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## A Human Rights-Based Approach to the Global Regulation of Humanitarian Relief: The Emerging Obligation to Incorporate Local Participation

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# A HUMAN RIGHTS-BASED APPROACH TO THE GLOBAL REGULATION OF HUMANITARIAN RELIEF: THE EMERGING OBLIGATION TO INCORPORATE LOCAL PARTICIPATION

*Tom Kabau\* & Shahla Ali‡*

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## INTRODUCTION

This article is based on the view that the global regulatory framework of humanitarian relief that is emerging, under the auspices of both state and non-state actors, is premised on a human rights-based approach to humanitarian assistance, which may crystallize a duty to ensure local participation. It is in that context that the article proceeds to examine the problems and opportunities associated with the obligation to ensure local participation.

The term “humanitarian” is often associated with humane and positive actions in relation to humanity.<sup>1</sup> Humanitarian assistance or relief is meant to alleviate the suffering of populations affected by a humanitarian crisis by protecting life and safeguarding the human dignity of affected peoples.<sup>2</sup> An examination of international legal instruments such as treaties, resolutions adopted under the auspices of the United Nations (“U.N.”), and the practice of states, confirms the existence of a right to provide humanitarian assistance. Therefore, as this section will demonstrate, the right to provide humanitarian assistance exists in international law.

Since treaties are among the primary sources of international law, this article begins by examining the relevant provisions of such international legal instruments. Article 214(1) of the

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1. B.S. Chimni, *Globalization, Humanitarianism and the Erosion of Refugee Protection*, 13 J. REFUGEE STUD. 243, 244 (2000).

2. AUSTRIAN DEV. COOPERATION, INTERNATIONAL HUMANITARIAN AID: POLICY DOCUMENT 8 (2009), [http://www.entwicklung.at/uploads/media/PD\\_International\\_humanitarian\\_a\\_id\\_03.pdf](http://www.entwicklung.at/uploads/media/PD_International_humanitarian_a_id_03.pdf) (last visited Sept. 10, 2015).

Treaty on the Functioning of the European Union provides that the humanitarian aid operations of the European Union (“EU”) “shall be intended to provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations.”<sup>3</sup> Additionally, the Food Assistance Convention, ratified by Canada, Switzerland, Denmark, the United States, Austria, Finland, EU and Japan in 2012, specifically regulates the provision of food aid to vulnerable populations,<sup>4</sup> aiming to ensure that the most vulnerable populations are granted appropriate relief food in a timely and effective manner.<sup>5</sup> Other treaties impose specific obligations to provide humanitarian assistance. The Protocol Relating to Conflict Resolution, Peace-Keeping and Security of the Economic Community of West African States (“ECOWAS”) provides that the sub-regional organization may participate in the provision of humanitarian assistance.<sup>6</sup> Specifically, the Protocol recognizes that ECOWAS has a responsibility to “intervene to alleviate the suffering of the populations and restore life to normalcy in the event of crises, conflict and disaster.”<sup>7</sup>

The right to provide humanitarian assistance has also been affirmed by “soft law” instruments such as resolutions adopted under the auspices of the U.N. and its institutions. In 1991, the U.N. General Assembly adopted the Resolution on Strengthening of the Co-ordination of Humanitarian Emergency Assistance, one of several instruments designed to facilitate effective delivery of relief within states.<sup>8</sup> This resolution affirmed the

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3. Consolidated Version of the Treaty on the Functioning of the European Union art. 214.1, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU].

4. Food Assistance Convention art. 1, Apr. 25, 2012, 52 I.L.M. 357.

5. *Id.* art. 2.

6. ECOWAS COMM’N, PROTOCOL RELATING TO THE MECHANISM FOR CONFLICT PREVENTION, MANAGEMENT, RESOLUTION, PEACE-KEEPING AND SECURITY art. 40 (1999) [hereinafter CONFLICT PREVENTION PROTOCOL], [http://documentation.ecowas.int/download/en/legal\\_documents/protocols/Protocol%20Relating%20to%20the%20Mechanism%20for%20Conflict%20Prevention,%20Management,%20Resolution,%20Peacekeeping%20and%20Security.pdf](http://documentation.ecowas.int/download/en/legal_documents/protocols/Protocol%20Relating%20to%20the%20Mechanism%20for%20Conflict%20Prevention,%20Management,%20Resolution,%20Peacekeeping%20and%20Security.pdf) (last visited Sept. 10, 2015). ECOWAS is comprised of fifteen West African states. *Basic Information*, ECON. COMMUNITY WEST AFRICAN STATES, <http://www.ecowas.int/about-ecowas/basic-information/> (last visited April 26, 2015).

7. CONFLICT PREVENTION PROTOCOL, *supra* note 6, art. 40.

8. G.A. Res. 46/182 (Dec. 19, 1991).

central role of the U.N. in providing coordination and leadership services in the supply of emergency aid.<sup>9</sup> The U.N. also maintains specialized institutions for promoting effective provision of humanitarian assistance, such as the United Nations Office for Disaster Risk Reduction ("UNISDR").<sup>10</sup> Established in December 1999, the UNISDR facilitates the effective implementation of the International Strategy for Disaster Reduction.<sup>11</sup> In particular, the 2005 Hyogo Declaration, adopted under the auspices of the UNISDR, recognized the necessity of strengthening the capacity of the local community to reduce the risks of various forms of disasters and the vulnerability of the people.<sup>12</sup>

The obstruction of humanitarian assistance by state and non-state actors, and the need to create an environment conducive for relief provision, have led the U.N. Security Council to authorize forceful intervention within a state in accordance with its powers under Chapter VII of the U.N. Charter. In 1992, the U.N. Security Council authorized member nations to establish "a secure environment for humanitarian relief operations in Somalia" through "all necessary means," which permitted forceful intervention.<sup>13</sup> Member states were requested to provide military forces to implement the Security Council decision.<sup>14</sup> As a result, on December 9, 1992, the Unified Task Force ("UNITAF") was formed under the leadership of the United States, but with military contingents from other states, and was deployed in Mogadishu, Somalia, for purposes of intervention.<sup>15</sup>

Yet the provision of humanitarian assistance, where it does not involve forceful military intervention, does not require prior authorization by the U.N. Security Council in order for it to

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9. *Id.*

10. *UNISDR in the UN System*, UNISDR, <http://www.unisdr.org/who-we-are/unisdr-in-un> (last visited April 26, 2015).

11. *Who We Are*, UNISDR, <http://www.unisdr.org/who-we-are> (last visited April 26, 2015).

12. World Conference on Disaster Reduction, *Report of the World Conference on Disaster Reduction, Hyogo Declaration*, ¶ 4, U.N. Doc. A/CONF.206/6 (Jan. 22, 2005) [hereinafter *Hyogo Declaration*].

13. S.C. Res. 794 (Dec. 3, 1992).

14. *Id.* para. 11.

15. *Somalia – UNOSOM I: Background*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/past/unosom1backgr2.html> (last visited June 17, 2015).

be legally acceptable. For example, in the *Military and Paramilitary Activities in and Against Nicaragua* (“*Nicaragua v United States*”), the International Court of Justice held that “the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.”<sup>16</sup> Therefore, prior authorization by the Security Council is only necessary where the provision of humanitarian assistance is undertaken in the context of a forceful military intervention.

There are also principles which have, over time, evolved within the international legal system to regulate the provision of humanitarian assistance. The principles of impartiality, neutrality, and nondiscrimination in providing humanitarian assistance are well developed and widely accepted.<sup>17</sup> The general acceptance and evolution of these principles supports the existence of a right for states to provide humanitarian assistance, as they stipulate the governing principles under which relief should be provided. The EU’s legal framework accepts these principles, as Article 214(2) of the Treaty on the Functioning of the European Union provides that “[h]umanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination.”<sup>18</sup>

The right to provide humanitarian assistance is also implied by the right to development, which confers an obligation to provide humanitarian assistance where necessary.<sup>19</sup> For in-

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16. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Advisory Opinion, 1986 I.C.J. Rep. 14, ¶ 242 (June 27).

17. See, e.g., TFEU art. 214.2, *supra* note 3. As Craig Allan and Thérèse O’Donnell observe, “the cardinal principles of impartiality, neutrality, humanitarian purpose and non-discrimination are regularly stressed in the patchwork of instruments which comprise the hard and soft architecture of international disaster response law.” Craig Allan & Thérèse O’Donnell, *An Offer You Cannot Refuse? Natural Disasters, the Politics of Aid Refusal and Potential Legal Implications*, 5(1) AMSTER. L. FORUM 36, 39 (2013).

18. TFEU, *supra* note 3, art. 214.2.

19. There is some interdependence between the right to development and the right to provide humanitarian assistance, although they are also distinct legal claims. Article I of the 1986 Declaration on the Right to Development defines the right as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in [an environment

stance, the 1991 General Assembly Resolution on Strengthening of the Co-ordination of Humanitarian Emergency Assistance of the United Nations states that development and emergency assistance are interrelated.<sup>20</sup> It notes that to promote effective “transition from relief to rehabilitation and development, emergency assistance should be provided in ways that will be supportive of recovery and long-term development.”<sup>21</sup> Therefore, emergency-humanitarian assistance should facilitate long-term development.<sup>22</sup>

Other U.N. instruments demonstrate the interrelation of the right to development and the right to provide humanitarian assistance. The 1986 United Nations General Assembly (“UNGA”) Declaration on the Right to Development states that the “right to development is an inalienable human right” and is a basis for which “all human rights and fundamental freedoms can be fully realized.”<sup>23</sup> The 1993 UNGA Vienna Declaration and Programme of Action affirms “the need for humanitarian assistance to victims of all natural and man-made disasters” and stresses that the right to development is “universal and inalienable” and “must be implemented and realized.”<sup>24</sup> Although there has been disagreement on whether the right to development amounts to a proper human right, the consensus achieved during the 1993 Vienna Declaration and Programme of Action, which has been reaffirmed in subsequent inter-governmental forums, essentially resolved the issue.<sup>25</sup>

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in] which all human rights and fundamental freedoms can be realized.” Declaration on the Right to Development, G.A. Res. 41/128 (Dec. 4, 1986) [hereinafter Right to Development].

20. G.A. Res. 46/182, *supra* note 8, ¶ 10.

21. *Id.* ¶ 9.

22. *Id.*

23. Right to Development, *supra* note 19, art. 1.

24. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, at 23, 72, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*].

25. Arjun Sengupta, *On the Theory and Practice of the Right to Development*, in REFLECTIONS ON THE RIGHT TO DEVELOPMENT 61, 64 (Arjun Sengupta et al. eds., 2005). For instance, the UNGA reaffirmed the right to development and “its commitment to the Vienna Declaration,” establishing the position of the High Commissioner for Human Rights with the responsibility of promoting “the universal respect for and observance of all human rights.” G.A. Res. 48/141 (Dec. 20, 1993).

Less formal international instruments also support the existence of a right to provide humanitarian assistance. The 2008 European Consensus on Humanitarian Aid defines the principles, policy and values of the EU relief activities.<sup>26</sup> The principles espoused by the European Consensus are a clear indication that the European Commission approves of a right to provide humanitarian assistance. Similarly, the Good Humanitarian Donorship (“GHD”) is an informal forum of states from across the globe that are humanitarian assistance donors, with the objective of encouraging and stimulating “principled donor behavior and, by extension, improved humanitarian action.”<sup>27</sup> The GHD objective is a further indication of the approval of a right to provide humanitarian assistance.

The above analysis of various international instruments indicates the existence of a right to provide humanitarian assistance. However, there is the problem of its justiciability and enforcement. Indeed, there are arguments that an alleged claim or entitlement, like the right to provide humanitarian assistance, must be properly justiciable or enforceable in order to qualify as a legal right. For instance, a humanitarian agency may have little leverage in ensuring that a sanction is enforced on a state that rejects and obstructs the delivery of humanitarian assistance, despite the suffering of its population. Arjun Sengupta points out that some positivist lawyers have postulated the view that “rights” which cannot be legally enforced should be viewed “as social aspirations or statements of objectives” as they do not qualify to be regarded as human rights.<sup>28</sup> However, as Sengupta argues, such views are inaccurate as

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26. *European Consensus on Humanitarian Aid*, EUROPEAN COMMISSION, [http://ec.europa.eu/echo/files/media/publications/consensus\\_en.pdf](http://ec.europa.eu/echo/files/media/publications/consensus_en.pdf) (last visited May 21, 2014).

27. *About GHD*, GHD INITIATIVE, <http://www.ghdinitiative.org/ghd/gns/about-us/about-ghd.html> (last visited May 18, 2015). As of May 2014, GHD members included Australia, Bulgaria, Croatia, Denmark, Finland, Greece, Latvia, Luxembourg, Ireland, Netherlands, Poland, Romania, Spain, United Kingdom, Austria, Brazil, Czech Republic, Estonia, France, Hungary, Italy, Liechtenstein, Malta, New Zealand, Portugal, Slovak Republic, Sweden, the United States of America, Belgium, Canada, Cyprus, European Commission, Germany, Iceland, Japan, Lithuania, Mexico, Norway, Republic of Korea, Slovenia, and Switzerland. *See Our Members*, GHDINITIATIVE.ORG, <http://www.ghdinitiative.org/ghd/gns/about-us/11.html> (last visited May 18, 2015).

28. Sengupta, *supra* note 25, at 76–77.



they reduce human rights to strict legal rights only.<sup>29</sup> While there may be limitations in the justiciability or enforcement of a right due to lack of proper legal sanctions in situations where the right is violated, it does not imply that the right is nonexistent.<sup>30</sup> Furthermore, it should be noted that various rights and duties established under international law have challenges and problems of enforcement.<sup>31</sup>

Human rights may exist even in the absence of explicit legislation. As Amartya Sen contends, “[h]uman rights may well be reflected in legislation, and may also inspire legislation, but this is a further fact, rather than a defining characteristic of human rights themselves.”<sup>32</sup> Indeed, human rights may precede legislation, since such rights are derived from the notion of human dignity rather than from a strictly legal source.<sup>33</sup> It is on this basis that Sengupta rightly argues that “[t]here is nothing in principle to prevent a right being an internationally recognized human right even if it is not individually justiciable.”<sup>34</sup> Therefore, problems of enforcement, or lack of well-defined legal sanctions in case of a breach of an alleged right, do not necessarily imply that the right is nonexistent.

However, the right to provide humanitarian assistance does not suffer from lack of enforcement in all circumstances. There are methods that humanitarian agencies can exploit in order to provide relief, which at times can be effective sanctions against an unwilling state, and can be the basis upon which the right to provide humanitarian assistance is recognized. First, hu-

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29. *Id.* at 77.

30. In addition, despite the lack of proper legal remedies and sanctions for failure to enforce some rights, unjustifiable or manifestly unreasonable failure may have undesirable political, moral, and ethical repercussions.

31. For instance, there is a problem with the full realization of the right to health. Andra Roux-Kemp points out that “formal obligations of governments with regard to human rights [such as the right to health] do not necessarily ensure that right-holders enjoy the full protection and realisation of these rights in practice” because governments may be confronted by economic and resource constraints, among other factors. Andra le Roux-Kemp, *Realising the Right to Health in Nigeria: Incongruities between International Obligations and Domestic Implementation*, 2 AFR. NAZARENE U.L.J. 119, 121 (2014).

32. Amartya Sen, *Human Rights and Development*, in DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL, AND ECONOMIC DIMENSIONS 1, 3 (Bard A. Andreassen et al. eds., 2006).

33. Sengupta, *supra* note 25, at 77.

34. *Id.*

manitarian agencies can lobby other states and intergovernmental organizations, such as the U.N., to condemn the concerned state, and apply diplomatic pressure for the concerned state to accept the distribution of humanitarian relief to its population. States and intergovernmental organizations can even be lobbied to apply economic and other forms of sanctions to the concerned state, especially where the actions have no implication on the already suffering population. Second, humanitarian agencies can lobby the U.N., through the Security Council, to authorize forceful intervention to create an environment that is conducive for the provision of humanitarian assistance and saving lives. The Security Council has the competence to rely on its powers under Articles 24, 25, and Chapter VII of the U.N. Charter to authorize a forceful intervention if it establishes that the humanitarian crisis within a state is a threat to international peace and security.<sup>35</sup>

In light of these considerations, it is apparent that the right to provide humanitarian assistance exists in the international legal regime. As discussed, various international legal instruments, including treaties, support the existence of a right to provide humanitarian assistance, and that right exists irrespective of some of its enforceability challenges. Furthermore, this right forms the basis for the responsibilities of state authorities, humanitarian agencies, and even those of the parties in a conflict situation.<sup>36</sup> However, despite the existence of the right to provide humanitarian assistance, it is highly doubtful that the right to receive assistance also exists in the international legal regime.<sup>37</sup>

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35. For instance, in 1992 the Security Council relied on Chapter VII of the U.N. Charter powers in Resolution 794 when it authorized states “to use all necessary means to establish . . . a secure environment for humanitarian relief operations in Somalia.” S.C. Res. 794, *supra* note 13.

36. Charlotte Dufour et. al., *Rights, Standards and Quality in a Complex Humanitarian Space: Is Sphere the Right Tool?*, 28 *DISASTERS* 124, 130 (2004).

37. *Id.* This is due to the fact that, in theory and practice, it is difficult to establish that a community or individuals have a clear legal entitlement to receive humanitarian assistance from foreign states and non-state actors.

I. SELF-REGULATION BY NON-STATE ACTORS: CONTRIBUTIONS TO THE LEGAL AND POLICY REGIME ON HUMANITARIAN ASSISTANCE

“Non-state actors” include the various participants in international and national activities that are not states, and they constitute an important part of international humanitarian assistance system. Non-governmental organizations (“NGOs”) are among the most active non-state actors in humanitarian relief activities. On that basis, this article will now examine the role of NGOs and related civil-society organizations. As Henry Steiner *et al* observe, NGOs are “an indispensable component in the functioning of the international human rights regime.”<sup>38</sup> The significant role of NGOs in the making of international law, especially in the drafting of international legal instruments, has been acknowledged by commentators.<sup>39</sup> For instance, Christine Chinkin points out that NGOs are often directly involved in the drafting of treaties, contributing professional expertise and commitment where the expertise of government representatives is insufficient.<sup>40</sup> Specific forms of participation by NGOs include negotiations, providing information, lobbying governments, and preparing drafts of the treaty text.<sup>41</sup> Furthermore, the role of NGOs proceeds beyond the drafting of treaties, as they subsequently insist on and monitor implementation and accountability by states, while “naming and shaming” violators.<sup>42</sup> These actions stimulate significantly the institutionalization of international-legal

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38. HENRY J. STEINER ET. AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1420–21 (2007).

39. Eric Suy, *New Players in International Relations*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 373, 376 (Gerard Kreijen ed., 2002).

40. Christine Chinkin, *The Role of Non-Governmental Organizations in Standard Setting, Monitoring and Implementation of Human Rights*, in THE CHANGING WORLD OF INTERNATIONAL LAW IN THE TWENTY-FIRST CENTURY: A TRIBUTE TO THE LATE KENNETH R. SIMMONDS 45, 52 (Joseph J. Norton et. al. eds., 1998). States and intergovernmental organizations have been keen to promote and endorse the activities of NGOs as they have benefitted from the services and advocacy of such organizations in resolving global problems. Kim D. Reimann, *A View from the Top: International Politics, Norms and the Worldwide Growth of NGOs*, 50 INT'L STUD. Q. 45, 63–64 (2006).

41. Chinkin, *supra* note 40, at 52.

42. ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 81 (2007).

norms.<sup>43</sup> Indeed, NGOs have been described as “societal actors that persuade, pressure and teach states new ideas, values, and practices.”<sup>44</sup>

NGOs are increasingly providing important expertise in the negotiation and drafting of international instruments, and at times even participate in states’ delegations. Indeed, Henry Steiner et al. observe that there has been a “blurring of the distinction between the insiders and the outsiders as NGO representatives have become part of governmental delegations.”<sup>45</sup> Steiner et al. further note that “NGOs have also increasingly become key partners in the delivery of humanitarian and other forms of development assistance.”<sup>46</sup> For instance, Costa Rica’s commitment to healthcare has not evolved solely from decisions at the state level, but has also involved health agendas formulated by international donors, as is the case with other developing countries.<sup>47</sup> Similarly, the 1993 Vienna Declaration recommended that nongovernmental and related organizations should undertake greater roles in promoting the right to development, which has a nexus to the right to provide humanitarian assistance.<sup>48</sup>

NGOs have developed self-regulation standards and benchmarks in order to promote efficiency, quality, and accountability in the provision of humanitarian relief. For instance, the Sphere Project was established in 1997 as an initiative of various NGOs and the International Red Cross and Red Crescent

43. *Id.* The diverse roles that NGOs perform in relation to human rights and humanitarian issues include funding projects, highlighting and criticizing violations of obligations, and lobbying governments for global policy developments. Daniel Bell & Joseph H. Carens, *The Ethical Dilemmas of International Human Rights and Humanitarian NGOs: Reflections on a Dialogue Between Practitioners and Theorists*, 26 HUM. RTS. Q. 300, 301–02, 312–13 (2004).

44. Reimann, *supra* note 40, at 59.

45. STEINER ET AL., *supra* note 38, at 1421.

46. *Id.*

47. LYNN M. MORGAN, COMMUNITY PARTICIPATION IN HEALTH: THE POLITICS OF PRIMARY CARE IN COSTA RICA 10 (1993).

48. *Vienna Declaration*, *supra* note 24, paras. 73–74. In addition to affirming the role of nongovernmental organizations in the realization of the right to development, the 1993 Vienna Declaration is significant because it emphasized “the need for humanitarian assistance to victims of all natural and man-made disasters.” *Id.* para. 23. On the interdependence between the right to development and the right to provide humanitarian assistance, see the introductory section of this article.

movement.<sup>49</sup> The Sphere Project drafted the Sphere Humanitarian Charter, one of the most well-known international non-state self-regulation mechanism.<sup>50</sup> The Sphere Humanitarian Charter stipulates minimum core standards in humanitarian relief for food security, nutrition, and health, amongst other life-saving activities.<sup>51</sup> Likewise, People in Aid, a consortium of humanitarian NGOs, aims to promote organizational effectiveness in the provision of humanitarian assistance.<sup>52</sup> People in Aid provides membership and quality certification to humanitarian agencies involved in humanitarian activities.<sup>53</sup> As of June 2015, there were 202 member agencies of the People in Aid network.<sup>54</sup>

Another NGO with influence in the development of the self-regulation mechanisms is the Humanitarian Accountability

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49. SPHERE PROJECT, HUMANITARIAN CHARTER AND MINIMUM STANDARDS IN HUMANITARIAN RESPONSE 4 (2011), <http://www.sphereproject.org/silo/files/the-sphere-handbook.zip> (last visited Sept. 10, 2015). The Board of the Sphere Project is comprised of eighteen organizations. Members include the International Federation of Red Cross and Red Crescent Societies, Sphere India, CARE International, *Aktion Deutschland Hilft*, International Medical Corps, *Office Africain pour le Développement et la Coopération*, ACT Alliance/Norwegian Church Aid, *Caritas Internationalis*, InterAction, International Council of Voluntary Agencies, Plan International, World Vision International, Lutheran World Federation/DanChurchAid, RedR International, Save the Children, Salvation Army, Oxfam International and Policy Action Group on Emergency Response. *Board Organizations*, SPHERE PROJECT, <http://www.sphereproject.org/sphere/en/about/governance/board-member-organizations> (last visited Oct. 22, 2013).

50. For a more detailed discussion of the contributions of the self-regulation standards and benchmarks articulated in the Sphere Charter, in the evolution of a progressive and more “victim centered” legal regime governing humanitarian assistance, especially in health and nutrition relief activities, see Shahla Ali & Tom Kabau, *Non-State Actors and the Evolution of Humanitarian Norms: Implications of the Sphere Charter in Health and Nutrition Relief* 5 J. INT'L. HUMANITARIAN LEGAL STUD. 70, 70–104 (2014).

51. SPHERE PROJECT, *supra* note 49, at 4.

52. *About People in Aid*, PEOPLE IN AID, <http://www.peopleinaid.org/about/default.aspx> (last visited May 22, 2014).

53. *Membership*, PEOPLE IN AID, <http://www.peopleinaid.org/about/default.aspx> (last visited May 22, 2014).

54. *Members' Directory*, PEOPLE IN AID, <http://www.peopleinaid.org/membership/directory.aspx> (last visited Apr. 25, 2014).

Project (“HAP”).<sup>55</sup> HAP is comprised of a group of humanitarian organizations that have the objective of enhancing accountability to the recipients of relief through quality mechanisms such as certification.<sup>56</sup> In addition, HAP provides a forum through which relief recipients can articulate grievances against humanitarian organizations.<sup>57</sup> Another important institution for self-regulation by the NGOs is the Emergency Capacity Building (“ECB”) Project. The ECB Project was established in 2004 when relief agencies, including Mercy Corps, Oxfam Great Britain, CARE International, Save the Children, Catholic Relief Services, International Rescue Committee, and World Vision International, met to discuss effective provisions of humanitarian assistance.<sup>58</sup> The ECB Project is tasked with improving the quality, speed, and effectiveness through which humanitarian relief is administered.<sup>59</sup>

In some cases, self-regulation standards embraced by NGOs have been adopted by the UNGA. When self-regulation standards are embraced by the UNGA, they acquire the status of what is referred to as “soft law.”<sup>60</sup> Upon adoption by the UNGA, such regulations inform the analysis of state practice, which is a prerequisite in the formation of new rules of customary international law.<sup>61</sup> One example of the UNGA’s adoption of NGOs self-regulation standards was its acceptance of the

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55. *The History of HAP*, HUMANITARIAN ACCOUNTABILITY PARTNERSHIP, <http://www.hapinternational.org/who-we-are/about-us/the-history-of-hap.aspx> (last visited Apr. 25, 2014).

56. *About Us*, HUMANITARIAN ACCOUNTABILITY PARTNERSHIP, <http://www.hapinternational.org/who-we-are/about-us.aspx> (last visited Apr. 25, 2014).

57. Jacqui Tong, *Questionable Accountability: MSF and Sphere in 2003*, 28 *DISASTERS* 176, 176 (2004).

58. *The Project*, EMERGENCY CAPACITY BUILDING PROJECT, <http://www.ecbproject.org/about.aspx> (last visited Apr. 25, 2014).

59. *Id.*

60. The phrase “soft law” is used in reference to various international legal instruments, which, though not explicitly legally binding, still have some legal value, and therefore regulate the conduct of states and international organizations to an extent. Alan Boyle, *Soft Law in International Law Making*, in *INTERNATIONAL LAW* 122, 122 (Malcolm D. Evans ed., 3d ed. 2012).

61. The International Court of Justice has already clarified that the elements necessary to form a new customary international law are state practice and *opinio juris*. See *Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 16, ¶ 207; see also *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. Rep. 3, ¶ 77 (Feb. 20).

Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, which had been negotiated under the International Federation of Red Cross and Red Crescent Societies ("IFRC"), in General Assembly Resolutions 63/137, 63/139 and 63/141 of 2008.<sup>62</sup>

As globalization increases, NGOs will have an even greater impact on the development of international legal and policy norms. Globalization refers to the increasing interdependence, interaction, and interconnectedness of states and societies in various spheres, including on matters related to ethics, human rights, and law.<sup>63</sup> The process of globalization has increased the role of non-state actors in humanitarian assistance.<sup>64</sup> Globalization has been exemplified by phenomenal growth in nongovernmental transnational activities, partly due to the opportunities provided by modern transport and communication systems.<sup>65</sup> Indeed, Joseph Nye and David Welch specifically observe that "the dramatic expansion of transnational channels and contacts means that more policies are up for grabs internationally, including regulations and practices...that were formerly regarded as the prerogatives of national governments."<sup>66</sup>

Traditionally, states were the only significant actors in international matters, especially in the making of international legal and policy norms. However, as Véronique Lapage observes,

62. *IDRL Guidelines*, INT'L FED'N RED CROSS & RED CRESCENT SOC'Y, <http://www.ifrc.org/en/what-we-do/idrl/idrl-guidelines/> (last visited May 10, 2013).

63. Bard A. Andreassen, *Development and the Human Rights Responsibilities of Non-State Actors*, in *DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL, AND ECONOMIC DIMENSIONS* 123 (Bard A. Andreassen *et al.* eds., 2006). On the meaning and implication of globalization, see Peter Viggo Jakobsen, *The Transformation of United Nations Peace Operations in the 1990s: Adding Globalization to the Conventional 'End of the Cold War Explanation'*, 37 *COOPERATION & CONFLICT* 267, 268 (2002); Robert O. Keohane & Joseph S. Nye, Jr., *Globalization: What's New? What's Not? (And So What?)*, 118 *FOREIGN POL'Y* 104, 105 (2000).

64. Andreassen, *supra* note 63, at 123. According to Chimni, some of the emerging principles in relation to humanitarian assistance, under the concept of "new humanitarianism," are as a result of the implications of globalization. Chimni, *supra* note 1, at 245.

65. ANN KELLEHER & LAURA KLEIN, *GLOBAL PERSPECTIVES: A HANDBOOK FOR UNDERSTANDING GLOBAL ISSUES* 17 (3d ed. 2009).

66. JOSEPH S. NYE, JR. & DAVID A. WELCH, *UNDERSTANDING GLOBAL CONFLICT AND COOPERATION: AN INTRODUCTION TO THE THEORY AND HISTORY* 243 (8th ed. 2011).

the “nation-state system is no longer the only foundation of global governance,” as there are now other important participants.<sup>67</sup> Wolf Heydebrand echoes this conclusion, asserting that the reality of global governance without government has emerged due to the declining classical concepts of state sovereignty and the influence of international law.<sup>68</sup> The role and influence of important self-regulating mechanisms of NGOs and civil society organizations, such as the Sphere Humanitarian Charter, HAP, People in Aid and ECB Project exemplify what Heydebrand refers to as “governance without government.”<sup>69</sup> Therefore, NGOs are a significant component of the non-state actors that are contributing to the global governance of humanitarian relief through a human rights-based approach, a concept that is discussed in Part III of this article.

One of globalization’s merits, especially in relation to humanitarian relief, is that it has converted previously local problems, including problems in health, food, and investment, into transnational concerns.<sup>70</sup> However, Véronique Lapaige is cautious that the weakening influence of the state due to globalization, “despite its merits on access to global aid, may have an implication on local participation.”<sup>71</sup> Globalization may be deemed as an antithesis of localization, and may be seen as likely to undermine the role and legitimacy of local participants in the provision of humanitarian assistance. However, this article postulates the view that the global governance of humanitarian assistance has adopted a human rights approach, which is evident in the self-regulatory mechanisms of NGOs. This has been the basis of the emerging obligation to ensure quality local participation. The human rights-based approach, and the emerg-

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67. Véronique Lapaige, “Globalized Public Health:” A Transdisciplinary Comprehensive Framework for Analyzing Contemporary Globalization’s Influences on the Field of Public Health, 2 RISK MGMT. & HEALTHCARE POL’Y 73, 74 (2009).

68. Wolf Heydebrand, *From Globalisation of Law to Law under Globalisation*, in ADAPTING LEGAL CULTURES 117, 120 (David Nelken & Johannes Feest eds., 2001).

69. *Id.*

70. Lapaige, *supra* note 67, at 74. On globalization blurring the distinction between domestic and foreign issues and problems, see Rebecca Katz et al., *Defining Health Diplomacy: Changing Demands in the Era of Globalization*, 89 MILBANK Q. 503, 504 (2011).

71. Lapaige, *supra* note 67, at 74.



ing obligation to ensure local participation, is examined in more detail in Part III of this article.

## II. DISTRIBUTION OF RESPONSIBILITIES IN THE REALIZATION OF THE RIGHT TO PROVIDE HUMANITARIAN ASSISTANCE

This section focuses on the nature of rights and duties that accrue to state and non-state actors in relation to the provision of humanitarian assistance. Wesley Hohfeld popularized the concept that rights and duties are correlative concepts.<sup>72</sup> He observed that, "it is certain that even those who use the word and the conception 'right' in the broadest possible way are accustomed to thinking of 'duty' as the invariable correlative."<sup>73</sup> It is generally accepted that "[t]o ascribe a right to one person is to imply that some other person is under a corresponding duty."<sup>74</sup>

Therefore, where the international community and agencies claim a right to provide humanitarian assistance, the questions of the nature of correlative duties, and entities that bear them, arise. Duties are often phrased as responsibilities. This article argues that a state's right to provide humanitarian assistance implies an obligation on the state to consent to, and not to obstruct, the delivery of humanitarian relief, if it is unable or unwilling to provide it. The state has a primary responsibility to provide humanitarian assistance,<sup>75</sup> and is therefore under a duty to accept such assistance where it is unable or unwilling to do so. Indeed, international instruments have specifically pointed out this state responsibility, including the 1991 Declaration on the Strengthening of the Co-ordination of Humanitarian Emergency Assistance of the United Nations, which states:

Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory.<sup>76</sup>

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72. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–32 (1913).

73. *Id.* at 31.

74. P J FITZGERALD, SALMOND ON JURISPRUDENCE 217 (12th ed. 2012).

75. G.A. Res. 46/182, *supra* note 8, ¶ 4.

76. *Id.*

Equally, the GHD, an informal grouping of donor states, has reaffirmed the “primary responsibility” of states to provide humanitarian relief to victims of disaster that are within their borders.<sup>77</sup> The 1986 Declaration on the Right to Development has also recognized that states bear the “primary responsibility” of creating national and international conditions (for instance, those of engaging external donors and transnational agencies) that promote the realization of the right to development.<sup>78</sup>

While states bear this primary responsibility, where a state fails to fulfil its primary obligation to provide humanitarian relief, the international community assumes secondary or subsidiary responsibility to provide assistance, emanating from their right to provide humanitarian relief. Being entitled to a right implies that its claimant incurs certain duties, in addition to other people bearing duties in relation to the claimant. R. Bhalla instructively opines that:

The relation of right and duty is also seen from another angle which states that in order to have a right a person must accept a duty as well, that is, right and duty... [may] exist in the same person at the same time... For example, if a person has a right to life, he must accept the duty to respect the life of others. Here right and duty exist in the same person rather than in two different persons.<sup>79</sup>

As discussed, the secondary responsibility of other states and NGOs to provide humanitarian assistance where a domestic state is unable or unwilling to do so arises from the right of humanitarian agencies to provide relief. If the domestic state is not fulfilling its primary responsibility, and is particularly obstructing the provision of humanitarian assistance by secondary actors, sanctions can even be imposed upon the state to facilitate the delivery of relief. For instance, the U.N. Security Council has previously authorized states “to use all necessary

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77. Int’l Meeting on Good Humanitarian Donorship, *Principles and Good Practice of Humanitarian Donorship*, para. 5 (June 17, 2003), <http://www.goodhumanitarianandonorship.org/gns/principles-good-practice-ghd/overview.aspx> (last visited May 19, 2014) [hereinafter Good Humanitarian Donorship].

78. Right to Development, *supra* note 19, art. 3. The parenthetical examples give our own illustration of the primary responsibility of states.

79. R.S. BHALLA, *CONCEPTS OF JURISPRUDENCE* 80 (1990).

means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.”<sup>80</sup>

The flow of responsibilities from the subject state to the international community of states, and nongovernmental agencies, has been affirmed by both states and commentators. For example, although the GHD consortium of donor states, has “reaffirm[ed] the primary responsibility of states for the victims of humanitarian emergencies within their own borders”, it still endeavours “to ensure flexible and timely funding, on the basis of the collective obligation of striving to meet humanitarian needs.”<sup>81</sup> The 2008 European Consensus on Humanitarian Aid observes that “[h]umanitarian action is a collective responsibility at an international level, involving many different organisations, governments, local communities and individuals.”<sup>82</sup> Therefore, while states bear the primary responsibility for the provision of humanitarian assistance within their borders, other states within the international community, and non-state actors such as NGOs, may have, or can claim, a secondary or subsidiary responsibility.

### III. A HUMAN RIGHTS-BASED APPROACH TO THE PROVISION OF HUMANITARIAN ASSISTANCE: CONCEPTUAL ANALYSIS

Although a human rights approach is not a binding principle of international law, it is based on the progressive philosophy of effectively “protecting the worst-off, the poorest and the most vulnerable.”<sup>83</sup> In addition, a human-rights approach emphasizes the “interrelation and interdependence of human rights.”<sup>84</sup> With regard to a state’s obligations, a human rights approach implies that states have a duty “to respect, protect and fulfil the rights of their citizens and of the people living in their territory.”<sup>85</sup> This approach, therefore, requires human rights

80. S.C. Res. 794, *supra* note 13, at 10.

81. Good Humanitarian Donorship, *supra* note 77, para. 5.

82. European Consensus on Humanitarian Aid para. 66, 2008 O.J. (C 25) 1 [hereinafter ECHA].

83. Sengupta, *supra* note 25, at 97.

84. Brigitte I. Hamm, *A Human Rights Approach to Development*, 23 HUM. RTS. Q. 1005, 1006 (2001).

85. BROOKINGS-BERN PROJECT ON INTERNAL DISPLACEMENT, HUMAN RIGHTS AND NATURAL DISASTERS: OPERATIONAL GUIDELINES AND FIELD MANUAL ON HUMAN RIGHTS PROTECTION IN SITUATIONS OF NATURAL DISASTER 8 (2008), <http://www.refworld.org/pdfid/49a2b8f72.pdf> (last visited Sept. 10, 2015).

standards in various developmental activities of the state. However, states may have insufficient resources to enable them to effectively protect and fulfil the rights of those within their borders, especially during disasters. In such circumstances, states are under an obligation to both appeal for and accept assistance from other states and nongovernmental organizations.

Under the framework of a human-rights approach, states and nongovernmental organizations undertaking humanitarian assistance are required to fulfil certain obligations. For instance, a human rights approach requires special focus on the marginalized or excluded groups, ensuring they are not discriminated against, and facilitating the establishment of mechanisms for their participation and empowerment.<sup>86</sup> Some commentators argue that the implementation of the right to development, which has a nexus to the provision of humanitarian assistance, should be:

[C]arried out according to the human rights standards, that is, with transparency, accountability and in a non-discriminatory and participatory manner and with equity and justice. In practice, this means that the schemes should be formulated and implemented at the grass-roots level with the beneficiaries participating in the decision-making and implementation, as well as sharing equitably in the benefits. In short, this implies planning that empowers the beneficiaries.<sup>87</sup>

As previously noted, a human-rights approach is concerned with the protection of the vulnerable. Such an approach seeks to ensure that marginalized populations are free from discrimination as empowered, active participants in national affairs.<sup>88</sup> Vulnerable and marginalized groups should be empowered to participate in economic and social programs of the state. For instance, there should be public participation forums within the state governance structures that specifically facilitate the marginalized and vulnerable groups to articulate their economic and social concerns and interests.

A human rights approach to the provision of humanitarian assistance requires legal, policy, and institutional mechanisms

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86. Hamm, *supra* note 84, at 1011.

87. Sengupta, *supra* note 25, at 97.

88. *See* Hamm, *supra* note 84, at 1011.

to ensure local participation and grass-roots capacity building.<sup>89</sup> This article argues that the current emphasis and endorsement of local participation in humanitarian relief has been precipitated by a shift towards a human rights approach by states and non-state actors. The next section examines the relevant legal and policy instruments, and self-regulatory standards of NGOs, which indicate that an obligation to ensure local participation in humanitarian assistance activities is emerging.<sup>90</sup>

*A. Local Participation as an Emerging Obligation in the Human Rights-Approach to Humanitarian Assistance*

As discussed above, a central requirement in a human-rights approach to humanitarian assistance is the participation, protection, and non-discrimination of the vulnerable.<sup>91</sup> The participation of beneficiaries has become one of the core issues in contemporary humanitarian-relief standards.<sup>92</sup> This trend is evidenced by several international instruments. The 1991 Declaration on Strengthening of the Co-ordination of Humanitarian Emergency Assistance of the United Nations states that country level co-ordination should include the use of locally available relief capacities.<sup>93</sup> The 2005 Hyogo Declaration, adopted by states under the auspices of the United Nations Office for Disaster Risk Reduction, affirms the necessity of community level capacities as a mechanism of diminishing the disaster risk.<sup>94</sup> The 2008 European Consensus on Humanitarian Aid provides that humanitarian activities by the EU are meant to support “local responses to humanitarian crises through a

89. A human rights approach particularly emphasizes participation. Dorothea Hilhorst, *Being Good at Doing Good? Quality and Accountability of Humanitarian NGOs*, 26 *DISASTERS* 193, 199 (2002). Hilhorst in particular notes that a human-rights-based approach commendably breaks away from the ‘earlier patronizing paradigms.’ *Id.*

90. For more complete discussion, see ALI, S., *GOVERNING DISASTERS: ENGAGING LOCAL POPULATIONS IN HUMANITARIAN RELIEF*, HUMANITARIAN POLICY PAPER SERIES (2015).

91. See Sengupta, *supra* note 25, at 97.

92. BÉATRICE POULIGNY, *SUPPORTING LOCAL OWNERSHIP IN HUMANITARIAN ACTION* 6 (2009), [http://www.disastergovernance.net/fileadmin/gppi/GPPiPPR\\_local\\_ownership\\_2009.pdf](http://www.disastergovernance.net/fileadmin/gppi/GPPiPPR_local_ownership_2009.pdf) (last visited Sept. 10, 2015).

93. G.A. Res. 46/182, *supra* note 8, ¶ 39.

94. *Hyogo Declaration*, *supra* note 12, ¶ 4.

partnership approach with the affected communities.”<sup>95</sup> The Good Humanitarian Donorship consortium of states emphasizes the need to involve the “beneficiaries in the design, implementation, monitoring and evaluation” of relief activities.<sup>96</sup> The 2012 Food Assistance Convention stipulates one of the governing principles in the provision of food assistance as being the involvement of the “beneficiaries in the assessment of their needs and in the design, implementation, monitoring and evaluation” of the relief activities.<sup>97</sup>

The 2008 Civil-Military Guidelines and Reference for Complex Emergencies by the United Nations and the Inter-Agency Standing Committee (“IASC”) provides further guidance for beneficiaries and relief providers. This instrument states that beneficiaries of relief and local personnel should be involved, to the extent possible, “in the design, management and implementation of assistance, including in civil-military coordination.”<sup>98</sup> The Sphere Humanitarian Charter, drafted by a consortium of NGOs, expressly states that its principles and standards are based on a “rights-based and people-centred approach” to the provision of humanitarian relief.<sup>99</sup> The Sphere Charter specifically affirms that its standards and principles are based on the need of involving the beneficiaries of assistance and local authorities.<sup>100</sup> Max O’Donnell *et al.* argue that the Sphere Charter may, in the future, contribute to the formation of international customary law with respect to “the rights of beneficiaries to a specific quality of response” by the states and nongovernmental organizations in situations of humanitarian disaster.<sup>101</sup> Such practice by state and non-state actors exemplifies the adoption of a human-rights approach to humanitarian assistance. Indeed, legal instruments adopted by

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95. ECHA, *supra* note 82, para. 4.

96. Good Humanitarian Donorship, *supra* note 77, para. 7.

97. Food Assistance Convention, *supra* note 4, art. 2(c)(ii).

98. UNITED NATIONS & THE INTER-AGENCY STANDING COMMITTEE, CIVIL-MILITARY GUIDELINES AND REFERENCE FOR COMPLEX EMERGENCIES 19 (2008), <https://docs.unocha.org/sites/dms/Documents/ENGLISH%20VERSION%20Guidelines%20for%20Complex%20Emergencies.pdf> (last visited Sept. 10, 2015) [hereinafter CIVIL-MILITARY GUIDELINES].

99. SPHERE PROJECT, *supra* note 49, at 6.

100. *Id.*

101. Max R. O’Donnell, Dimitri Bacos & Michael L. Bennish, *Nutritional Response to the 1998 Bangladesh Flood Disaster: Sphere Minimum Standards in Disaster Response*, 26 DISASTERS 229, 238–39 (2002).

states and self-regulatory mechanisms of NGOs such as the Sphere Charter represent a progressive codification of an obligation to ensure local participation in relief activities.

Incorporation of local participation in relief activities by aid agencies has become an emerging obligation in the human-rights approach to humanitarian assistance. The Code of Good Practice of the People in Aid, a network of NGOs, requires that policies give consideration to local legal and cultural issues through the notion of thinking globally, but acting locally.<sup>102</sup> The HAP Project aims at stimulating accountability of humanitarian agencies to beneficiaries through standards on quality and accountability, and includes certification mechanisms.<sup>103</sup> In addition, HAP provides a forum through which relief beneficiaries can articulate their grievances against humanitarian agencies.<sup>104</sup> The ECB Project formulates tools and mechanisms for ensuring the participation of local people during the project assessment, design, implementation and monitoring.<sup>105</sup> The 2001 "Responsibility to Protect" Report of the International Commission on Intervention and State Sovereignty cautioned that:

[A] reconstruction and rehabilitation programme which does not take sufficient account of local priorities and excludes local personnel could create an unhealthy dependency on the intervening authority, stultify the regrowth of local institutions and the economy, and infinitely delay the population's desire or ability to resume responsibility for its own government.<sup>106</sup>

Relief agencies have an emerging obligation to involve the local beneficiaries in the design, implementation, monitoring and evaluation of humanitarian projects. The next section examines

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102. PEOPLE IN AID, CODE OF GOOD PRACTICE IN THE MANAGEMENT AND SUPPORT OF AID PERSONNEL 10–11 (2003), <http://www.peopleinaid.org/pool/files/code/code-en.pdf> (last visited Sept. 10, 2015).

103. *About Us*, HUMANITARIAN ACCOUNTABILITY PARTNERSHIP, <http://www.hapinternational.org/who-we-are/about-us.aspx> (last visited Apr. 25, 2014).

104. Tong, *supra* note 57, at 176.

105. EMERGENCY CAPACITY BUILDING PROJECT, IMPACT MEASUREMENT AND ACCOUNTABILITY IN EMERGENCIES: THE GOOD ENOUGH GUIDE 34–35 (2007).

106. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT ¶ 5.27 (2001).

some of the problems and opportunities in the institutionalization of local participation in humanitarian-relief activities.

*B. Themes, Problems, and Opportunities in the Institutionalization of Local Participation in Humanitarian Relief Activities*

It is apparent that the issue of local participation is central in the provision of humanitarian relief, and is even evolving to an obligation. This section highlights the themes that have emerged in the local participation discourse, the problems that impact humanitarian agencies in their quest to incorporate local participation, and the opportunities that humanitarian actors can exploit.

1. Determining Legitimate Local Participants

First, determining the people who qualify as “local” may be problematic. At times the phrase “local” differentiates between national and international actors. Yet at other times, a person originating from another region in the same state may be regarded as an outsider, and therefore not be deemed a local participant.<sup>107</sup> As such, even a national of the state may in certain contexts not be deemed a local with regard to humanitarian activities. The legitimacy of local participants is inevitably disputed in efforts to ensure local ownership of humanitarian projects.<sup>108</sup>

The concept of “insiders” and “outsiders,” despite having some element of subjectivity, helps distinguish those who qualify as locals, and, therefore, must be involved as participants in relief efforts.<sup>109</sup> Under this criterion, an insider is a person or community that is vulnerable or affected by the disaster, and therefore must be involved as a local participant in relief efforts. Outsiders are individuals and agencies who involve themselves as parties in a conflict or as providers of humanitarian assistance.<sup>110</sup> The concept of insider and outsider is accommodative in determining local participants as it has no ge-

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107. Pouligny, *supra* note 92, at 6–7.

108. HANNAH REICH, “LOCAL OWNERSHIP” IN CONFLICT TRANSFORMATION PROJECTS: PARTNERSHIP, PARTICIPATION OR PATRONAGE? 7 (2006), <http://edoc.vifapol.de/opus/volltexte/2011/2544/pdf/boc27e.pdf> (last visited Sept. 10, 2015).

109. Pouligny, *supra* note 92, at 6–7.

110. *Id.*



ographical limitations. Depending on the magnitude of disaster, local participants can be populations within neighboring states, or inhabitants of a small village or settlement.

The concept of insider and outsider may be incorporated in resolutions adopted by states and in the self-regulatory mechanisms of NGOs to provide a criterion for determining legitimate local participants in relief efforts. In addition, humanitarian actors should recognize that local participants may include diverse groups and entities with varying strengths and limitations.<sup>111</sup> For instance, local relief participants may include women advocacy groups, religious institutions, nongovernmental organizations, local government officials, and community leaders.<sup>112</sup> It is imperative for external humanitarian agencies to include the various categories of local actors as much as it is feasible.

## 2. Standards and Depth of Local Participation

Despite the now common narrative of local participation in humanitarian relief projects, local participation is still an “infinitely malleable concept” that amounts to anything that involves local people.<sup>113</sup> Equally, NGOs and external humanitarian agencies have, at times, declined to recognize local resources and avoided qualitative local participation. During the 2004 Indian Ocean earthquake and tsunamis that affected Asian states such as Sri Lanka, Indonesia, India, and Thailand, it has been observed that international agencies at times ignored local resources and structures, despite their subscription to standards that require their engagement with local actors.<sup>114</sup>

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111. LARRY MINEAR, *THE HUMANITARIAN ENTERPRISE: DILEMMAS AND DISCOVERIES* 57 (2002).

112. *Id.* To ensure diversity in the representation of the local community, humanitarian agencies should strive to engage, or consult, the widest categorization of groups within the beneficiary population that may be practically possible. Therefore, to achieve diversity in the local community participants, or those to be consulted, the population may be categorized on the basis of gender, age, occupation, level of education or professional training, religion, household income, *etc.* With regard to community leaders, besides involving local administrators in the formal state governance system, the community can be requested to nominate their representatives.

113. Andrea Cornwall, *Unpacking 'Participation': Models, Meanings and Practices*, 43 *CMTY. DEV. J.* 269, 269 (2008).

114. JOHN COSGRAVE, *TSUNAMI EVALUATION COALITION, JOINT EVALUATION OF THE INTERNATIONAL RESPONSE TO THE INDIAN OCEAN TSUNAMI: SYNTHESIS*

International agencies are also accused of having avoided accountability to the beneficiaries of relief, and of failing to communicate effectively with beneficiary communities.<sup>115</sup> Even the international media, critical in shaping the views of the public on the contributions of various actors, often publicizes the role of external participants while ignoring that of the locals, including the host government and community civil societies.<sup>116</sup> Therefore, the media has, at times, reinforced the notion of the humanitarian relief as a responsibility of external agencies.<sup>117</sup> In some circumstances, even where local agencies are incorporated in the relief project, the arrangement is more of “patronage than partnership,” with the local organization merely following instructions.<sup>118</sup> However, neglecting and avoiding the involvement of the local community can contribute to burden-shifting of disaster mitigation responsibilities to external humanitarian actors.

One of the factors that legitimizes the qualitative participation of locals is their immediate and timely role during the occurrence of disasters. On that basis, the EU recognizes that the protection of lives is enhanced through the strengthening of the local capacity, as locals are well-positioned to respond immediately when the disaster occurs.<sup>119</sup> For example, during the 2004 Indian Ocean earthquake and tsunamis in some parts of South East Asia, local people provided the early emergency services, and undertook almost all action that resulted in the saving of lives at that time.<sup>120</sup> As an illustration of the immediate and significant rescue role of the locals after the earthquake and tsunamis, the events at Banda Aceh, Indonesia, are described by Jon Bennett *et al.* as follows:

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REPORT 4 (2007). See also, John Telford & John Cosgrave, *The Int'l Humanitarian System and the 2004 Indian Ocean Earthquake and Tsunamis*, 31 DISASTERS 1, 10 (2007); M.W. Amarasiri de Silva, *Ethnicity, Politics and Inequality: Post-Tsunami Humanitarian Aid Delivery in Ampara District, Sri Lanka*, 33 DISASTERS 253, 258 (2009).

115. COSGRAVE, *supra* note 114, at 4.

116. MINEAR, *supra* note 111, at 65.

117. *Id.*

118. HUMANITARIAN & WAR PROJECT, PATRONAGE OR PARTNERSHIP: LOCAL CAPACITY BUILDING IN HUMANITARIAN CRISES 1 (Ian Smillie ed., 2001).

119. ECHA, *supra* note 82, para. 74.

120. COSGRAVE, *supra* note 114, at 4.

[I]n the first week, some temporary shelters were already being run by students/volunteers, heads of mosques and local NGOs prior to the arrival of any international organisations. These were the first informants. Then came the government and military, then international NGOs, then international military, and finally the establishment of UN offices and UN common services.<sup>121</sup>

The affected population is often the best source of first-hand information that is required by external humanitarian relief providers, and therefore they should not be viewed as mere victims and inactive beneficiaries of aid.<sup>122</sup> Local knowledge provides external humanitarian agencies with information that they can rapidly examine to determine the initial needs and opportunities for the mitigation of disaster.<sup>123</sup>

Often, there are insufficient resources to address the effects of disaster and save lives. Local resources are essential in supplementing the resources of the external agencies in order to have more effective disaster mitigation. Although international skills and resources are critical in mitigating a humanitarian crisis, they are insufficient on their own.<sup>124</sup> Collaboration and burden-sharing, through the use of both local and external knowledge and resources, is therefore essential. Local communities can “be a source of strength, contributing innovative ideas and local knowledge which, when mobilised and used appropriately, can lead to solutions that can make a fundamental contribution to mitigating the negative impacts of natural disasters.”<sup>125</sup> Therefore, for greater efficiency and success in the delivery of humanitarian assistance, local resources and knowledge should not be despised or ignored, but should be tapped to the highest extent possible.

Indeed, external humanitarian actors can benefit from local coping mechanisms and knowledge on disaster mitigation, de-

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121. JON BENNETT ET AL., TSUNAMI EVALUATION COALITION, COORDINATION OF INTERNATIONAL HUMANITARIAN ASSISTANCE IN TSUNAMI-AFFECTED COUNTRIES 34 (2006), <http://www.alnap.org/resource/3530> (last visited Sept. 10, 2015) [hereinafter TSUNAMI EVALUATION COALITION].

122. Pouligny, *supra* note 92, at 6–7.

123. Phong Tran et al., *GIS and Local Knowledge in Disaster Mgmt.: A Case Study of Flood Risk Mapping in Viet Nam*, 33 DISASTERS 152, 154 (2009).

124. Wolfgang Fengler & Homi Kharas, *Delivering Aid Differently: Lessons from the Field*, 49 ECON. PREMISE 1, 7 (2011).

125. Tran, *supra* note 123, at 152.

veloped over decades of experience. Communities, especially in developing countries where governments often have minimal resources, have relied on their coping mechanisms and knowledge to respond to disaster and mitigate its effects.<sup>126</sup> With regard to flood risk mapping in Viet Nam, it has been pointed out that the integration of local knowledge into the disaster-management scheme provides relief agencies with greater insights into the various aspects of vulnerability to disaster.<sup>127</sup> Therefore, when external NGOs bring in new technology and knowledge, local practices and traditions should not be displaced if they have been beneficial to the community.<sup>128</sup> Efforts should be made to balance the introduction of external technology and innovations with support for local practices and knowledge.<sup>129</sup>

In order to address the challenge of local participation, there are helpful and qualitative guidelines and standards that are emerging from treaties, resolutions of states, and self-regulatory instruments of the non-governmental organizations.<sup>130</sup> The guidelines and standards require that local participants be involved, at the minimum, “in the design, implementation, monitoring and evaluation” of the humanitarian relief activities.<sup>131</sup> One such guideline is the Sphere Humanitarian Charter.

A range of basic activities are postulated under the Sphere Humanitarian Charter which are deemed prerequisites to people-centered relief efforts that involve qualitative local partici-

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126. Mikio Ishiwatari, *Government Roles in Community-Based Disaster Risk Reduction*, in COMMUNITY-BASED DISASTER RISK REDUCTION 19, 21 (Rajib Shaw ed., 2012). Local people have extensive knowledge about their environment, which they have used over the years in order to cope with disasters. Dorothea Hilhorst, *Responding to Disasters: Diversity of Bureaucrats, Technocrats and Local People*, 21 INT'L J. MASS EMERGENCIES & DISASTERS 37, 47 (2003).

127. Tran, *supra* note 123, at 168.

128. David Alexander, *The Study of Natural Disasters, 1977-1997: Some Reflections on a Changing Field of Knowledge*, 2 DISASTERS 284, 299 (1997).

129. *Id.* See also, Tran, *supra* note 123, at 153.

130. See Food Assistance Convention, *supra* note 4; see also Good Humanitarian Donorship, *supra* note 77; CIVIL-MILITARY GUIDELINES, *supra* note 98; EMERGENCY CAPACITY BUILDING PROJECT, *supra* note 105.

131. Food Assistance Convention, *supra* note 4, at 4. See also, Good Humanitarian Donorship, *supra* note 77, para. 7; CIVIL-MILITARY GUIDELINES *supra* note 98, at 19; EMERGENCY CAPACITY BUILDING PROJECT, *supra* note 105, at 34-35.

pation.<sup>132</sup> First, as a way of stimulating local capacity, the Sphere Charter obligates external humanitarian actors to identify and utilize local social networks and community organizations, including supporting self-help and community-based efforts.<sup>133</sup> Second, humanitarian agencies should ensure that local communities have access to appropriate and safe venues, where they can hold meetings and information sharing sessions.<sup>134</sup> Third, there should be sufficient and balanced representation of the beneficiaries in their meetings with humanitarian agencies.<sup>135</sup> Fourth, relief beneficiaries should be provided with sufficient information on the humanitarian agency, for instance, on the organization's projects and the entitlements of the population, in a language and format that they can comprehend.<sup>136</sup> Fifth, transparent and effective feedback mechanisms, which empower the beneficiary community to influence the implementation of the relief activities, should be established and made available to the beneficiaries.<sup>137</sup>

Sixth, humanitarian organizations have an obligation to establish effective complaints systems that enable beneficiaries to raise grievances in an easy and safe manner, in addition to ensuring that replies and required actions are carried out in a transparent and timely way.<sup>138</sup> Seventh, the Sphere Charter requires that local resources, such as labor and environmentally sustainable materials, be utilized by humanitarian agencies as a mechanism of promoting proper recovery and enhancing the local economy.<sup>139</sup> Eighth, the Sphere Charter requires that progressive local religious, cultural and traditional norms be considered, accommodated and upheld in programs by relief agencies.<sup>140</sup> Ninth, as the humanitarian project progresses, relief agencies are required to progressively increase the level of participation by the local people, by enhancing the beneficiary people's ownership of programs and decision-making power.<sup>141</sup>

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132. SPHERE PROJECT, *supra* note 49, at 55.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 56.

As the mechanisms of the Sphere Charter indicate, emerging guidelines ensure uniform and objective qualitative standards for participation by beneficiaries in various stages of the relief project carried out by external actors.

Commitment in the implementation of the established standards is still required. Theory and concepts must be transformed into actual practice. However, there is already the acknowledgement of the need for local participation, and objective regulations are being formulated, indicating that there is progress towards quality local participation. The existence of standards, especially the self-regulation mechanisms of the NGOs, indicates some level of commitment, which may progress to effective implementation.

### 3. Tension between Local Cultural Practices and Human Rights Norms

As previously observed, most humanitarian and human rights NGOs with adequate resources are based in western countries but often send their staff to the field in other states.<sup>142</sup> The staff and representatives of the NGOs at times “experience ethical conflicts where they must decide between promoting their versions of human rights norms and respecting ... cultural norms” of the local people.<sup>143</sup> Daniel Bell and Joseph Carens propose three approaches in addressing this tension between human rights norms and local cultural practices, especially in relation to international nongovernmental organizations.<sup>144</sup> These approaches include condoning reasonable differing cultural ideologies, “revising the principles and practices” of the organization where necessary, and confronting unreasonable cultural practices, which may have the benefit of improving the livelihoods of marginalized and vulnerable members of the society.<sup>145</sup>

The Sphere Charter employs the approaches proposed by Bell and Carens by requiring that progressive local cultural, traditional and religious practices be accommodated and upheld in humanitarian projects.<sup>146</sup> The Charter even requires that in-

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142. Bell & Carens, *supra* note 43, at 303.

143. *Id.* at 304.

144. *Id.* at 304–07.

145. *Id.*

146. SPHERE PROJECT, *supra* note 49, at 55.

formation on the humanitarian agency be provided to the beneficiary communities in a language and format that they can comprehend.<sup>147</sup> In addition, Bell and Carens' suggestions are affirmed by the 2008 Civil-Military Guidelines and Reference for Complex Emergencies, which recognize that "[r]espect and sensitivities must be maintained for the culture, structures and customs of the communities and countries where humanitarian activities are carried out."<sup>148</sup>

#### 4. Capacity Building and Sustainability of Recovery

Disaster mitigation and recovery projects are not sustainable in the long term if they are wholly conceptualized by external actors and implemented locally without the participation and capacity empowerment of the beneficiaries.<sup>149</sup> If external providers of humanitarian assistance solely provide solutions, rather than assisting beneficiaries in formulating and implementing remedies, the capacities of local communities may be undermined and diminished.<sup>150</sup>

States and self-regulation instruments of NGOs have recognized and endorsed the need to develop the capacity of the local community as a mechanism of ensuring sustainable, long-term recovery. For instance, the 2005 Hyogo Declaration acknowledged that it is necessary to strengthen the capacities of communities to address risks of disasters as a way of reducing their vulnerabilities.<sup>151</sup> The 2008 European Consensus on Humanitarian Aid equally emphasized local capacity, stating that part of the EU humanitarian aid practices include the building of local capacities to mitigate and pre-empt the impact of disasters and enhance the response capabilities.<sup>152</sup> In the case of the GHD consortium of states, strengthening the capacities of subject communities to address and resolve humanitarian tragedies remains the principal objective.<sup>153</sup> Likewise, the Sphere Charter obligates humanitarian agencies to utilize local re-

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147. *Id.*

148. CIVIL-MILITARY GUIDELINES, *supra* note 98, at 19.

149. REICH, *supra* note 108, at 6.

150. Anne H. Toomey, *Empowerment and Disempowerment in Community Development Practice: Eight Roles Practitioners Play*, 46 COMMUNITY DEV. J. 181, 185 (2011).

151. *Hyogo Declaration*, *supra* note 12, ¶ 4.

152. ECHA, *supra* note 82, para. 9.

153. Good Humanitarian Donorship, *supra* note 77, para. 8.

sources such as labor and materials as a mechanism of enhancing the recovery of the community and promoting the growth of the local economy.<sup>154</sup> These obligations must be implemented by states and humanitarian agencies as a way of progressively reducing the vulnerability of communities, and in order to render recovery efforts long-term and sustainable. Ultimately, the solution to the disaster risk of vulnerable communities is local self-sufficiency, which can be achieved through the transfer of technology and expertise by external relief agencies to the local community.<sup>155</sup>

### 5. Coordination and Collaboration Problems

The provision of humanitarian relief often involves various participants from both external agencies and local communities. As such, there may be both dilemmas and mishaps of coordination and collaboration. Clear partnership strategies and rules of engagement, which encourage effective burden-sharing while reducing tension and duplicity, are necessary. The primary role of the host government in providing general coordination, leadership, and guidance is recognized. For instance, the 2008 European Consensus on Humanitarian Aid states that while its members operate in partnership with the affected communities, “[n]ational authorities in countries faced with crisis retain the primary responsibility for protecting populations confronting disaster.”<sup>156</sup> This indicates that the EU recognizes the primary role of state authorities in providing general leadership in matters of coordination and collaboration. Similarly, the Sphere Charter also allocates the primary duty of coordination of humanitarian aid on the government of the host state.<sup>157</sup>

However, there are circumstances where the government of the host state is incapable of providing proper coordination and guidance, or is otherwise unwilling. With regard to incapacity, it has been observed that in the case of Sri Lanka after the earthquake and tsunamis of December 2004, the local government was unable to effectively coordinate and register the ac-

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154. SPHERE PROJECT, *supra* note 49, at 55.

155. David Alexander, *Globalization of Disaster: Trends, Problems and Dilemmas*, 59 J. INT'L AFFAIRS 1, 12 (2006).

156. ECHA, *supra* note 82, para. 4.

157. SPHERE PROJECT, *supra* note 49, at 60.



tions of the many humanitarian agencies that were active on the ground.<sup>158</sup> However, the failure of the international relief agencies to mitigate Sri Lanka's incapacity was arguably inconsistent with the principles articulated in the Sphere Charter. As recognized in the Sphere Charter, where the host state is unwilling or unable to provide effective coordination services, appropriate options should be devised.<sup>159</sup> To address the lacuna, the Sphere Charter proposes that humanitarian agencies can rely on a lead agency, which they can collectively nominate, to operate as the primary provider of coordination services, or even seek guidance from more resourcefully endowed and acceptable intergovernmental agencies such as those of the U.N.<sup>160</sup> In the case of Sri Lanka after the 2004 tsunamis, it has been argued that international agencies should have utilized their immense capacity to address and mitigate the absence of the Government's coordination services at the initial stage, rather than just "regretting" such failures and challenges.<sup>161</sup> Therefore, since co-ordination and collaboration problems can seriously impede the efficiency and success of the delivery of humanitarian assistance by multiple participants, where the host state is unwilling or unable to provide coordination services, relief agencies can nominate a lead organization to address the leadership lacuna.

#### 6. Accountability to Beneficiaries

At times, the organizational failures of international humanitarian agencies can impair relief efforts. During the humanitarian response to the 2004 earthquake and tsunamis in parts of South East Asia, it was observed that accountability through joint agency communication, regular updates on recovery activities and a complaints mechanism were lacking.<sup>162</sup> Because consultation and communication between the humanitarian agencies and the beneficiary communities was uncoordinated and erratic, there was a lot of misinformation and frustration within the beneficiary communities.<sup>163</sup> At other times, the objectives of the humanitarian agencies are the determinants of

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158. TSUNAMI EVALUATION COALITION, *supra* note 121, at 42.

159. SPHERE PROJECT, *supra* note 49, at 60.

160. *Id.*

161. TSUNAMI EVALUATION COALITION, *supra* note 121, at 42.

162. *Id.* at 11–12.

163. *Id.* at 12.

the decisions and activities undertaken by the organizations, rather than the needs of the beneficiaries on the basis of objective assessments.<sup>164</sup>

Frustration through a perceived lack of accountability, or failure to understand and meet local expectations, can even have dangerous consequences for the staff of humanitarian agencies. Research on local perceptions of humanitarian action through case studies in different countries between 2006 and 2007 concluded that there was increased security risk for humanitarian agencies' staff in Nepal and Pakistan due to their failure to meet local expectations or respond appropriately to local political dynamics.<sup>165</sup> Consequently, there were incidences of violence and threats against humanitarian agencies' staff and the organizations' premises, especially in Pakistan.<sup>166</sup>

Proper accountability requires that agencies communicate their activities, explain such actions, and accept criticism.<sup>167</sup> By so doing, relief agencies are able to receive important feedback concerning the efficacy or shortcomings of their activities, policies, and procedures. In addition, feedback from the beneficiary communities often includes important information for the monitoring and evaluation mechanisms of relief agencies. Donors of relief agencies are likely to be more interested in funding organizations that take into consideration the concerns and needs of the beneficiaries, and are accountable to the aid recipients in the design, implementation, and evaluation of humanitarian assistance projects. The benefit of downward accountability to the beneficiaries is that if effectively implemented, it largely involves accountability to the agency donors also.<sup>168</sup> Therefore, downward accountability is beneficial to the relief agencies both in the context of the efficacy of their projects to the beneficiaries, and with regard to their relationship with donors. Due to the importance of such accountability in the

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164. Helen Young, *Public Nutrition in Emergencies: An Overview of Debates, Dilemmas and Decision-Making*, 23 *DISASTERS* 277, 281 (1999). Young draws this conclusion from a 1999 case study by Patricia Diskett and Rita Bhatia in Bangladesh.

165. ANTONIO DONINI ET AL., *HUMANITARIAN AGENDA 2015: FINAL REPORT: THE STATE OF THE HUMANITARIAN ENTERPRISE* 23 (2015).

166. *Id.*

167. COSGRAVE, *supra* note 114, at 23.

168. *Id.*

provision of humanitarian assistance, the Sphere Charter has elaborate provisions on the issue.

As a mechanism of improving accountability, the Sphere Charter obligates humanitarian agencies to increase the decision making power of the beneficiaries, including the ownership of the projects.<sup>169</sup> The Humanitarian Charter also requires humanitarian agencies to establish efficient and transparent feedback mechanisms through which the beneficiaries can provide their responses and influence relief activities.<sup>170</sup> In addition, the Charter requires the establishment of a complaints system that is safe and easily accessible to the beneficiaries.<sup>171</sup> Finally, responses and action by humanitarian agencies should be transparent and timely.<sup>172</sup>

Commentators have also proposed other local participation monitoring and evaluation mechanisms. For instance, Dorothea Hilhorst postulates various modes of monitoring and evaluating accountability and quality of NGOs involved in humanitarian aid, which can be used in the assessment of whether the extent of local participation by various agencies is adequate and proper.<sup>173</sup> The modes of monitoring and evaluation include social audits, gauging activities on a code of conduct, accreditation to quality evaluation agencies and peer reviews.<sup>174</sup> The issue of accountability to the beneficiaries of aid is a significant matter in the context of the establishment of qualitative local participation mechanisms by humanitarian agencies. There is the danger that humanitarian organizations can be motivated, primarily, by their own objectives, without qualitative consideration of the unique needs of the beneficiaries. Such an approach can result in the failure of relief agencies to address local expectations, or merely act in accordance with local political and social norms, which can have multiple negative implications that may include increased security risks to their staff. It is, therefore, in the interest of humanitarian agencies that they enhance downward accountability. Besides contributing to greater acceptability of the humanitarian agencies activities by the locals, in addition to enhancing the quality

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169. SPHERE PROJECT, *supra* note 49, at 56.

170. *Id.* at 55.

171. *Id.*

172. *Id.*

173. Hilhorst, *supra* note 89, at 206–09.

174. *Id.*

of their assistance, the resource bases of such organizations are also likely to increase due to greater approval of their projects by the donors.

## CONCLUSION

This article is premised on the view that the global governance of humanitarian relief, by both the legal and policy instruments of states and the self-regulatory mechanisms of NGOs, has elements of a human-rights approach to humanitarian assistance. The existence of the right to provide humanitarian assistance within the international legal regime is the basis of the responsibilities of other states and humanitarian agencies in the provision of relief. If the domestic state, which bears the primary duty, is unable or unwilling to provide humanitarian assistance to its suffering population, then other states and nongovernmental organizations have a subsidiary responsibility to act. The fact that the self-regulation mechanisms of non-state actors have an influence on the development of international legal and policy regime on humanitarian assistance, especially due to the impetus created by globalization, has been demonstrated.

Further, the human rights-based approach to the provision of humanitarian assistance has made the issue of participation by the beneficiaries a core concern of the legal and policy instruments of states and the self-regulatory mechanisms of NGOs. On that basis, the human rights-based approach to humanitarian assistance is contributing to the emergence of an obligation to ensure local participation in relief projects.

Problems and opportunities that have characterized the ongoing institutionalization of local participation in humanitarian-relief activities persist. These include the determination of the legitimate local participants, the quality of participation, the impact of tensions between local cultural practices, and human rights norms, coordination challenges and accountability to the beneficiary community. Despite the identified challenges, qualitative local participation has the effect of increasing the legitimacy and acceptability of the activities of humanitarian NGOs amongst the beneficiary population, in addition to enhancing the effectiveness of aid programs. Local participation increases the likelihood of approval and positive rating of the projects of relief organizations by donors, thus improving their resource base. It is on that basis that qualitative local participation is

increasingly becoming a core obligation in the human rights-based approach to humanitarian assistance by relief agencies.