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A Global Force for Good?

Human Rights and the U.S. Military in International Disaster Relief Operations

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Abstract:

This paper examines whether U.S. military support to international natural disaster relief properly accounts for the human rights of the disaster affected populations. The analysis begins with a comprehensive overview of the international legal framework of disaster response and the development of a codified human rights based approach to disaster relief operations. It then specifically assess how that international framework provides human rights guidance for responding military actors. The remainder of the paper examines how the U.S. military accounts for human rights of the affected population in the law and doctrine governing U.S. military disaster relief operations. The analysis concludes with a brief examination of three examples of mission execution assessed against the legal and doctrinal guidance, to determine if U.S. military action considers a human rights based approach.

Introduction:

The Pentagon in Washington D.C. is named such because of its shape. With five sides, five stories, and five inner rings of hallways around which the nation's top military and civilian leadership in the Department of Defense (DoD) reside, the building is iconic for both its unique structure and its representation of American military strength. What those unfamiliar with the daily workings of the Pentagon may not know, is how the building structure is oriented to facilitate the power structure within the DoD, with the outer most ring of offices as host to the highest ranking members of each branch of service. As such, the building layout presents a natural path of traffic from the main Pentagon entrance and through the rings of hallways for visitors to peruse the corridor walls lined with museum style exhibits of the military's sources of pride and success. In May of 2009, Secretary of Defense Gates dedicated one of those high visibility corridors to celebrate the efforts of American servicemembers who participated in humanitarian relief efforts, thus identifying the prominent role of such missions in both the Department's self-conception and projection to the world.¹ Secretary Gates proclaimed at the corridor dedication, "The U.S. Military is the greatest fighting force in the world- but there is another side to what they do. That side is represented in this exhibit. The suffering caused by war and natural disaster prompts a compassionate nation to respond."²

The response of that "compassionate nation," has been called upon in growing number in recent years, as both the frequency and intensity of natural disasters escalates.³ With global warming, the modern world is increasingly shaped by escalating meteorological, hydrological

¹ John Valceanu, *Officials Dedicate Humanitarian Relief Corridor in Pentagon*, DoD News, May 19, 2009, <http://archive.defense.gov/news/newsarticle.aspx?id=54416>

² *Id.*

³ Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari, and Giulio Bartolini, *Introduction and Acknowledgements*, in *Routledge Handbook of Human Rights and Disasters* 3, 3 (Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari, and Giulio Bartolini eds., 2018).

and climatological events that result in situations of intense human suffering and displacement.⁴

The landmark report by the United Nations Intergovernmental Panel on Climate Change released in October 2018 further amplified the degree of impact of global warming on the world climate and the resulting implications for human life across the globe in the near future.⁵ With a reported 3.6 billion people impacted by natural disasters worldwide between 2000 and 2016, the United States has increasingly participated in disaster relief operations to assist disaster affected states abroad.⁶ The Department of Defense reported in 2011, that the United States Government was responding to an average of 70-80 natural disasters per year, with the military a component of 10-15% of those responses.⁷ As acknowledged by the Pentagon's Humanitarian Relief Corridor, the U.S. military, along with militaries around the world, has become a crucial component of international disaster response.⁸

The self-guided tour brochure at the Pentagon explains that, “the United States Military doesn't just fight wars, we lead humanitarian missions around the world.”⁹ The U.S. Navy slogan from 2007 to 2014 proclaimed America's Navy as a “Global Force for Good.”¹⁰ However, with the growing role of militaries in disaster relief, concerns about the implications

⁴ Jennifer Leaning, M.D. and Debarati Guha-Sapir, Ph.D., *Natural Disasters, Armed Conflict, and Public Health*, 369 N Engl J Med 1836 (2013) (the world experienced three times as many natural disasters in the decade from 2000 through 2009 as in the decade from 1980 through 1989).

⁵ M. Allen, O. P. Dube, W. Solecki, F. Aragón-Durand, W. Cramer, S. Humphreys, M. Kainuma, J. Kala, N. Mahowald, Y. Mulugetta, R. Perez, M. Wairiu, K. Zickfeld, *Framing and Context*, in *Global warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming* 51, 69 (V. Masson-Delmotte, P. Zhai, H. O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J. B. R. Matthews, Y. Chen, X. Zhou, M. I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, T. Waterfield eds., 2018).

⁶ Giustiniani, Sommaro, Casolari, Bartolini, *supra* note 3, at 3.

⁷ James A. Schear, *Forward*, in *Department of Defense Support to Disaster Relief: Handbook for JTF Commanders and Below* i, at i, (2011), available at <https://fas.org/irp/doddir/dod/disaster.pdf>.

⁸ Michael D. Carsten and David Fisher, *The Law of International Disaster Response*, Naval War College International Law Studies 83-293 (2014).

⁹ Pentagon Tour Brochure, <https://pentagontours.osd.mil/Tours/Self.Guided.Tour.pdf>

¹⁰ Mark D. Farem, *Navy Dumps Unpopular Recruiting Slogan During Army Game*, Navy Times, December 15, 2014, <https://www.navytimes.com/news/pentagon-congress/2014/12/15/navy-dumps-unpopular-recruiting-slogan-during-army-game/>.

and outcomes of the militarization of disaster relief have developed in parallel.¹¹ The contradictions of claiming a warfighting force serves double duty as an agent of humanitarian assistance is not lost on the humanitarian community, nor on the populations being served. As military forces descend upon disaster affected civilian populations in the very uniforms and with the very types of equipment many of these populations have been victim to in a conflict setting, the question presents of the appropriateness of military forces in international disaster relief operations. This critique is complicated by the international consensus that the unique capabilities of a military force, from air-lift and transport capacity, to trauma trained medical personnel, to ship's water-making capability, are essential to the emergency phase of disaster response.¹² The question thus becomes, if military forces are essential to disaster relief, are they operating within a human rights framework?

This paper looks specifically at U.S. military support to international natural disaster relief and seeks to assess if the U.S. military properly accounts for the human rights of the affected populations.¹³ As the needs and corresponding human rights of individuals affected by a natural disaster often require emergency attention to save lives and alleviate intense human suffering, disaster relief is inherently a health issue. This paper will focus only on those disasters that occur by acts of nature and outside the U.S, and will not address humanitarian assistance efforts in a conflict situation that would prompt application of International Humanitarian Law.¹⁴

¹¹ Carsten and Fisher, *supra* note 8.

¹² UN Office for the Coordination of Humanitarian Affairs (OCHA), *Guidelines on the Use of Foreign Military and Civil Defence Assets In Disaster Relief ("Oslo Guidelines")*, November 2007, available at: <https://www.refworld.org/docid/47da87822.html>

¹³ The U.S. Military defines disaster in DoDD 5100.46 as, "a calamitous situation or event that occurs naturally (such as earthquakes, storms, droughts, volcanic eruptions, wildfires) or through human activities (such as industrial explosions or fires, civil strife, infectious disease), which threatens or inflicts human suffering on a scale that may warrant emergency relief assistance from the U.S. Government or from foreign partners."

¹⁴ This paper is limited to an examination of military operations abroad, and will not address U.S. military support in the response to domestic natural disasters, though that is certainly a subject ripe for analysis. "

I first provide an overview of the international legal framework of disaster response and the development of a codified human rights based approach to disaster relief operations. The legal framework is defined to include “soft law” instruments that provide human rights guidance, but do not create binding legal obligations. I then assess how that framework provides guidance for responding military actors. The remainder of the paper examines how the U.S. military accounts for human rights in the law and doctrine governing U.S. military disaster relief operations. I conclude with a brief examination of three examples of mission execution assessed against the legal and doctrinal guidance, to evaluate if U.S. military action considers a human rights framework. I determine that at the tactical level of executing operations, U.S. military disaster relief include elements of a human rights based approach in line with international guidance. At the same time, the missions challenge the international human rights frameworks due to their inherently political character and strategic objectives.

International Legal Framework for Human Rights in Disaster Relief :

The conception of a field of law specific to disaster relief long precedes the modern public awakening to the complexities of disaster response that has come with each successive catastrophic event in the past two decades. Efforts in the first half of the twentieth century to maintain an intergovernmental organization to oversee disaster relief ultimately failed, allowing for the development of the current state of law, which has been described as “unsystematic state practice, partial codification and best practice guidance.”¹⁵ The establishment of cohesive and comprehensive international disaster response law (IDRL) is mired in the tension between protecting the human rights of natural disaster victims, while adhering to the sovereignty of a

¹⁵ Michael J. Kelly, *Introduction*, in *The International Law of Disaster Relief*, 1, 1, (David D. Caron, Michael J. Kelly and Anastasia Telesetsky eds., 2014).

disaster affected state.¹⁶ In 2007, the International Federation of Red Cross and Red Crescent Societies (IFRC) put forth the “Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance,” (IDRL Guidelines) in attempt to provide states with a model to strengthen their domestic disaster laws and procedures.¹⁷ Though the IDRL Guidelines do allocate responsibilities to the assisting states and non-governmental organizations (NGOs) in addition to the affected state, their orientation to serve a state’s preparation for disaster response within its territorial boundaries is indicative of the structure of disaster relief.¹⁸ It is the affected state that has primary responsibility for relief efforts, and it is the affected state that has legal human rights obligations to its population under international human rights law.¹⁹

Thus, there has been much recent work regarding the notion of an individual human right to disaster assistance, which would place a legal onus on a state that does not have capacity to provide adequate disaster relief to seek assistance from the international community.²⁰ This notion has been most explicitly expressed in the “Draft Articles on the Protection of Persons in the Event of Disasters,” which were adopted by the United Nations International Law Commission in 2016.²¹ While not binding law, Draft Article 10 imposes a duty on the affected state to ensure disaster relief is provided to those in need, with Draft Article 11 obligating the

¹⁶ See Matias Tomsen, *Article: The Obligation not to Arbitrarily Refuse International Disaster Relief: A Question of Sovereignty*, 16 *Melbourne J. of Int’l Law* 240,241-245 (2015).

¹⁷ International Federation of Red Cross and Red Crescent Societies, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (“IDRL Guidelines”)*, November 2007, available at <https://www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20.pdf>.

¹⁸ *Id.*

¹⁹ International Human Rights Oxford University Press 159, 193 (Philp Alston and Ryan Goodman eds., 2013); Tomsen, *supra* note 16 at 259. Note, this paper does not address the application of treaty derogations that a state may assert to alleviate meeting their legal obligations due to the emergency conditions resulting from the natural disaster event. That is indeed a legal possibility and a circumstance that demands further analysis, but is determined to be beyond the scope of this paper.

²⁰ IDRL Guidelines *Supra* note 17.

²¹ International Law Commission (ILC) Draft Articles on the Protection of Persons in Disasters, Int’l Law Comm’n Rep. on the Work of Its Sixty-sixth Session, draft article 10, U.N. Doc. A/69/10 (2014).

affected state to seek external assistance if the necessary response exceeds its capacity.²²

Arguably elevating human rights concerns over state sovereignty concerns, Draft Article 13 goes so far as to prohibit a state from arbitrarily withholding consent to external assistance.²³ The Draft Articles do not further define what disaster relief consists of, but reiterate in Article 5, that disaster victims are entitled to all human rights protections provided by international law.²⁴

As one scholar identifies, asserting “that human rights must be respected and protected in the event of a disaster sounds like a truism,” as human rights instruments impose the same legal obligations during a disaster as during any other situation.²⁵ Customary International Law and International Human Rights Law (IHRL) primarily obligate states to fulfill, respect and protect enumerated human rights of their citizens, some of which become particularly emergent during a time of natural disaster. Notwithstanding the contentious development of a legal duty upon affected states to seek international assistance, predominant state practice is for an affected state to accept external aid from state and non-state actors to facilitate satisfaction of the affected population’s fundamental needs in line with their human rights. However, as IDRL developed to primarily address the logistics of international disaster response, human rights protections for disaster victims received less emphasis than logistics matters such as customs and immigration processes, port entry and overflight permissions, and recognition of medical credentialing.²⁶

Consequently, Inter-governmental organizations and civil society actors established several soft-

²² Int’l Law Comm’n, Sixty-sixth Session, *supra* note 21, draft art. 10-11.

²³ *Id.* at draft art. 13.

²⁴ *Id.* at draft art. 4-5.

²⁵ Gabriella Venturini, *Conclusions*, in *The Routledge Handbook of Human Rights and Disasters* 364, 364-65 (Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari and Giulio Bartolini eds., 2018).

²⁶ Carsten and Fisher, *supra* note 8; Kristen Nakjavani Bookmiller, *Symposium: Professional Standards and Legal Standard Setting: INSARAG, FMTs, and International Disaster Relief Volunteers*, 48 *Vand. J. Transnat’l L.* 957, 967 (2015). A state’s process for the recognition of medical credentials of foreign medical providers has been an issue with repeated impact on disaster relief, to include disaster training exercises. Numerous U.S. military after-action reports I reviewed noted the challenge of adhering to the affected state process while also abiding by the military requirements regarding release of the personal information of deployable personnel.

law instruments of operating standards, principles, and guidelines to emphasize that human rights must be at the foundation of all humanitarian disaster relief.²⁷

The principal instruments providing for application of a human rights framework to disaster relief are the Sphere Project Humanitarian Charter and Minimum Standards (Sphere Charter) and the United Nations Interagency Standing Committee Operational Guidelines on the Protection of Persons in Situations of Natural Disaster (IASC Guidelines).²⁸ Both instruments seek to facilitate maximum rights realization of disaster victims, by operationalizing identified legal rights recognized by customary international law and enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and other international treaties.²⁹ These include most fundamentally, the right to life, the right not to be discriminated against, and the right to participation derived from the ICCPR, and the right to food, the right to shelter, and the right to health and medical services derived from the ICESCR and the right to water as derived from CEDAW.³⁰

Both the Sphere Charter and the IASC Guidelines derive human rights obligations from instruments of IHRL, to provide guidance for how disaster response actors should respect and

²⁷ Carsten and Fisher, *supra* note 8; *See also* Roberta Cohen and Meghan Bradley, Disasters and Displacement: Gaps in Protection, 1 J. Int'l Humanitarian Legal Stud. 1, 3-5 (2010); Bridget Lewis, *A rights based approach to Disaster Displacement in Asia*, Asian J. Law 326, 345 (2016); Bookmiller, *supra* note 26 at 959.

²⁸ Catherine Gribben and Ilario Maiolo, *Legal Framework Applicable to Humanitarian Actors Responding to Disasters*, in *The International Law of Disaster Relief*, 139, 156 (David D. Caron, Michael J. Kelly and Anastasia Telesetsky eds., 2014).

²⁹ Therese O'Donnell and Craig Allen, *Identifying Solidarity, the ILC Project on Protection of Persons* 49 Geo. Wash. Intl. L. Rev 53, 61-64 (2016); *see also* Katie Sykes, *Hunger Without Frontiers: The Right to Food and State Obligations*, in *The International Law of Disaster Relief*, 190, 198-200 (David D. Caron, Michael J. Kelly and Anastasia Telesetsky eds., 2014).

³⁰ G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. A/34/46 (Dec. 18, 1979); G.A. Res. 2200 (A) (XXI) International Covenant on Civil and Political Rights, U.N. Doc. A/6316, (entered into force Mar. 23, 1976); G.A. Res. 2200 A (XXI), International Covenant on Economic, Social and Cultural Rights, (entered into force on Jan. 3, 1976); *see also* Sykes, *supra* note 28 at 198-200.

protect the human rights of the affected population.³¹ The IASC Guidelines reflect the need for a human rights framework to identify “the relevant needs of affected purposes, the rights-holders and duty-bearers, the limitations of what people can demand,” and “ensure that humanitarian action meets human rights standards.”³² The IASC guidelines are predicated on an understanding that rights will need to be prioritized during the emergency context of natural disaster relief. They group and prioritize rights, with primacy given to the “Group A” protection of rights related to life, security, physical integrity and family ties, followed by the second “Group B” of rights to basic necessities such as food, health, shelter and education.³³ In operationalizing a rights based approach, the guidelines reiterate the fundamental human rights principles of non-discrimination and accountability, and emphasize the importance of the participation of affected persons in all stages of disaster relief.³⁴

The Sphere Project evolved from a code of conduct for NGOs and non-state actors, into a set of principles and minimum standards for all international humanitarian actors to employ in response operations. The Sphere Charter affirms that a human rights based approach to humanitarian response is based on the fundamental respect for the right to human life with dignity.³⁵ The Sphere Charter sets forth protection principles for humanitarian assistance, to include enhancing the rights of affected persons and protecting them from further harm, ensuring access to impartial assistance, and helping them claim their rights.³⁶ The Charter further provides for minimum standards for disaster relief actors to apply in an operating environment as

³¹ Inter-Agency Standing Committee, *IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters* (“*IASC Guidelines*”), January 2011, available at https://www.ohchr.org/Documents/Issues/IDPersons/OperationalGuidelines_IDP.pdf

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Sphere Association, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response*, fourth edition, 2018, available at www.spherestandards.org/handbook.

³⁶ *Id.* at 36.

a means of securing the right to life with dignity through satisfaction of the affected person's immediate needs³⁷ Both instruments translate legal duties of a state to provide for the legal rights of their disaster affected population into principles and objectives that actors in disaster relief can use to shape their response actions in assisting the affected state to meet those rights.

The 1991 United Nations General Assembly Resolution 46/182 (UNGA 46/182), establishes principles for humanitarian assistance that must serve as the basis of all United Nations (UN) and assisting state response to disaster. Assistance must be provided in accordance with the principle of humanity, to address human suffering with respect for the rights of the affected population, with particular account for the most vulnerable segments of society. Assistance must be neutral, and not align with any side of a political, religious or ideological controversy. Assistance must be available and distributed to affected populations without discriminating as to ethnic origin, race, gender, religion, nationality or political affinity.³⁸ The resolution further affirms the sovereignty of the affected state as protected by the UN Charter.³⁹

The principle of independence was added in 2003 by UN General Assembly Resolution 58/14 (UNGA 58/14), directing that disaster relief must be autonomous from the “political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented.”⁴⁰ The Sphere Charter and IASC Guidelines both affirm the independence requirement, emphasizing the singular objective of disaster relief is to

³⁷ *Id.* at 7.

³⁸ G.A. Res. 46/182, U.N. Doc. A/RES/46/182 (Dec. 19, 1991).

³⁹ A robust discussion has ensued amongst policy makers and academic in the past decade regarding the application of the doctrine of humanitarian intervention or the Responsibility to Protect (R2P), to allow assisting states to violate the sovereignty of an affected state in order to provide relief to an affected state that the state is unwilling or unable to provide. However, the consensus has come to rest on the inapplicability of these doctrines to disaster relief scenarios, with natural disasters deliberately left out of the UN General Assembly endorsement of R2P in UN General Assembly Resolution 63/308. *See* UN GA 63/308; Karen da Costa, *R.I.P. R2P*, in *The Routledge Handbook of Human Rights and Disasters*, 27, 32, 38, (Flavia Zorzi Giustiniani, Emanuele Sommario, Federico Casolari and Giulio Bartolini eds., 2018). *The Routledge Handbook of Human Rights and Disasters* (Routledge, 2018).

⁴⁰ G.A. Res. 58/114 U.N. Doc. A/RES/58/114 (February 5, 2004).

meet the needs of the affected population while respecting and promoting their rights. The IDRL guidelines also echo the condition that aid be provided “without seeking to further a particular political or religious standpoint.”⁴¹

These soft law instruments of principles, operational guidelines, and standards provide a comprehensive framework to direct assisting foreign states, intergovernmental organizations (IGOs), NGOs, and private actors to aid an affected state to meet the needs of disaster victims in a manner that protects their human rights enshrined in IHRL. Though the affected state is always the primary guarantor of rights, this framework supports the security of affected persons’ rights through relief operations, while striving to rebuild the affected state capacity to meet its legal human rights obligations.⁴²

Though this framework assumes the assistance of foreign actors to come to the aid of an affected state, there is no international legal requirement for states (or other actors) to do so. The UN ILC Draft Articles propose an affected state duty to request international assistance and not arbitrarily deny assistance that is offered, but presents no correlative duty upon other states to respond.⁴³ Like non-state actors, states have thus far provided aid of their own accord, often lending support of their military forces as a primary means of support. However, little attention has been given to whether military actors specifically employ a human rights based approach to disaster relief operations.

⁴¹ IDRL Guidelines *Supra* note 17.

⁴² Amanda M. Klasing, P. Scott Moses, and Margaret Satterthwaite, *Measuring the Way Forward in Haiti: Grounding Disaster Relief in the Legal Framework of Human Rights*, 13 *Health and Human Rights* 15, 32; Venturini, *supra* note 25 at 366.

⁴³ Lewis, *supra* note 27.

Human Rights and Military Disaster Relief

The principal international instrument addressing military participation in disaster relief operations is the “Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief,” promulgated by the UN Office for the Coordination of Humanitarian Affairs and known as the Oslo Guidelines. The Oslo Guidelines were first published in 1994 as the culminating work of an international conference of 45 states and 25 organizations, including the U.S.⁴⁴ As another soft law mechanism, the Oslo Guidelines are not binding, but intend to provide a formalized framework to improve the efficiency and effectiveness of military participation in disaster relief.⁴⁵ Though the Oslo Guidelines are directed at forces supporting UN operations, they urge that the principles apply to foreign military forces generally in provision of international disaster relief.⁴⁶ They implicitly recognize the particular predicaments that use of military assets can bring to an affected state, reiterating as a foundational attribute, that militaries should only be used a “last resort,” if no available civilian capability will meet the need of the affected population. Furthermore, military assistance should be limited to “infrastructure support” and “indirect assistance,” with military actors providing “direct assistance” to the affected population only if absolutely necessary.⁴⁷

Though the Oslo Guidelines focus much attention on the types of logistics matters that the IDRL Guidelines address, the guidelines do reiterate fundamental principles of a human rights framework.⁴⁸ The enumerated core principles of the Oslo Guidelines incorporate the UN

⁴⁴ The Oslo Guidelines were re-examined following the unprecedented international military response to the South Asian tsunami in December 2004 and re-released in 2007.

⁴⁵ The Oslo Guidelines define humanitarian assistance as “aid to an affected purpose that seeks as its primary purpose to save lives and alleviate suffering,” and international disaster relief as “material, personnel and services provided by the international community to an affected state to meet the needs of those affected by a disaster.”

⁴⁶ Oslo Guidelines, *supra* note 12 at para. 13, 14, 16.

⁴⁷ Oslo Guidelines, *supra* note 12 at para. 38.

⁴⁸ The Oslo Guidelines address logistics matters such as the legal status of forces, designation of responsibilities between an affected state and external actors, and management of civil-military coordination.

General Assembly affirmations of humanity, neutrality, impartiality, independence and respect for state sovereignty. The guidelines also encourage actors to adopt the ten principles of the Sphere Charter Code of Conduct.⁴⁹ As military assets are assumed to only be available for disaster relief missions if no primary warfighting functions demand their attention, there is a concern that an affected state (and NGOs) must not become reliant on the external military presence.⁵⁰ Consequently, the Oslo Guidelines instruct that use of military assets be limited in time and scope with planned transition of all functions back to civilian actors and the affected state as soon as possible.⁵¹ The guidelines direct that military commanders must account for the core humanitarian principles in all operations, and assert that UN lead missions are prohibited from exploitation by any assisting force for intelligence collection, psychological operations or distribution of propaganda.⁵²

Thus the Oslo Guidelines incorporate a human rights based approach to the extent they emphasize that core humanitarian principles must undermine military operations. Yet, the promulgation of standards such as last resort and exclusion of direct assistance, indicate the discomfort of the international community with military participation in disaster relief. The Sphere Charter is more overt in explaining the concern with military assets, stating, “cooperation with militaries has an actual or perceived impact on a humanitarian organisation’s neutrality and operational independence.”⁵³ Similarly, the IDRL guidelines advise that an affected state should only accept military support after “having considered comparable civilian alternatives.”⁵⁴ The IDRL guidelines also instruct that any international assistance must “not be used as a means to

⁴⁹ Oslo Guidelines, *supra* note 12 at para. 33.

⁵⁰ Oslo Guidelines, *supra* note 12 at para. 34.

⁵¹ Oslo Guidelines, *supra* note 12 at para. 32, 33, 99.

⁵² Oslo Guidelines, *supra* note 12 at para. 93, 98.

⁵³ Sphere Project, *supra* note 35 at 19.

⁵⁴ IDRL Guidelines, *supra* note 17 at para. 11.

gather sensitive information of a political, economic, or military nature that is irrelevant to disaster relief.”⁵⁵

Though the international community seems to recognize the necessity of military participation in disaster relief by addressing its proper role in the Oslo Guidelines and other soft law mechanisms, that recognition is one of reluctant acquiescence to accept military aid, but with stringent limitations on its scope. It is perhaps not surprising then that the Oslo Guidelines do not explicitly impose a human rights based approach on military aid, or that the Sphere Project or IASC Guidelines do not more explicitly account for military actors. Yet for full employment of an international human rights framework, it must be applied by all actors in the disaster relief realm, including external military forces.⁵⁶

US Military and International Disaster Relief

By measuring the structure and execution of a military disaster relief operation against the international standards of human rights protections in disaster scenarios, I seek to assess whether the U.S. military adequately accounts for human rights in disaster relief operations.

Legal Authority

Consideration of the domestic legal authority for U.S. military disaster relief operations abroad is important to assess military disaster relief at the structural level. The legal authority for military disaster relief derives from the statutory scheme governing U.S. Foreign Aid generally under Title 22 of U.S. Code, as well as specific DoD authorizations within Title 10. With the Foreign Assistance Act of 1961 (FAA), Congress authorizes the United States

⁵⁵ IDRL Guidelines, *supra* note 17 at para. 4 (2)(d).

⁵⁶ Klasing, Moses, and Satterthwaite, *supra* note 42 at 30.

Government to provide international disaster relief with the express purpose to alleviate human suffering caused by natural and manmade disasters,” as, “an important expression of the humanitarian concern and tradition of the people of the United States.⁵⁷ This act of deploying prompt U.S assistance is an inter-agency process that is triggered when a state affected by natural disaster requests U.S assistance.⁵⁸ The Department of State (DoS) is the lead federal agency in disaster response scenarios, with the Office of Foreign Disaster Assistance (OFDA) within U.S. Agency for International Development (USAID) designated as the response coordinator.

Upon a request for assistance, OFDA will deploy a disaster assistance response team to determine what relief capacity is needed. If OFDA identifies that military assets are necessary, because the relief demands specific capacities that cannot be met by civilian assets, DoS will request military support from DoD. The Secretary of Defense then assesses whether the requested capacity is available and if so, the Joint Staff orders deployment of forces under the direction of the cognizant Combatant Commander (COCOM), who will stand up a Joint Task Force (JTF) to oversee execution of the relief operations in theater.⁵⁹

Understanding the interagency process that leads to deployment of U.S military assets in disaster relief is important to assess the employment of a human rights framework at the structural level. Institutionalized in this process, is the Oslo Guidelines requirement that military assets only be used as a last resort, if no civilian alternative is available to meet the need. However, critics of the current practice identify that the increasing requests for military support have resulted in the U.S. military acting as an assumed and primary humanitarian responder.⁶⁰

⁵⁷ Foreign Assistance Act of 1961, 22 U.S.C. § 2151 as amended (P.L. 87-195, sections 491-493).

⁵⁸ Rhoda Margesson, *International Crises and Disasters: U.S. Humanitarian Assistance Response Mechanisms*, Congressional Research Service Report 1, 4 (2015) available at <https://fas.org/sgp/crs/row/RL33769.pdf>; Charles M. Perry and Marina Travayiakis, *The U.S. Foreign Disaster Response Process: How it Works and How it Could Work Better*, Institute for Foreign Policy Analysis, 1, 2 (2008).

⁵⁹ *Id.* at 4, 11.

⁶⁰ *Id.* at 5.

Reports that DoS will allow DoD to drive the offering of military assets if the affected state is in a theater of strategic interest indicate the influence of political or military objectives in the external provision of aid, and undermine the human rights considerations.⁶¹ The Secretary of Defense's ultimate authority to determine the availability of military assets relative to other mission requirements is also significant. The principles of humanity and impartiality, as endorsed by the UN GA and reflected in the Oslo Guidelines, Sphere Charter, IASC Guidelines and ILC Draft Articles, requires response to human suffering wherever found without regard to the characteristics of the affected population. However, allowance for the DoD to prioritize mission requirements, to include strategic considerations or warfighting operations, over the needs of a suffering population, arguably contradict those principles.⁶² With strategic considerations as a factor of disaster relief, the core principle of independence is also jeopardized.

The statutory authorizations and continued fiscal appropriations for military humanitarian assistance and disaster relief operations serve as another potential measure of human rights considerations in U.S. military action at the strategic level.⁶³ Statutory authorizations specific to DoD disaster relief include 10 U.S.C. 2561, which allows DoD to use appropriated funds for humanitarian operations and 10 U.S.C. 402, which authorizes privately donated humanitarian relief supplies to be transported by military assets on a space available basis. As these acts are

⁶¹ Id.

⁶² These same concerns extend to the unilateral ability of a military commander to act in an emergency. U.S. Statutory authorities also allow a local on-site Commander, or any superior Commander with operational control within has the authority to deploy military assets within her control to the affected state to provide emergency relief for an initial 72 hours without prior DoS or DoD approval.

⁶³ It could be argued that the very existence of extensively funded statutory authorizations that enable DoD to respond to disaster scenarios is Congressional acknowledgment that military assets will be required for the U.S. to provide international relief, despite the "last resort" consensus in international guidance. However, more nuanced analysis determines that the DoD funding levels for humanitarian assistance/disaster relief operations remain a fraction of the DOS funding as the primary agency responder.

outside the scope of the Title 10 mandate of the Armed Forces, this legislative framework must exist to legally facilitate military relief operations whenever needed, whether as regular course of business or as a rare occasion. International disaster assistance is authorized by 10 U.S.C. 404, which explains the authority of the President to direct the Secretary of Defense to provide international disaster assistance “when necessary to prevent loss of lives or serious harm to the environment.” These authorizations, all of which are funded through the Overseas Humanitarian, Disaster, and Civic Action (OHDACA) appropriation within the annual DoD appropriations, assert initial objectives in line with the a human rights framework.⁶⁴ The prevention of loss of life corresponds to the primary Group A protection of rights related to life, in accordance with the IASC Guidelines, while the transport of relief goods correspond to the “Group B” of rights to basic necessities such as food, health, shelter.

However, the statutory scheme is complicated by authorizations for military provision of international aid in preparation for disaster response. 10 U.S.C. 401 authorizes military forces to conduct humanitarian and civic assistance activities (HCA) in conjunction with execution of other taskings if the activities meet two criteria. The activities must further theater security cooperation efforts with the implicated state, and they must have a training benefit to the U.S. military members involved. Though HCA allows for the military to directly provide medical, dental, and veterinary care to rural or underserved areas, the objectives for provision of services are explicitly in furtherance of U.S. strategic interests of security cooperation and training. The parameters of HCA are further delineated by the specific appropriations that source HCA activities, such as the Asia Pacific Regional Initiative (APRI) that is specifically designated to U.S. Pacific Command “to execute theater security cooperation a activities.”⁶⁵ The APRI

⁶⁴ Margesson, *supra* note 58 at 7.

⁶⁵ Pub. L. No. 112-74, § 8086 (2011).

appropriation further requires that the justification for use of APRI funds must demonstrate “why it is in the Secretary of Defense’s interest to incur these costs and how the Pacific theater campaign plan would be enhanced.”

Thus, the legislative enabling of military support to disaster relief is multifaceted, with the legal authorities for action, the processes for effecting action, and the fiscal appropriations that fund the action, shaping the nature of the military operations. While the authorities for emergency response action textually assert mission priorities that conform with a human rights framework, the process of military forces being ordered to act is complicated by strategic considerations outside a human rights based approach.

U.S. Military Doctrine

An examination of the execution of military operations must start at the doctrinal level, as all on the ground response is governed by standard operating procedures, manuals, directives and handbooks that dictate the conception of operations and actual performance. The highest authority is the Department of Defense Directive 5100.46, “Foreign Disaster Relief,” as direction from the Secretary of Defense to all U.S. military forces.⁶⁶ The Directive repeats the authorization provided for in the FAA for the Secretary of Defense to provide disaster assistance in support of DoS at the direction of the President, upon request from DoS, or in an emergency situation to save lives without time to receive DoS approval. The Directive further asserts that “Nothing in this Directive shall be construed as preventing a military commander with assigned forces at or near the immediate scene of a foreign disaster from taking prompt action to save

⁶⁶ Department of Defense Directive 5100.4, *Foreign Disaster Relief*, (Jul. 6, 2012) available at http://www.jag.navy.mil/distrib/instructions/DODD_5100.46_Foreign_Disaster_Relief.pdf.

human lives.”⁶⁷ Though under the directive, such action is discretionary, not obligatory, the reminder to local on-site military commanders of their unilateral emergency authority to take action in order to protect the right to life, demonstrates DoD’s support of such action.

Joint Publication 3-29, “Foreign Humanitarian Assistance,” (JP 3-29) is one of a series of joint doctrine publications by the Joint Chiefs of Staff that offer core principles and guidance from a unified joint service perspective. While not binding on military operators, JP 3-29 presents the learned best practices that operators strive to adhere to in planning and executing operations. JP 3-29 references the Oslo Guidelines, and explains the U.S. participation in drafting the Oslo Guidelines as a means to improve the effectiveness and efficiency of foreign military forces in disaster relief. Though it reiterates that the Oslo Guidelines are not binding, JP 3-29 restates some fundamental provisions of the Oslo Guidelines. The publication directs that military assets only be used when providing a unique capability not available with civilian means and that the scope and duration of military support should be limited, with the objective of transition of humanitarian efforts to the affected state.⁶⁸

JP 3-29 also includes descriptions of the core humanitarian principles as endorsed by the UN General Assembly of humanity, neutrality, impartiality, and independence. The text asserts that “humanitarian principles are essential to establishing and maintaining access to affected populations.” There is not explicit direction that military operations shall be conducted in accordance with those principles. However, the assertion of their importance to access the affected population, which is likely required to execute a disaster relief mission, encourages compliance for operational effectiveness, if not for actual human rights considerations. The joint

⁶⁷ Id.

⁶⁸ Joint Chiefs of Staff Publication 3-29, *Foreign Humanitarian Assistance* (“JP 3-29”), I-1, I-1 (Jan. 3, 2014), available at http://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_29.pdf.

publication further references international human rights standards in suggesting that the assessment factors that are developed in the planning phase of a mission, be based on the minimum standards and indicators promulgated in the Sphere Charter. Though JP 3-29 recognizes that the Sphere Charter is non-binding, it encourages adoption of the Sphere key indicators and correlating minimum standards for provision of water, sanitation, food, health, and shelter as the measures of effectiveness for assessment of the disaster relief operation. In doing so, JP 3-29 advocates for employment of a human rights framework, which characterizes the very purpose of the Sphere Charter, at least in the planning and assessment phase of the operation.⁶⁹

Additionally, the planning guidance recommends review of factors that facilitate participation of the local population in the relief efforts, such as the identification of local key communicators within the operational area and assessing the local population's attitude towards the presence of U.S. forces. Inclusion of the affected population is an important element of a human rights based approach as expressed in the Sphere Charter and IASC Guidelines. Additionally, the execution guidance emphasizes particular actions also in line with a human rights based approach, though not explicitly identified as such. For example, planners are urged to place logistics bases as close as possible to the affected populations who need relief in order to prevent travel or migration of individuals in search of relief.⁷⁰

In directing the mission analysis for disaster relief operations, JP 3-29 identifies that for missions using military assets, the President, Secretary of State or Secretary of Defense will establish a set of national strategic objectives to achieve a national strategic end. As with any deployment of military force under U.S. military doctrine, the national strategic end determines

⁶⁹ *Id.* at IV-6.

⁷⁰ *Id.* at IV-1.

the leading Combatant Commander's strategic military objectives. This process is fundamental to the structure of all military operations. It is significant to this analysis, because the way in which the national strategic end is defined may dictate the way in which military operators execute the resultant military objectives. Therefore, the national strategic end may ultimately dictate what specific action forces they take or do not take to provide assistance and address the needs and corresponding rights of an affected population.⁷¹

As even more specific, self-proclaimed "tactical level" direction to military operators executing missions, the "Department of Defense Support to Disaster Relief: Handbook for JTF Commanders and Below" (Commander's Handbook), provides procedures for commanders tasked to perform disaster relief operations. As a starting point of assessment, the phrase "human rights," only appears twice in the 314 page document, with both instances in reference to the function of the United Nations. However, as in JP 3-29, the Commander's Handbook recounts the UN core humanitarian principles of humanity, neutrality, impartiality and independence, but more directly identifies that those principles should form the basis of any humanitarian action. This is further boiled down into the practical note, that, "Humanitarian relief should be provided under the general principle of Do No Harm." The handbook explains the implications for improper provision of aid, noting that "Improperly delivered aid can divide communities, fuel conflicts, force displacement, and build cultures of dependency." The Handbook further adopts principles of a human rights framework in urging that delivery of aid must be provided for the needs of the affected population by competent personnel with particular attention to the most

⁷¹ Id. at III-9.

vulnerable. It further directs that provision of aid must include the participation of the host population and be consistent with internationally recognized standards.⁷²

The Commander's Handbook emphasizes that military forces should consider the affected population's perception of the military involvement in all communications for effectiveness of operations and trust and goodwill of those being assisted. As an example, the handbook suggest a tactical decision to have forces wear a modified, less threatening version of the military uniform (if the security environment allows). For external communications, the handbook specifies that the mission's strategic messaging must emphasize "that the US response to disasters strives to serve those in need."⁷³ Additional messaging samples provided include, "our focus is upon delivering food, water, and medical assistance quickly to those living in the affected areas," and "the Affected State is resilient and capable of recovering from this disaster."⁷⁴ Thus the handbook instructs external communications in line with a human rights based approach, though characterization of the communications as "strategic," also indicate the inherent national objectives within which the disaster relief mission operates.

The planning and execution guidance in the Commander's handbook further adopts elements of a human rights framework in terms of prioritizing action of rights fulfillment and reiterating need as the driving force for provision of aid. While the military planning process instructs a series of immediate assessments to inform operations, the handbook emphasizes to commanders, "Do not delay life-saving activities while awaiting comprehensive assessments." The handbook directs that it must be a commander's priority to assess the public health needs of the affected population. The priority of needs fulfillment is further clarified in line with the

⁷² Department of Defense, *Department of Defense Support to Disaster Relief: Handbook for JTF Commanders and Below* ("JTF Commander's Handbook"), i, 3-1, (2011), available at <https://fas.org/irp/doddir/dod/disaster.pdf>.

⁷³ *Id.* at 4-13.

⁷⁴ *Id.* at 4-14.

IASC groups of rights with instruction of conducting assessments in order of medical care, food, water and shelter.⁷⁵ Thus, measures to protect the right to life and right to basic necessities are reiterated as primary objectives, though not necessarily with the lexicon of a rights based approach that a human rights framework calls for.

Mission Execution

The execution of disaster relief missions provides the greatest source of analysis of whether the U.S. military properly accounts for a human rights framework. An assessment of mission execution should include review of mission documentation, as well as participant accounts of the mission. Review of mission documentation is challenging due to the volume and fragmented nature of information, which is complicated by the fact that many key directives, operation orders, execute orders, and after action reports (AAR), are classified or designated as for official use only. Consequently, my analysis is limited to review of the mission documentation that did not have any disclosure constraints.

The most insightful assessment of mission execution is from personnel interviews. As, Amanda M. Klasing, P. Scott Moses, and Margaret Satterthwaite note in their study on aid workers in the 2010 Haiti earthquake response, there has been little empirical research into how well aid workers execute a human rights based approach in practice.⁷⁶ As their study attempted an analysis of practical application of a human rights framework in Haiti, I modeled some of my interview questions after their research approach to ask participants about their familiarity with sources of human rights law and operational guidance.⁷⁷ I then extended the inquiry, asking

⁷⁵ *Id.* at 5-12.

⁷⁶ Klasing, Moses, and Satterthwaite, *supra* note 42 at 16.

⁷⁷ Their research employed an electronic survey distributed to 138 aid workers within six months of the event. That distinction of recency is significant in capturing the experience and knowledge the participants had at the time of the

mission participants to describe their experience supporting the mission, any mission specific training they received, and their perception of the mission objectives, in their individual tasking, as a military, and nationally. This process provided for more anecdotal, than empirical, data for analysis. My brief review of three disaster relief missions and the experiences of personnel involved are a starting point of an assessment of the actual execution of U.S military disaster relief that demands far more research.

Case #1: Operation Unified Response

Operation Unified Response was the U.S. military support mission to what President Obama identified as the “whole of Government” response to assist the people of Haiti after the country experienced a 7.0 magnitude earthquake in January of 2010.⁷⁸ The resulting devastation included the death of over 300,000 people, with injuries to 300,00 more, and damage or total destruction of over 300,000 structures.⁷⁹ Within two days of the event, at the request of the Haitian Government, U.S. Southern Command (SOUTHCOM) stood up Joint-Task Force Haiti (JTF Haiti) to execute the military disaster relief.

The legal AAR for the supporting Army logistics unit of 3d Sustainment Command (Expeditionary) referenced a SOUTHCOM directive that required mandatory human rights training for all forces deployed to Haiti.⁸⁰ However, neither JTF- Haiti, nor the Navy supporting

event. In contrast, my personal interview consisted of open-ended questions of a far small sample size of participants, several years after the event provides more anecdotal than empirical evidence.

⁷⁸ Cecchine, Gary, Forrest E. Morgan, Michael A. Wermuth, Timothy Jackson, Agnes Gereben Schaefer, and Matthew Stafford, *The U.S. Military Response to the 2010 Haiti Earthquake: Considerations for Army Leaders*, RAND Corporation, i, xi, (2013) https://www.rand.org/pubs/research_reports/RR304.html.

⁷⁹ Id.

⁸⁰ 3d Sustainment Command (Expeditionary) After Action Report on Operation Unified Response.

element, U.S. FOURTH Fleet (C4F), identified that requirement in their respective AARs.⁸¹ The military personnel I interviewed did not received any human rights training and reported no knowledge of human rights treaties or the soft law human rights guidance. This is significant, as the personnel I spoke to reported that military personnel responding in the initial few days of the operation provided direct assistance in medical care and provision of food and water.

I interviewed a Marine Corps helicopter pilot who was tasked with coordinating the movement of Navy helicopters carrying medical personnel and supplies from the aircraft carrier, USS CARL VINSON, and bringing Haitian patients back to the ship for medical treatment. He described coordinating helicopter landing zones (LZs) in the affected area for aircraft to distribute supplies and evacuate those in need of medical care. In the first few days of the response, the pilots laded wherever they could determine a safe LZ, and provided food supplies and bottled water that the ship had made onboard with its desalinate capacity. Thus the aircrew was both assessing the need from the air in identifying where to secure an LZ and directly distributing supplies. If people in need continued to come to the LZ looking for food and water, the aircraft would keep returning to that LZ as a distribution point. They would stop using an LZ the numbers of individuals waiting for and demanding supplies dissipated so they assessed the need had been met.

A Navy Public Affairs Officer who coordinated the Navy public affairs response and transport of media into the affected area, described receiving reports of difficulties with aid distribution to women and children. She explained that the personnel providing aid had to address situations where men awaiting a supply drop physically fought to the front of the

⁸¹ Commander, United States FOURTH Fleet, Staff Judge Advocate After Action Report on Operation Unified Response; Commander, Joint Task Force- Haiti, Staff Judge Advocate After Action report on Operation Unified Response.

distribution line or used force to extract relief supplies from women and children. Though she did not use the human rights lexicon of impartiality, she and the mission personnel she described, understood the importance of aid distribution to the most vulnerable populations without distinction based on gender or age, in accordance with that principle. She also reported that Pentagon leadership specifically requested imagery of U.S. military personnel giving water and food to the Haitian people, providing direct aid, as the medium to be published to the world.

The C4F AAR identified another SOUTHCOM requirement with significant implications for a human rights based approach. The directive required all medical personnel and first responders to carry small arms when entering the joint operating area in Haiti. The AAR identified the logistical challenges in ensuring that medical personnel were properly trained to carry small arms, not the concerns related to the impact on affected personnel of being treated by armed uniformed medical providers.⁸² Though the requirement was eventually rescinded, it was apparently due to those operational considerations, not an assessment of the potentially negative human rights impact.

The Marine pilot was candid in explaining that he understood and executed the mission in terms of the very specific tasking he received from his leadership. He was to locate LZs and get the helicopters off the ship with supplies and back to the ship with passengers safely, which was not a significant departure from his usual duties. Conceptually, he believed that in the first few days of the response, the mission intent was entirely to get water, food, and medical care to people in need. However, once those needs became satisfied after several days of operations, when pilots reported Haitians using the water provided to wash their bikes instead of drink, the pilot believed the intent of the ship's operation in Haiti shifted to support the display the

⁸² Commander, United States FOURTH Fleet, Staff Judge Advocate After Action Report on Operation Unified Response.

goodwill of the American people. He understood this objective as part of a larger attempt to restore the America's negative image after years in Afghanistan and Iraq. His opinion was solidified by the massive logistical lift required when Secretary of State Clinton wanted to visit the mission, which caused great disruption to execution of the actual assistance operations.

Perhaps true to her professional training, the public affairs officer, who had additional experience with disaster relief missions in Japan, the Philippines and HCA exercises, had a different perspective. She explained the disaster relief missions were fundamentally governed by the needs of the affected populations. She reiterated that military aid is only provided if the affected state requests it, and then the specifics of that aid is tailored in response to the needs expressed by the affected population. While she reported concerns regarding the durability of the aid provided after the withdrawal of forces, she summed up Operation Unified Response “to be there for people in need.”

Case #2: Operation Tomodachi

Operation Tomodachi is the U.S. name for the joint U.S.- Japanese military response to the devastation caused by a 9.0 magnitude earthquake and ensuing 40 meter high tsunami that devastated the eastern coast of Honshu Island in March of 2011.⁸³ The events killed 16,000 people, destroyed 129, 500 homes, and triggered a breakdown of systems at the Fukushima Daiichi nuclear power complex that lead to the evacuation of 177, 503 people. Upon a request from the Japanese Government, the U.S. deployed nearly 24,000 personnel, 189 aircraft and 24 Navy ships to support the disaster relief efforts in conjunction with Japanese self-defense

⁸³ Moroney, Jennifer D. P., Stephanie Pezard, Laurel E. Miller, Jeffrey Engstrom, and Abby Doll, *Lessons from Department of Defense Disaster Relief Efforts in the Asia-Pacific Region*, RAND Corporation, 1, 85 (2013), available at https://www.rand.org/pubs/research_reports/RR146.html.

forces.⁸⁴ The U.S. military capabilities focused on search and rescue (SAR), transport of personnel and supplies, and deployment of nuclear experts to respond to the Fukushima disaster.⁸⁵ Operation Tomodachi was unique relative to other missions, given the strength of the U.S.-Japan alliance, the presence of nearly 40,000 troops already forward deployed in Japan, and the developed infrastructure and stable Government of Japan.⁸⁶ The operation mainly provided infrastructure support and indirect assistance, in accordance with the Oslo Guidelines.

Three examples of specific aid, exhibit different human rights considerations. First, the capability of a U.S. Marine unit to clear the 5,000 foot runway and reopen the Sendai airport in the disaster affected area within 3 hours of arrival, was a crucial operation that the Japanese Government did not have the ability to conduct in the immediate aftermath of the tsunami. That allowed for the landing of a U.S. MC-130 aircraft the next day, carrying 50,000 bottles of drinking water for Japanese forces to distribute to the 100,000 people living in nearby shelters with little food or water.⁸⁷ The U.S. military did not provide direct assistance in the distribution of aid, but enabled the affected state to meet its rights obligations in providing water to those without. Secondly, though U.S ships and aircraft were employed for SAR operations, the U.S. and Japanese forces arranged for the Japanese military to exclusively execute the recovery of Japanese casualties.⁸⁸ This exhibited the primacy of the affected state response with consideration for the cultural sensitivities of U.S. military assistance to enable Japan to meet the needs of its citizens in line with international human rights law.

⁸⁴ Id.

⁸⁵ Id. at 90.

⁸⁶ Commander, Joint Task Force 505, Staff Judge Advocate After Action Report for Operation Tomodachi.

⁸⁷ Rockie K. Wilson, Major, USAF, Operation Tomodachi: A Model for American Disaster Response Efforts and the Collective Use of Military Force Abroad (Jan. 2012) (unpublished Research Report, Harvard University).

⁸⁸ Moroney, Pezard, Miller, Engstrom and Doll, *supra* note 81 at 90.

Thirdly, the deployment of U.S. airborne intelligence, surveillance and reconnaissance (ISR) assets to image survivors and infrastructure damage was critical in providing high-resolution, broad-area imagery of the areas impacted by the tsunami, but raises significant human rights implications.⁸⁹ ISR capabilities intrinsically perform intelligence collection and present an opportunity for data compilation of strategic military value beyond the disaster relief objective. Additionally, the high-resolution imagery can invade the privacy of the affected population. Despite those concerns, as a strong U.S. military ally, Japan allowed use of the ISR technology, which proved crucial to life saving efforts. However, that capability may be prohibited by other affected state governments who are not U.S. allies and may weigh their national security concerns against the potential protection of life capability of the ISR assets.⁹⁰ The potential military advantage created by the life-saving capability of ISR, displays the challenge of applying a human rights based approach to the unique capabilities of inherently military assets.

The strategic benefit to U.S. national interests is crucial to evaluating the U.S. military's account for human rights. Even the very name of the mission, Operation Tomodachi, meaning "friendship" in Japanese, was intentional in furthering the U.S. national objective of strengthening the U.S.-Japan alliance.⁹¹ Thus in addition to expending \$88 million of aid to alleviate human suffering and support Japanese provision of basic necessities to its citizens, the favorability rating of the U.S. amongst the Japanese population jumped from 66% to 85%, a watershed level.⁹²

⁸⁹ Id. at 93.

⁹⁰ Id. at 94.

⁹¹ Id. at 105.

⁹² Id. at 86.

A Naval Officer I spoke with who supported the mission from the amphibious assault ship, USS ESSEX, experienced what he interpreted as the preeminence of that national objective over all other concerns. The ESSEX was immediately deployed off the coast of the affected area to conduct SAR operations using aircraft and small boats of marines. As the Chemical, Biological and Radiological Weapons Officer aboard the ship, he started noting a significantly heightened radiation reading from the boots of the Marines who were returning from the affected coastline. He reported the abnormal readings up his chain of command to initiate an avoidance response, which his training and doctrine directed to remove the Navy assets and personnel from an operating area potentially affected by radiation. However, against standard procedures, leadership directed that ship continue to execute its tasking, deploying aircraft and marines to the affected area. Even once the nuclear disaster in Fukushima was identified, the ship continued to operate, with the ship medical providers requiring all personnel onboard to take an iodine pill to prepare for any negative medical impact of heightened radiation levels. Consequently, this officer very strongly perceived that the political and diplomatic motivations of Operation Tomodachi drove all military action, to include at the risk to the health and safety of U.S. military personnel in involved.⁹³

Case #3: Pacific Partnership

Pacific Partnership is a Navy lead HCA mission, funded by an annual APRI appropriation, that commenced after the 2004 South Asian tsunami to strengthen interoperability in the region in preparation for future natural disasters. The Commander for the 2018 mission,

⁹³The radiation exposure of Navy sailors has been the subject of ongoing litigation filed by a class action of Navy personnel who were stationed in the USS REAGAN, which was also operating closely off the coast of the Sendai region during the Fukushima nuclear disaster.

described, “this dynamic mission enables many nations and subject matter experts to come together to pursue solutions to complex problems while enhancing preparations for disaster emergencies that reduce the severity of their impact.”⁹⁴ The mission is focused on medical care and infrastructure building, with the 2018 mission treating 12,700 patients in, including conducting over 60 surgeries onboard the MERCY.⁹⁵

Distinct from emergency disaster response, Pacific Partnership is a planned mission that repeatedly deploys advance teams of military planners, medical providers, engineers and other subject matter experts to the host nations years in advance of the mission. The advance teams assess the host nation needs and capabilities and develop civic action projects in conjunction with the local population to provide medical, dental, and veterinary care and construction projects on schools and clinics.⁹⁶ Military participants in Pacific Partnership missions emphasize the importance of the participation of the local population, with the intent for the local need to dictate the aid provided. One Navy surface warfare officer who served as a planner for the 2015 mission spoke of her deliberative planning of host nation engagements to respect the needs and circumstances of the local population. Though the Navy had offered to build a water catchment at a village school, in discussions with the local leadership her team learned that a previous catchment had been stolen. The village preferred a more enduring project, like building of a new classroom instead, which the Navy planners then adopted as the new engineering mission objective.

⁹⁴ DoD News, Defense Media Activity, *USNS Mercy Deploys in Support of Pacific Partnership 2018*, DoD News, Feb. 26, 2018, <https://dod.defense.gov/News/Article/Article/1450292/usns-mercy-deploys-in-support-of-pacific-partnership-2018/>.

⁹⁵ Kelsey Adams, Pacific Partnership 2018 Concludes, Department of the Navy News, Jun. 21, 2018, https://www.navy.mil/submit/display.asp?story_id=106083.

⁹⁶ Pacific Partnership 2017 Staff Judge Advocate After Action Report.

The mission planner also spoke of the challenge in assessing need in a place where there was no means of mass communication. Although the medical providers arriving on the hospital ship USNS MERCY had the capacity to provide 100 surgeries, there was no means to communicate the availability of that service to the entirety of the population to ensure that the most needy patients benefited from the surgeries. Though she was not familiar with the legal human rights instruments or policy guidance, she recognized concerns of a human rights based approach in the participation of the local population and the intent to provide impartial aid.

However, as the statutory authority for the mission dictates, there must be a training benefit to U.S. personnel, with the APRI appropriation explicitly identifying the theater security cooperation goals of the mission. The 2018 Mission Commander promoted the military advantages and strategic benefits in a Navy press release, stating, “through Pacific Partnership we are deepening integral ties with our allies and partners across the Indo-Asia-Pacific region.”⁹⁷ This sentiment was echoed by the Navy planner as she explained the purpose of the Pacific Partnership mission was to execute “pre-planned disaster response to aid global partnerships and make alliances with countries that happen to be close to China.”

Conclusions

The public affairs benefits and strategic and military advantage the U.S. gained in all three cases, prompt the very questions with which this analysis began, of the appropriateness of military forces in international disaster relief operations. My broad assessment of the international legal framework for human rights in disaster relief supports the conclusion that it is not the identity of the actor that renders its participation in disaster response appropriate, but the

⁹⁷ DoD News *supra* note 94.

manner in which that relief is provided. Restated, if the U.S. military provides relief with a human rights based approach, that is the end of the analysis. It is the answer to that second question that this paper has sought to determine via a comprehensive review of what comprises a human rights based framework in disaster relief and examination of whether U.S military disaster relief applies that framework through analysis of law, policy, doctrine and mission execution.

I determine the answer to that question must consider two levels of analysis. The strategic national deployment of military forces at a structural level is one consideration, while the execution of operations on the ground is a second matter. At the national level, the statutory authorities for military support to disaster relief predominantly espouse a human rights framework in directing provision of aid based on need, in line with the groups of rights set out in the IASC Guidelines. However, the inter-agency process for DoD provision of military assistance and a recognition of national strategic objectives and military aims, challenge a conclusion that the U.S military disaster relief comports with a human rights framework. This is particularly true in the context of HCA activities in preparation for disaster relief, where by definition, the security and strategic benefits drive the mission, rendering the human rights of the aided populations as a secondary concern. The dual objectives of the relief operations, to affect national security and strategy interests in addition to alleviate human suffering, undermine the human rights considerations of U.S. military disaster relief.

The execution level of military forces providing aid in the affected state is inherently dictated and shaped by the defined strategic objectives. However, that alone does not render execution of aid at odds with a human rights framework. Conversely, the doctrine and guidance that inform the planning, execution and assessment of military disaster relief operations do

attempt to employ a human rights based approach in charging operators to observe the UN core humanitarian principles as well as the most crucial provisions of the IASC Guidelines and the Sphere Project. Though the personal accounts of participants in these operations demonstrate a lack of formalized awareness of instruments of human rights law and policy and the notion of a human rights based approach, their descriptions of core human rights principles underpinning the planning and operations of the missions still may ultimately achieve that approach.

More rigorous analysis is required to assess these conclusions on a broader scale with thorough review of a greater number of missions to provide a more complete analysis of the U.S military's account for human rights in execution of disaster relief operations. More extensive research, to include empirical study, is required to make a conclusive determination of how military personnel in the aggregate account for human rights in the tactical practice of disaster relief operations. Additionally, further discussion is required as to the potential solutions to bridge the gap in human rights and military operations that does exist. Of course additional training is the obvious initial proposal. However, given the research findings of Klasing, Moses, and Satterthwaite that trained NGO aid workers in Haiti did not unambiguously apply a human rights framework, the human rights community must examine how easily accessible and operational the current guidance really is as a whole.⁹⁸

Though much work is still to be done, there is solace in the knowledge that even under the current administration, in the current state of the world, regardless of the ultimate motivations, if natural disaster strikes tonight, a global force for good with beach landing craft, helicopters, and ships that can generate and bottle water will be on the move to provide aid to those in need.

⁹⁸ Klasing, Moses, and Satterthwaite, *supra* note 42 at 33.