and people affected by crisis know their rights and entitlements, have
access to information and participate in decisions that affect them’ introducing the important
dimension of the right to transparency and to information, which is an essential element of any
accountability mechanisms. 65

As a result, what can be observed in the CHS’s approach is that human rights are still there,
but they lie in the background, not constituting autonomous normative components as was
the case for the Sphere Project. The focus shifts instead to the affected community, no longer
conceived merely as a group of individuals in need or as a collectivity of right holders. In this
‘people-based’ approach, the beneficiaries assume a proactive role, as clearly demonstrated by
the extensive use of terms such as participation, awareness, information-sharing, consultation,
feedback, non-harm, open communications, complaint-handling processes and accountability.

Somehow, human rights are less distinctly considered as part of the operational plan of NSHAs
response, but rather as a basis of action for the victims, whose initiatives gain a decisive preven-
tion in accountability dynamics. In this regard, it can be pointed out that, in one of the first
monitoring actions drawn up on the basis of the CHS, the ‘Nepal earthquake signal response
review’ by the Disaster Emergency Committee (September 2015), no explicit references are made
to specific human rights. On the contrary, the recommendation in n. 5 calls upon humanitarian
actors to ‘build the right housing based on listening people’s realities and supporting traditional
practices’. 66 Also in other reports on the earthquake in Nepal of 2015, containing ‘lessons learnt’
on the base of evaluation processes, human rights are never mentioned, even if the need to guar-
antee and adequate housing has been at the centre of the analysis. 67

However, this does not obviously mean that human rights protection is now considered as
indirect in relation to disaster context as demonstrated for the work of the Women and Children
other Nepali organisations on the strengthening of community-based capacities in preventing
gender violence and child trafficking phenomena after the earthquake. 68 On the contrary,
the relevance of human rights in post-disaster humanitarian assistance has been described as even-
more crucial and recognized as an essential element, but with a clear perplex placed on the impor-
tance of the affected authorities. 69

The actual impact of the CHS can only be assessed over the coming years. At present, it can
only be noted that innovative approaches seems to facilitate a more coherent and reliable
positioning of human rights law within the activities put in place by the ‘responders’ cauldron’. 70
Their endorsement during the first World Humanitarian Summit held in Istanbul in May 2016,
as which they have been incorporated as a way to improve humanitarian effectiveness and to
ensure people affected by crises are not only informed and consulted, but put at the centre of the decision-making processes', 73 appears as a clear intention to definitively go beyond the beneficiaries needs-rights discourse.

Final remarks – NSHAs, human rights and disaster law: filling the gap or creating an autonomous soft regime?

As stated in the introduction, the aim of this contribution was not to address the general theory of subjectivity in the creation/application of the law, which characterise – in all its complexity – an international legal order in constant mutation. On the contrary, the intention was to examine how contemporary private actors have been involved in the elaboration of norms on the right to information, on the public participation in the decision-making processes, and in the provision of humanitarian assistance in a crisis environment, in order to provide an answer to the question of whether IDL is, in a certain sense, a frontier of international law in the elaboration of norms that are not yet widely accepted.

As demonstrated by the analysis of three specific cases, NSHAs have been able to address the international protection of individual rights. Given the assumption that the territorial State is still the central actor around which all other entities revolve, 75 a humanitarian organisation like the IFRC effectively contributed to the production and interpretation of (potential) international norms, as in the case of the ILC's Draft Articles, with a clear impact on the purposes of guaranteeing the fundamental human rights of the disaster victims. This is because its expert knowledge – deriving from research activities and practice in the field – has been considered as an indispensable 'source' for that normative process.

Moreover, thanks to their capacity to gather information, provide expertise, mobilise resources – both human and economic – in the course of relief activities, it has been underlined how the most relevant humanitarian entities currently contribute to enhance the overall effectiveness of international human rights provisions in post-disaster scenarios, also by the creation of operative standards shaped by the necessity of guaranteeing their content. 76 However, this kind of activity, as in the case of the Sphere Handbook, is accompanied by the risk of discrepancy and headlong rushes, with potential counterproductive effects and other setbacks.

Private actors can also complement the states in related compliance or enforcement mechanisms, making crucial contributions to the implementation of human rights instruments. This complementary activity can be possible not only for the gathering and disclosing of information, but also through the development of internal regulatory tools aimed at creating compliance mechanisms and framing multiple stakeholders (to the victims, the territorial authorities and the donors) within national systems to which the exercise of the public authority can be seriously undermined. Only the time will tell if the Core Humanitarian Standards (2014) are suitably paving the way in this respect.

The above-mentioned examples show how, from a normative perspective, NSHAs are strengthening their capacity to contribute to the functioning of international guarantee procedures, the identification of more advanced preventive, protective and reparatory mechanisms and the definition of standards to interpret in practice the rights formally recognized. 77 While in an early phase their activity was characterized by the affirmation of the basic humanitarian
principles, with the so-called "new humanitarianism" the focus has shifted—though not without frictions—to include other operational perspectives such as human rights protection. It is thus, currently evolving again with the rise of a participative approach, in which the conduct of humanitarian entities, and somehow its "legitimacy", is evaluated in terms of compliance with informal (soft) regimes, procedural patterns and monitoring systems.

The relevance of this process cannot be underestimated, as it casts a new light not only on the way in which NSHAs operate internationally but also, and perhaps most importantly, on the changing norms by which the distinction legal/illegal is perceived and applied by relevant actors in contemporary international society. In certain cases, such as for the presumed individual right to humanitarian assistance, it creates a communicative practice whereby the conduct of states is no longer assessed in terms of acting in compliance with specific rules, but by some basic understanding of certain human values the impact of which is prospective and essential.

The need for new conceptual tools, as well as a new assessment of the social forces that structure a wider community whose members have "values, identities and roles distinct from the geographic limitations of states," therefore seems increasingly necessary. Considering the humanitarian practice, the risk of a greater marginalization and the subsequent loss of authority of international law appears rather concrete, and the use of terms and categories "borrowed" from other fields of studies must be seen as a clear warning.

To conclude, the role of NSHAs as contextualized in the present work should not be seen as a demonstration of a supposed redistribution of legitimacy and power in international law, nor as a claim for a self-contained democratic regime "coming from below". On the contrary, what emerges is the need to deal with the increasing capacities of "unconventional" actors to affect the regulatory patterns of the formal interstate system. For these reasons, the attempts at worldwide harmonization via traditional international law-making mechanisms and the self-regulatory dynamics of the transnational civil society should not be regarded as competing processes of a completely different nature but rather as converging mechanisms aimed at reinforcing the value of human dignity and their protection.

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A. Bianchi, "Introduction: Relativizing the Subjects or Subjectivizing the Actors: Is That the Question?" in A. Bianchi (ed), The Possible Contribution of International Civil Society to the Protection of Human Rights (Routledge, 2009) xiv.


Notes


2 See A. Bianchi, "Introduction: Relativizing the Subjects or Subjectivizing the Actors: Is That the Question?" in A. Bianchi (ed), Non-State Actors and International Law (Routledge, 2009) xiv.

3 Ibid xii, for which
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The term “actor” comes from the language of political science. The term may seem surprising to those who are not familiar with the jargon of this discipline. The political science literature on international relations has used the term “actor” to characterize different kinds of political entities that are involved in international relations, including states, societies, and individuals. The term “actor” is often used to refer to a political entity that is capable of making decisions and taking actions that affect the outcomes of international relations.

For example, in the context of international law, an “actor” could refer to a state, international organization, or non-governmental organization. The term “actor” is also used to refer to individuals who engage in international relations, such as diplomats or human rights activists.

The use of the term “actor” in political science has been criticized by some scholars who argue that it is too broad and too vague. Some scholars have suggested that the term “actor” should be replaced with more specific terms, such as “state” or “society.”

Despite these criticisms, the term “actor” remains widely used in political science and international relations. It is likely to continue to be used in these disciplines for many years to come.
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24. See ILC, Sixth Committee Summary Record of the 22nd Meeting, UN Doc. A/C.6/64/SR.22 (3 November 2009) para 36.  


26. See, among others, ILC, Sixth Committee Summary Record, UN Doc. A/C.6/65/SR.25 para 47 on draft art 1 (Scope); UN Doc. A/C.6/64/SR.22 para 31 on draft art 3 (Definition of disaster); UN Doc. A/C.6/64/SR.22 para 30 on draft art 8 (Duty to cooperate); UN Doc. A/C.6/69/SR.21 paras 73–74 on draft art 4 (Use of terms); UN Doc. A/C.6/64/SR.22 para 32 on draft art 9 (Forms of cooperation); UN Doc. A/C.6/67/SR.20 paras 16–18 on draft art 10 (Cooperation for Disaster Risk Reduction) and art 11 (Duty to reduce the risk of disasters); UN Doc. A/C.6/64/SR.22 para 9 on draft art 13 (Constitution of a national commission); UN Doc. A/C.6/64/SR.22 para 25 on draft art 14 (Consent of the affected States); UN Doc. A/C.6/64/SR.22 para 22 on draft art 15 (Conditions on the provision of external assistance); UN Doc. A/C.6/64/SR.22 para 30 on draft art 16 (Offers of external assistance); UN Doc. A/C.6/64/SR.22 para 31 on draft art 17 (Facilitation of external assistance); UN Doc. A/C.6/67/SR.20 para 62 on draft art 18 (Tertiarization of external assistance); UN Doc. A/C.6/67/SR.20 para 60 on draft art 19 (Termination of external assistance); UN Doc. A/C.6/65/SR.25 para 46 including general observations.  

27. See ILC, Sixth Committee Summary Record of the 22nd Meeting, UN Doc. A/C.6/65/SR.22 (3 November 2009) para 36.  

28. Ibid.  


30. Ibid para 119, for which [the IFRC] was conscious of the fact that it would be impossible to enunciate every right that could prove relevant in a disaster operation and that mentioning some examples might be misread as implying that rights not enunciated do not apply. Nonetheless, there existed certain rights that were of frequent concern in disaster settings and could be underlined in the draft articles, such as: the right to receive humanitarian assistance; the rights of particularly vulnerable categories, such as elderly people, children, and women; and the right to freedom of movement.  


33. Ibid para 28.  

34. ILC, Fifth Report on the Protection of Persons in the Event of Disasters, UN Doc. A/CN.4/652 (2012) paras 42–43, for which [the IFRC Guidelines presents] attributes that can be linked to the foregoing discussion. First, a duty to seek international assistance only arises in cases where national incapacity is demonstrated. . . . Second, the duty is framed as a duty to ‘seek’ rather than a duty to ‘request’ assistance.  

35. See ILC, Sixth Committee Summary Record of the 22nd Meeting, UN Doc. A/C.6/65/SR.22 (3 November 2009) para 36.  


38. Ibid.  

39. See ILC, Sixth Committee Summary Record, UN Doc. A/C.6/65/SR.25 para 47 on draft art 1 (Scope); UN Doc. A/C.6/64/SR.22 para 31 on draft art 3 (Definition of disaster); UN Doc. A/C.6/64/SR.22 para 30 on draft art 8 (Duty to cooperate); UN Doc. A/C.6/69/SR.21 paras 73–74 on draft art 4 (Use of terms); UN Doc. A/C.6/64/SR.22 para 32 on draft art 9 (Forms of cooperation); UN Doc. A/C.6/67/SR.20 paras 16–18 on draft art 10 (Cooperation for Disaster Risk Reduction) and art 11 (Duty to reduce the risk of disasters); UN Doc. A/C.6/64/SR.22 para 9 on draft art 13 (Constitution of a national commission); UN Doc. A/C.6/64/SR.22 para 25 on draft art 14 (Consent of the affected States); UN Doc. A/C.6/64/SR.22 para 22 on draft art 15 (Conditions on the provision of external assistance); UN Doc. A/C.6/64/SR.22 para 30 on draft art 16 (Offers of external assistance); UN Doc. A/C.6/64/SR.22 para 31 on draft art 17 (Facilitation of external assistance); UN Doc. A/C.6/67/SR.20 para 62 on draft art 18 (Tertiarization of external assistance); UN Doc. A/C.6/67/SR.20 para 60 on draft art 19 (Termination of external assistance); UN Doc. A/C.6/65/SR.25 para 46 including general observations.  

38. See ILC, Sixth Committee Summary Record of the 22nd Meeting, UN Doc. A/C.6/65/SR.22 (3 November 2009) para 36.  

groups (such as women, children, women, and disabled persons) to have their special protection and assistance needs taken into account; the right of communities to have a voice in the planning, and execution of risk reduction, preparedness and recovery measures, and the rights of all persons displaced by disasters to receive documentation as evidence of their displacement.


33 Founded in 1972, SCHR brings together nine of the world's leading humanitarian organisations to share analysis and learning and promote greater accountability and impact of humanitarian action. See http://schr.info/about.


36 It has to be noted that 'The Code of Conduct' was published with no steering tools as guidelines for implementation, or training practices, and that it lacked any mechanism to monitor compliance.

37 See The Code of Conduct (n. 34), principles 1, 2, 8.

38 For a comprehensive analysis of the origins of the Project, see M. Buchanan-Smith (n. 32) passim.

39 For more information and documentation, see the page www.sphereproject.org/about/, accessed on 13 March 2017.


42 Ibid 21.

43 Ibid.

44 Ibid.

45 The right to humanitarian assistance will be therefore a right revered, and the Sphere Project will be considered as a test of the application of the Guiding Principles in practice. See SCHR, Strengthening Humanitarian Action (2010) 5.

46 See The Sphere Project, '2011 Edition of the Sphere Handbook: What Is New?' (2012) para 4(a). The document recalls that the new edition was considered as necessary in order to 'clarify the definition and the use of principles included in the Charter', and states in an 'aspirational and a statement of belief rather than a straightforward statement of legal norms'.

47 J. Darcy, User Guidance and Commentary on the Humanitarian Charter (Sphere Project, 2011) 3.

48 Ibid 5.

49 See M. Van Dyke and R. Waldman, The Sphere Project Evaluation Report, Center for Global Health and Economic Development, Columbia University (2010) 3, according to which '[a]fter eight years of research, the commitment of the Sphere Project's philosophical approach to humanitarian attributes as a set of fundamental and non-inclusive agency proposed to the Handbook and since diverse voices have discovered the need to elaborate a global standard for the Sphere Project's skills in the field of humanitarian action.'

50 See ibidem para. 44 (103–104).

51 See Darcis, and 2.1.3, 2.3, 2.4, 2.5, 2.6, 2.7.

52 See Darcis, and 2.1.3, 2.3, 2.4, 2.5, 2.6, 2.7, according to which 'The commitment for accountability against these standards remain underwritten, and there is no consensus between individual and collective responsibility for the achievement of the specified outcomes.'
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52 See C. Goldblum, and J. Mandle, Legal Framework: Applicable to Humanitarian Action Respecting to Human Rights and Foreign Affairs (in D. Cress, M. Reeds and R. Stubbs (eds.), The International Law of Disaster Relief (Cambridge University Press, 2016) 167, according to whom '[h]umanitarian law is the body of law and practice governing humanitarian action in situations of armed conflict, to which human rights and international humanitarian law are applied as appropriate.

53 See C. Gribbin and I. Maiolo, 'Legal Framework Applicable to Humanitarian Actors Responding to Disasters in Weak and Fragile States' in D. Caron, M.J. Kelly and A. Telesetsky (eds.), The International Law of Disaster Relief (Cambridge University Press, 2014) 157, according to whom '[i]n spite of the success of initiatives such as Sphere, the HA community has recognized that it is difficult to set universal objective standards for humanitarian responses'.


56 With reference to the Standard in Accountability and Quality Management: Humanitarian Accountability Partnership (HAP 2010). accountability is defined as the means through which power is used responsibly. It is a process of taking account of, and being held accountable by, different stakeholders, and primarily those who are affected by the exercise of power.


58 As affirmed by M. Casey-Maslen, executive director of HAP International, following the humanitarian responses to the Haiti earthquake and the Pakistan floods in 2010,

59 CHS Alliance, Group URD and the Sphere Project, Core Humanitarian Standard on Quality and Accountability (2014) 2.

60 See www.chsalliance.org/verification, accessed on 13 March 2017. The CHS Verification Scheme, currently under testing phase, should become a structured, systematic process to assess the degree to which an organisation is working to achieve the CHS.


62 Art 9 ICCPR.

63 Art 10.2 ICESCR.

64 See CHS (n. 59) 8, Principled Humanitarian Action.

65 Ibid 12.


67 See A. Featherstone, ‘Improving Impact: Do Accountability Mechanisms Deliver?’ in Christian Aid, Save the Children and the Humanitarian Accountability Partnership (Christian Aid and Save the Children, 2013) 27, observing that A modest investment in information sharing (in terms of financial resources, staff time and agency commitment), involvement by project participants in the design and delivery of programmes, and ensuring there is a process for challenging and correcting mistakes by agencies, is relatively low cost intervention that can yield significant improvements in humanitarian programmes.

68 On the right to information see also A. Riccardi's chapter in this book.


82 See Tampere Convention on the Protection of Relief Operations for Disasters (emerged 18 June 1998, entered into force 8 January 2005) 2296 UNTS 157, signatories 60, parties 48. In particular, art 5 of the Convention provides necessary privileges and immunities to be afforded by the State to persons (other than its nationals) and to organisations (other than those headquartered within its territory) exercising the core functions of aid, relief and humanitarian activities. The Convention also recognizes the right of the persons concerned to possess and transport necessary personal and professional objects, which are necessary for carrying out their humanitarian activities. Such persons are also to be exempted from taxation and duties related to the export of such objects and to the medicaments and instruments that may be essential for the humanitarian operations undertaken.

83 See also Bihoro (n. 1) 4, highlighting that: “The need for a clear and comprehensive legal framework for the humanitarian action is crucial and is not only a question of States, but also of non-governmental organizations and humanitarian actors.”

84 See HPG, Time to Let Go: Remaking Humanitarian Action for the Modern Era (ODI, 2016) 5, for which the current dynamics within the humanitarian system show that “most organisations engaged in humanitarianism are not-classical humanitarian organisations, relief or voluntary organisations, but are agencies, organisations, networks or other types of international organisations engaged in humanitarian action; they are called transnational organisations, or hybrid organisations, SMONs, because their humanitarian work itself combines development and humanitarian needs on complex and overlapping issues.”

85 See M. Palma, The Possible Contribution of International Civil Society to the Protection of Human Rights, in Cassese (n. 4) 81.


87 See Bihoro (n. 1) 1 highlighting that: “The need for a clear and comprehensive legal framework for the humanitarian action is crucial and is not only a question of States, but also of non-governmental organizations and humanitarian actors.”

88 See Bihoro (n. 1) 4, highlighting that: “The need for a clear and comprehensive legal framework for the humanitarian action is crucial and is not only a question of States, but also of non-governmental organizations and humanitarian actors.”


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