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Collaborative and Support Action

Grant Agreement Number 653748
CARISMAND
Culture And RISk management in Man-made And Natural Disasters

WP6 “Citizens rights”
Lead Partner – P6 – LUH

D6.1 “Report on European Fundamental Rights in Disaster Situations”

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<tr>
<td>ACHPR</td>
<td>African Charter on Human and Peoples’ Rights</td>
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<td>ADRDM</td>
<td>American Declaration of the Rights and Duties of Man</td>
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<tr>
<td>CRED</td>
<td>Centre for Research on the Epidemiology of Disasters</td>
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<tr>
<td>CFREU</td>
<td>Charter of Fundamental Right of the European Union</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CPM</td>
<td>Civil Protection Mechanism</td>
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<td>CHR</td>
<td>Commissioner for Human Rights</td>
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<td>DRR</td>
<td>Disaster Risk Reduction</td>
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<td>Disaster Risk Management Knowledge Centre</td>
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<td>Disaster Preparedness ECHO Programme</td>
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<td>EU</td>
<td>European Union</td>
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<td>ECHO</td>
<td>European Commission’s Humanitarian Aid and Civil Protection Department</td>
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<td>ERCC</td>
<td>Emergency Response Coordination Centre</td>
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<td>ECSR</td>
<td>European Committee of Social Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Right</td>
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<td>ESC</td>
<td>European Social Charter</td>
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<td>ECHR</td>
<td>European Convention of Human Right</td>
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<tr>
<td>EAGF</td>
<td>European Agricultural Guarantee Fund</td>
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<td>EAFRD</td>
<td>European Agricultural Fund for Rural Development</td>
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<td>FRA</td>
<td>Agency for Fundamental Right</td>
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<td>FCPNM</td>
<td>Framework Convention for the Protection of National Minorities</td>
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<td>HFA</td>
<td>Hyogo Framework for Action</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>IFRC</td>
<td>International Federation of the Red Cross and Red Crescent Societies</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<td>-----------</td>
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<tr>
<td>IASC</td>
<td>Inter-Agency Standing Committee</td>
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<td>ICSECR</td>
<td>International Covenant on Social, Economic and Cultural Rights</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>JRC</td>
<td>Joint Research Centre</td>
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<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<td>PRO MEDHE</td>
<td>Protecting Mediterranean Cultural Heritage During Disasters</td>
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<td>SOP</td>
<td>Standard Operating Procedure</td>
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<td>TEU</td>
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<td>UN</td>
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1. Executive Summary

Natural or man-made disaster situations are times when respect for human rights may be needed most, but such instances also appear to create challenges for public authorities to fully respect all human rights. This conundrum could be understood through the prism of the exigencies of such moments where on most occasions, saving lives and maintaining public order and safety rank highest in the order of priorities. Understandably, human rights laws permit States to a certain extent to either limit the enjoyment of certain rights or derogate from their obligations as prescribed by international and national laws in order to guarantee public order.

This partially is a consequence of the States’ obligation to balance protection of various human rights. Disaster situations, creating exceptional threats for citizens’ life and health, may demand intensive measures to provide adequate protection, while likewise involving limitations on enjoyment of other fundamental human rights (to e.g. property, personal freedom or privacy) of both victims and third parties. Moreover, this state of affairs also calls for a balancing of public interest of the society and the personal interests of disaster victims (or any other individual affected), even at such emergencies. To that extent, States are encouraged – if not obliged – to integrate a human right-based approach in all phases of their disaster management – mitigation; preparedness; response and recovery, and could be made accountable for their actions in this respect.

Indeed, the modern Europe is founded on the values of respect for human dignity and human rights at all times. Although disaster situations have been witnessed in a number of European countries in the past, issues of human rights have not been in direct focus in the context of disasters, and only scanty research has been undertaken to analyse how fundamental rights have been implemented in or are impacted by, disaster management across Europe. However, some landmark cases of violation of fundamental rights in disaster scenarios have been recorded at the European level, especially from the Council of Europe’s European Court of Human Rights.

In general, this deliverable aims to look at the European fundamental rights framework and to map out those provisions that are relevant in disaster situations, especially against the grouping in the guidelines by the Inter-Agency Standing Committee (IASC) on human rights and natural disasters. Although the guidelines were initially aimed at natural disasters, its relevance spans beyond natural disasters and could take care of man-made disasters too.

Apart from this holistic approach, specific attention is also paid to the implementation of the right to privacy and data protection, as well as cultural rights in disaster situations. This report
also takes into account the two normative systems of the Council of Europe and the European Union in its analysis. Thus, some of the analyses have been divided in this formation in order to underscore the differences in the enforcement of fundamental rights at the European level.

The following summarises our findings:

1. A multi-dimensional relationship exists between human rights and disasters – disasters could affect the enjoyment of fundamental rights; human rights bring to light the need for legal protection of individuals against hazards that cause disasters; disaster management operations may require a human rights-based approach in order to effectively serve their purposes.

2. None of the major European fundamental rights instruments specifically elaborates on disaster situations.

3. Irrespective of the above, international human rights law, as well as European human rights provisions, contain rights and principles that are relevant and applicable in disaster scenarios.

4. As such, European fundamental rights provisions as applicable in the EU as well as human rights framework of the Council of Europe could be mapped against the IASC grouping of human rights that are relevant in disaster cases.

5. While some human rights provisions such as the right to life, the right to property and the right to enjoyment of family life have been subject of litigation in the context of disasters in the ECtHR, some others such as the right to data protection and cultural rights appear not to have been so litigated.

6. However, the right to privacy and data protection can be limited as a result of disasters; this has been recognised in the Recital of the new General Data Protection Regulation (Regulation (EU) 2016/679). But no EU-wide guidelines exist that circumscribes this limitation within a disaster situation. Such guidelines would be necessary for directing the operational aspects of disaster management.

7. The legal dimension of cultural rights in disaster management appears complex, and no harmonisation of cultures exists in the Europe. Rather, cultural diversity is encouraged. This makes it particularly challenging on having an articulated framework on how to implement cultural rights in disaster operations. However, some soft law references could be found in this direction, and could be a starting point towards articulating such policy.

8. On its part, the EU has various measures that are aimed at preventing, mitigating and responding to disasters, including a dedicated civil protection mechanism (CPM) coordinated between the Union and its Member States. While no evidence of human
rights violation has been recorded in this CPM at the EU level, there seems to be, however, no articulated policy on right-based approach in the operational dimension of disasters within the EU or even Council of Europe.
2. Introduction

2.1. Disasters and Human Rights

Disasters – natural or man-made – directly impact the way affected population enjoys their human rights. As Kälin (2012) pointed out, the relationship between human rights and disaster is multi-dimensional: disasters may seriously affect the enjoyment of human rights (factual dimension); human rights may entitle individuals to be protected by the State against (certain) hazards and their effects on the life, limb, property and other objects of human rights protection (legal dimension); and human rights may help shape disaster management and response and suggest a right-based approach to disaster relief and reconstruction (operational dimension).¹ For instance, destroyed shelter due to flooding affects the right to shelter, and other ripple effects could follow: lack of food, sickness, etc., which invariably affect other human rights such as the right to food, the right to health, among others.

Although natural and man-made disasters have been in existence for a long time in history, it was only recently that meaningful discussions on their human rights approach began, especially, following some major disaster crises such as the Indian Ocean Tsunami.² Evidence of lack of preparation, human rights violations as well as the suffering of affected citizens in the aftermath of such crises have prompted inquiries into government actions or inactions before disasters (assuming they could be predicted), during and after such incidents.³ Findings from such inquiries have exposed a number of shortcomings, and have also brought into focus the need for human rights protection to be incorporated into disaster management frameworks (right-based approach).⁴

² Ibid. See also Sara Davies, ‘Natural Disasters and the Responsibility to Protect’ (2012) 55 GYIL 149.
⁴ Human rights-based approach in disaster management refers to the framework and necessary standards for humanitarian assistance activities that is grounded in the respect for universal principles of human rights such as human dignity and non-discrimination, etc. In this approach, those affected by the disasters thus become individual rights holders who can claim rights from particular duty bearers rather than simply being passive beneficiaries and recipients of charity. See IASC, IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (The Brookings – Bern Project 2011).
In fact, the Hyogo Framework for Action 2005-2015 is a result of such global desire to reconstruct disaster management systems, as evidence from past events suggests that among others, human rights of disaster victims are not always sufficiently taken into account. Unequal access to assistance, discrimination in aid provision, lack of recognition of cultural rights (including minority rights), sexual and gender-based violence, loss of documentation, unsafe or involuntary return or resettlement, and issues of property restitution have been recorded in such situations.\(^5\) Regrettably, at such difficult times, legal entitlements (in terms of human rights) of affected individuals and groups and the corresponding State obligations seem to be given little consideration by some States, arguably due to the exigencies of such situations. State obligations as prescribed by international human rights law (as well as constitutional and statutory national law) - obligation to respect, protect and fulfil human rights, and above all, accountability of governments for their actions or inactions during this period are often questioned.\(^6\)

Indeed, calamities could call for the imposition of limitations on some of the rights and freedoms guaranteed by international as well as national laws:\(^7\) freedom of expression may be curtailed to avoid panic; freedom of movement and of residence could be restricted through the adoption of forced evacuation orders; freedom from compulsory labour may be curbed to compel individuals to participate in the building of shelters or perform other kinds of tasks; limitations on the right to property may be introduced if requisition of private goods is deemed necessary. However, such limitation ought to be proportional and follow a certain standard.\(^8\) Limitations must be provided for by national law that is in force at the relevant time, and must not be applied in an arbitrary, unreasonable or discriminatory manner as discussed further in Chapter 3.3 below.

In Europe, the issue of human rights in disaster situations has been addressed in some cases, and seems to resurface following the influx of refugees and other migrants since 2014.\(^9\) As will be shown below, European law has various provisions on fundamental rights, and with the

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\(^6\) Ibid. This seems to cut across both developed and developing nations as could be seen in the aftermath of the Hurricane Katrina and the Indonesian Tsunami.


\(^9\) Samuel Cogolati et al, *Migrants in the Mediterranean: Protecting Human Rights* (European Parliament 2015). Note however that this present report does not focus on the current migrant and refugee issues, and also does not cover EU external action in humanitarian assistance.
This project has received funding from the European Union’s Horizon 2020 research and innovation programme under grant agreement No 653748.
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2.2. Methodology

Extensive desk research of literature relating to disaster management and human rights, international disaster response law, primary and secondary EU law, case law and other published literature were utilised in this report. Additionally, some reports of the EU and Council of Europe’s institutions were analysed. The sequence followed in this report is to first understand international principles that form the current sources of human rights rules applicable in disaster situations. Thereafter, specific attention is paid to the European legal system, wherein legal sources of fundamental and human rights were analysed in the context of disasters. The two normative systems of the European Union and the Council of Europe informed the separation of these European sources into two in this report. After identifying all the relevant sources and the rights they provide, a mapping of these rights is made against the grouping of the IASC. Furthermore, apart from the general rights, a more specific attention is also paid to how the rights of privacy and data protection, as well as cultural rights, are implemented in disaster scenarios. Having identified the theoretical norms, the report also looks at European level mechanisms aimed at preventing and responding to disasters as well as avenues by which victims of disasters could seek redress. In all, this report contains seven Chapters, including some recommendations at the end.

2.3. Definition of Concepts

2.3.1. Disaster

The term disaster has multiple meanings in everyday context, and as such a number of definitions of the term could be found in the literature. This makes it challenging to have a universally accepted definition. However, in the context of a large-scale or colossal nature of events befalling a society, the UN defines a disaster as “a serious disruption of the functioning of society, causing widespread human, material or environmental losses, which exceed the
ability of the affected society to cope using only its own resources”.\textsuperscript{14} This could be contrasted with an “emergency” in which the society has enough resources to cope with those losses.\textsuperscript{15}

Similarly, the Centre for Research on the Epidemiology of Disasters (CRED)\textsuperscript{16} defines disaster as “a situation or event which overwhells local capacity, necessitating a request to a national or international level for external assistance; an unforeseen and often sudden event that causes great damage, destruction and human suffering.”\textsuperscript{17}

The EU Decision on a Union Civil Protection Mechanism, however, adopts a more open approach by defining disaster as “any situation which has or may have a severe impact on people, the environment, or property, including cultural heritage.”\textsuperscript{18} Request for external assistance is not emphasized here, which arguably tries to forestall issues that may arise if an event is only adjudged a disaster from the criterion of external assistance, either locally or internationally (for example, what type of assistance would be sufficient or qualify for such definition – material, legal, investigational, law enforcement assistance, etc). The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief also follows this line of definition.\textsuperscript{19} However, an underlying factor across these definitions is the colossal nature of a disastrous event, and its impact on the resource and capability of the affected population to cope with it.

Generally, disasters could be broadly categorized into two – natural and man-made disaster, reflecting whether a disaster is triggered by natural or man-made hazards as highlighted below. Further, disaster management studies have identified 4 phases of disaster – be it natural or man-made – as: Mitigation; Preparedness; Response and Recovery.\textsuperscript{20}

\textsuperscript{15} Ibid.
\textsuperscript{16} http://www.emdat.be/.
\textsuperscript{19} It defines a disaster as “a calamitous event resulting in loss of life, great human suffering and distress, and large-scale material damage.”
\textsuperscript{20} CARISMAND Deliverable D 2.1 Report on Actors in Disaster Management has classified disasters for the purposes of the project into: a) Natural disasters; b) Man-made non-intentional disaster; and c) Man-made intentional disaster. See the deliverable for details.
I) Natural Disaster

Natural disaster refers to the consequences of events triggered by natural hazards that overwhelm local response capacity and seriously affect the social and economic development of a region.\(^\text{21}\) Because of its nature, there is a tendency to treat natural disasters as beyond human control; the product of unstoppable forces, acts of God, or events of which human intervention appear ineffective or of only secondary relevance.\(^\text{22}\)

But some disasters that appear as if they are caused by natural hazards may have their origin from human activities as seen in some climate change debates involving gas emission, indiscriminate tree logging, etc. A recent European Commission’s Humanitarian Aid and Civil Protection department (ECHO) factsheet indicates that the severity and frequency of natural disasters have risen steadily over the past decades, partly because of climate change, urbanisation, population growth, and environmental degradation.\(^\text{23}\) It reported also that between 2002 and 2014 natural disasters in the EU caused over 80,000 deaths and over €100 billion in economic losses.\(^\text{24}\)

A number of natural disaster classifications exist. CARISMAND adopts the Integrated Research on Disaster Risk Research classification of natural disasters - Geophysical disasters; Meteorological disasters; Hydrological disasters; Climatological disasters; Biological disasters and Extraterrestrial disasters.\(^\text{25}\) Examples of natural disasters are numerous but the UN knowledge portal has listed some of them as: drought, earthquake, epidemic, extreme temperature, flood, mass movement, tsunami, volcano and wildfire.\(^\text{26}\)

II) Man-made Disasters

Man-made disasters could be further classified into intentional and unintentional disasters.

a) Man-made unintentional disaster


\(^\text{22}\) Hewitt, Culture and Risk (n 11) 5.


\(^\text{24}\) Ibid.

\(^\text{25}\) See CARISMAND Deliverable D2.1 for details of this classification.

Man-made unintentional disasters usually refer to technological and accidental hazards originating from activities such as transportation, industrial, oil or chemical spill, nuclear accident or other technological accident of a non-transport and non-industrial nature.\(^{27}\) Technological hazards account for a considerable number of deaths, destruction, and financial loss, and some of them could be triggered by natural hazards such as the Fukushima nuclear plant that was affected by the 2011 earthquake and tsunami in Japan.\(^{28}\) A database of technological disasters can be found at [http://www.emdat.be/](http://www.emdat.be/).

b) Man-made intentional disaster

Intentional disasters refer to those disasters that were intentionally caused by humans such as an act of terrorism, civil disorder, war, etc, including any actions which do not directly aim at causing a disaster, but the foreseeable result of which is typically leading into one.

### 2.3.2. Fundamental Rights

The terms “fundamental rights” and “human rights” are two terms that are often used as synonyms, even though some scholars have pointed out their differences in terms of normative values and legal consequences.\(^{29}\) Irrespective of this moot point, on the one hand, the term ‘fundamental rights’ is used in EU to express the concept of ‘human rights’ within a specific EU internal context, as noted by the EU Agency for Fundamental Rights (FRA).\(^{30}\) Human rights, on the other hand, are rights inherent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status.\(^{31}\)

Traditionally, the term ‘fundamental rights’ is used in a constitutional setting whereas the term ‘human rights’ is used in international law.

As explained by the UN OHCHR Europe Regional Office “while the terminology applied by the EU has been that of ‘fundamental rights’, rather than ‘human rights’, there is, in fact, no real

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\(^{27}\) See CARISMAND Deliverable D2.1.


difference between the two.”\footnote{UN OHCHR Europe Regional Office, The European Union and International Human Rights Law, 9 \textless http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf\textgreater accessed 26 April 2016} The two terms refer to similar substance as can be seen when comparing the content in the CFREU and the ECHR and the ESC.\footnote{FRA (note 30).} EU fundamental rights derive from various sources, including international instruments and constitutional traditions common to the Member States. The international human rights landscape has therefore provided and continues to provide, the context for the development of EU fundamental rights.\footnote{UK Government, Review of the Balance of Competences between the United Kingdom and the European Union Fundamental Rights (2014) 11, \textless https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335018/evidence-academics.pdf\textgreater accessed 25 April 2016.}

For the purposes of this report, we use the term fundamental rights to refer to both the fundamental principles guaranteed under EU law as well as those human rights guaranteed under the Council of Europe treaties. In some contexts, the terms are used interchangeably.
3. International Legal Sources of Human Rights Relevant to Disaster Situations

International human rights and humanitarian law provide for civil and political rights as well as economic, social and cultural rights applicable in all situations – war, peace and disaster times. While none of the major human rights instruments specifically refers to or elaborates on disasters, there are ample provisions in many human rights instruments that address core issues related to disaster vulnerability, displacement and how these affect humans. As such, they provide sources of human rights principles applicable in disaster situations. Furthermore, the current efforts by the International Law Commission (ILC) in drafting a document on the Protection of Persons in the Event of Disasters (which adopts a human rights-based approach) will add value to the existing framework of human right in disaster management when finalised.

3.1. International Law

There is no unified international disaster response law similar to the Geneva Convention which regulates armed conflict. Rather, many international and bi-lateral treaties exist in this area. However, the ILC has identified three immediate sources of present-day international disaster protection and assistance framework, namely: international humanitarian law, international

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37 This gap prompted the International Federation of the Red Cross to adopt the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance in 2007 which has helped a number of states in developing legislation in this direction. See <http://www.ifrc.org/en/what-we-do/idrl/idrl-guidelines/new-legislation-adopted-on-idrl/> accessed 2 May 2016.

38 See Andrea de Guttry, ‘Surveying the Law’ in Andrea de Guttry et al. (eds.), International Disaster Response Law (T.M.C. Asser Press 2012) 3.
human rights law and international law on refugees and internally displaced persons. Though natural and man-made disasters have been in existence for a long time in history, previous human rights discourse on humanitarian crises focused almost exclusively on armed conflict and other widespread conflict situations. This arguably is because international humanitarian law (IHL) was initially meant for the assistance of soldiers in armed conflict, but has crystallized to also take care of civilians in such situation. Even though IHL was not meant to cater for natural disasters, the fact that the object of humanitarian assistance is to protect humans, and a lot of similarities could be found in victims sufferings – be it from war or natural disasters, the ILC suggests: “Consequently, in conflict situations there exists a large body of law dealing with assistance that may not only inspire rules on the protection of persons in the event of disasters, but may even be applied by analogy to the extent that a rule is relevant to disaster situations other than armed conflict.” A number of disaster management documents have made reference to IHL which reinforces the position that relevant principles of IHL should at least by analogy be applicable in disaster cases.

Another source of protection for disaster victims is international human rights law which comprises rights and freedoms bestowed upon the individual under various international human rights instruments as well as customary international human rights law, and the corresponding obligation on the State. This obligation is for States to respect, fulfil and protect human rights within their territory. Although human rights are meant to be applicable at all times, due to the peculiarity of disasters, the ILC has provided examples of a number of human rights that are of particular importance in disaster situations. These include the right to life, the right to food, the right to health and medical services, the right to the supply of water, the right to adequate housing, clothing and sanitation, and the right not to be discriminated against.

It is also noteworthy that for practical reasons, the Inter-Agency Standing Committee (IASC) has also identified certain human rights which are relevant in disaster scenarios and grouped them

40 Kälin, ‘The Human Rights Dimension of Natural or Human-made Disasters’ (n 1) 122.
41 Rules of International Humanitarian Law are embodied in the Geneva Conventions 1949 and the Additional Protocols thereto, which reflect to a large extent the corresponding customary rules.
42 Valencia-Ospina (n 39) 148.
45 Eduardo Valencia-Ospina (n 39) 149; IFRC, (n 43) 34-36 ; Venturini (n 43) 49-50.
into four, namely: (A) rights related to physical security and integrity (e.g. protection of the right to life and the right to be free of assault, rape, arbitrary detention, kidnapping, and threats to these rights); (B) rights related to basic necessities of life (e.g. the rights to food, drinking water, shelter, adequate clothing, adequate health services, and sanitation); (C) rights related to other economic, social and cultural protection needs (e.g. the rights to be provided with or have access to education, to receive restitution or compensation for lost property, and to work); and (D) rights related to other civil and political protection needs (e.g. the rights to religious freedom and freedom of speech, personal documentation, political participation, access to courts, and freedom from discrimination).\(^{46}\)

The law on refugees and internally displaced persons also form another source of human rights applicable in disaster cases. However, it has to be noted that refugees and internally displaced persons are generally treated as distinct categories of persons depending on the source of the displacement and whether the displacement results to affected persons either crossing borders (refugees) or stayed within the State where the incident occurred (internally displaced persons). On the one hand, international refugee law has been developed against the background of displacement caused by fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion that results to the affected person crossing to another State.\(^{47}\) The occurrence of a disaster is not envisaged as a ground for granting refugee status under the Convention relating to the Status of Refugees.\(^{48}\) Evidence suggests that such victims have been accommodated in other State through other legal means such as national immigration law provisions which grant temporary visas to such victims as seen, for example, in Italy, Finland, Sweden, Bolivia, Argentina, Brazil.\(^{49}\)

Regarding internally displaced persons on the other hand, at present, there seems to be no legally binding international instrument governing their activities, but an authoritative (non-binding) source of norms that apply to those internally displaced by disasters as well as by conflict is the Guiding Principles on Internal Displacement.\(^{50}\) These principles were drawn up by the Representative of the Secretary-General on internally displaced persons, and are based on relative norms of international human rights and humanitarian law (and by analogy, refugee law). In particular, the Guiding Principles state that the primary responsibility for protection and

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\(^{47}\) See the Convention Relating to the Status of Refugees (1951).

\(^{48}\) The Convention Relating to the Status of Refugees, Art. 1.


assistance of internally displaced persons lies with the national authorities and that internally displaced persons have the right to request and to receive protection and assistance from such authorities. The Principles recognize that individuals have a right to protection from arbitrary displacement, protection and assistance when they are displaced and support to find durable solutions to their displacement – return or settlement in their place of displacement or in another part of their country.51

3.2. Soft Law

Soft law refers to normative provisions contained in non-binding texts.52 Although various soft law that has bearing on human rights and disaster situations exist, for the purposes of this report, only three will be briefly looked at.

3.2.1. The Sendai Framework for Disaster Risk Reduction 2015-2030

The Sendai framework53 is the successor instrument to the Hyogo Framework for Action (HFA) 2005-2015: Building the Resilience of Nations and Communities to Disasters. It was signed in March 2015 as a 5-year, voluntary, non-binding agreement with expected outcome to achieve a substantial reduction of disaster risk and losses in lives, livelihoods and health and in the economic, physical, social, cultural and environmental assets of persons, businesses, communities and countries.54 The framework recognizes that the State has the primary role to reduce disaster risk. However, such a responsibility should be shared with other stakeholders including local government, the private sector and other stakeholders.

The implementation of the framework is guided by thirteen principles among which acknowledges that: “Managing the risk of disasters is aimed at protecting persons and their property, health, livelihoods and productive assets, as well as cultural and environmental assets, while promoting and protecting all human rights, including the right to development.”55

51 Ibid.
54 Ibid, 12.
Four priority areas of action have been set by the framework in order to achieve its goals: (1) Understanding disaster risk; (2) Strengthening disaster risk governance to manage disaster risk; (3) Investing in disaster risk reduction for resilience; and (4) Enhancing disaster preparedness for effective response and to “Build Back Better” in recovery, rehabilitation and reconstruction.

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

Established in June 1992 in response to United Nations General Assembly Resolution 46/182 on the strengthening of humanitarian assistance, the Inter-Agency Standing Committee (IASC), a unique forum involving key UN and non-UN humanitarian partners, has been involved in finding a human rights-based approach in disaster and humanitarian assistance activities. IASC’s work in this area has culminated into the Operational Guidelines on Human Rights and Natural Disasters drafted in 2006 and revised in 2011.

The Operational Guidelines mainly cover response and recovery phases of natural disasters, and clearly spelt out what protection of human rights means in such situation. The Guidelines also include a grouping of rights that are relevant in a disaster context. The Guidelines further contain key principles which should guide humanitarian action in situations of natural disasters and the provisions are targeted at international and non-governmental humanitarian organizations, Inter-Agency Standing Committee, government actors, and civil society at large. Although the Guidelines were made in the context of natural disasters, they appear relevant also in man-made disasters.

3.2.3. Guiding Principles on Internal Displacement

Another important soft law instrument that provides for respect for human rights in disaster situations is the Guiding Principles on Internal Displacement. These Principles were first drafted in 2001 and revised in 2004 under the auspices of the UN Commission on Human Rights and the General Assembly. The Principles refer to internally displaced persons as persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of

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56 https://interagencystandingcommittee.org/.
58 See note 46.
habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

They contain 30 principles and identify rights and guarantees relevant to the protection of the internally displaced in all phases of displacement. Importantly, the Guiding Principles provide that “internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.”\[^{60}\] In cases of disasters, the Principles provide that unless the safety and health of those affected require their evacuation, every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.

The Guiding Principles also contain provisions on protection and assistance to victims after the displacement has taken place; as well as on assistance for a safe and voluntary return or resettlement and rehabilitation. All actors – States and non-state agencies including the UN, NGOs, etc., who play any role in addressing internal displacement are guided by these Principles that have been widely recognized as an important tool and standard for addressing such situations.\[^{61}\]

### 3.3. Obligations of States in Disaster Situations and Derogation of Human Rights

States have the primary responsibility not only to respect but also to protect and fulfil the human rights of all people living in their territory. In the context of disasters, international human rights law obliges States, to the extent possible, to prevent or at least mitigate the negative effects emanating from disasters, including refraining from violations of human rights in all the phases of their disaster management.\[^{62}\]

As argued by Criddle and Fox-Decent (2012), States bear an obligation to safeguard their subjects’ equal freedom during emergencies – even if this requires a derogation from some

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60 Guiding Principles on Internal Displacement, Principle 1.
62 See Chapter 4 below.
human rights norms such as the freedoms of expression, movement, and peaceable assembly. Under this fiduciary theory, non-peremptory human rights norms may be derogated from in contexts where their strict observance would conflict with the State’s overarching fiduciary obligation to guarantee subjects’ secure and equal freedom. But States must also refrain from taking measures in emergencies that would simply derogate from peremptory norms (norms that possess universal character in that no state may derogate from them such as the prohibitions against genocide, prolonged arbitrary detention, or torture), because the violation of these norms could never be consistent with the state’s obligation to guarantee the public’s secure and equal freedom.

Apart from defining the scope of derogation between peremptory and non-peremptory norms, international law also distinguishes circumstances under which a State could initiate a state of emergency from a State’s conduct during emergencies. A number of international and regional treaties on civil and political rights employ a two-stage inquiry when evaluating the legality of a State’s action: First, are circumstances sufficiently dire to justify initiating a state of emergency? Second, if a state of emergency is justified, what measures may a State employ to address the emergency’s threats to public order and security?

Article 15 ECHR for example, requires a threat of war or other emergency that threaten the life of the nation before measures derogating from human rights obligation under the treaty may be taken. The European Commission on Human Rights and the ECtHR have interpreted this provision and have the contours of circumstances necessitating such derogation. For instance, in Lawless v Ireland, the ECtHR defined a “public emergency” as a “danger or crisis” that is (1) present or imminent, (2) exceptional, (3) concerns the entire population, and (4) constitutes a “threat to the organised life of the community.” However, the third criterion concerning the entire population has been watered down, and current jurisprudence indicates that danger affecting just a section of the population could validly warrant a declaration of a state of emergency.

On the second layer, international law jurisprudence has shown that a declaration of emergency does not give a State unfettered power to exercise its powers indiscriminately without any regards to its international obligations. During emergency situations, States must tailor their

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64 Ibid.
66 App. No 332/57 (ECtHR, 14 November 1960). See also ECommHR, Greek Case, 1969.
67 Ireland v The United Kingdom, App. No. 5310/71 (ECtHR 18 January 1978)
responsive measures to minimize the potential impact on human rights, and there could be substantive and procedural limitations on a State’s action during such periods. As seen in *Sakik and Others v Turkey*, a State could be held accountable for its actions during emergencies. In this case, the ECtHR considered Turkey’s suspension of human rights protections in territories outside those identified in the State’s derogation notice. In holding that Turkey violated the ECHR, the Court explained that it “would be working against the object and purpose of [the ECHR’s derogation provision] if, when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation.”

Thus, Turkey’s delay in presenting detainees before a judge in territories not covered by its derogation notice violated its commitments under the ECHR.

In summary, States must strictly observe peremptory human rights norms during emergencies, and may suspend non-peremptory human rights only if their responsive measures would comply with the geographic and temporal scope of the derogation, as well as a substantive conception of proportionality that requires States to use only those measures that minimally restrict the freedoms ordinarily protected by the suspended treaty rights. It is important to note that resource constraints do not allow States to avoid their human rights obligations altogether, though the lack of resources may prevent them from fully realizing certain human rights. In any case, States are still required to guarantee the rights that are essential to survival such as food, water, shelter, sanitation and access to medical assistance; and where this is not possible, they are required to request international assistance.

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69 Ibid, para 39.
70 See also *Abdulsamet Yaman v. Turkey*, App. No. 32446/96 (ECtHR 2 November 2004) (held that Turkey abused its emergency powers by suspending human rights in territories beyond those identified in its formal notice of derogation).
71 Evan Criddle (n 66); The Siracusa Principles on the Limitation and Derogation Principles in the ICCPR (n 68).
72 Harper (n 7).
4. European Legal Provisions of Fundamental Rights Relevant in Disaster Situations

Fundamental rights have a high priority in Europe, and a number of instruments and mechanisms have been put in place to safeguard them, ranging from treaties to case law. The European legal framework that addresses issues of human rights mirrors its international law counterpart, especially in two important documents – the CFREU and ECHR. This is due to the fact that the European States are part of the international community and have signed or ratified the major international human rights and humanitarian treaties. This perhaps is reflected on the one hand that one of the central values of the EU is to respect fundamental rights, and Member State must guarantee these rights. On the other hand, the Council of Europe’s main objectives include to protect human rights, and it has created a number of mechanisms in order to realise this. The instruments considered below will be categorised as they apply to the EU and the Council of Europe (both at the regional level), and the main focus will be on how they apply in disaster situations. The implementation of the rights created under the auspices of these organisations at the national level will be the focus of the next Deliverable D6.2.

4.1. EU Instruments

4.1.1. Treaty on European Union (TEU)

The TEU is one of the instruments upon which the EU is founded. It acknowledges that the EU is founded on the values of respect for human dignity and human rights among others,⁷³ and goes further to recognise the rights, freedoms and principles set out in the CFREU, thereby giving the Charter the same legal value as the Treaties.⁷⁴ Additionally, the Treaty provides that EU shall accede to the ECHR and that fundamental rights as guaranteed by the Convention and the constitutional traditions common to the Member States shall constitute general principles

⁷³ TEU, art 2.
⁷⁴ TEU, art. 6 (1).
of EU law. A reference to human rights and fundamental freedoms is also found in the provisions on the Union’s external action.

As mandated by the Treaty, efforts have been made for the accession of the EU to the ECHR, including an Additional Protocol to the ECHR allowing for such accession. However, a negative opinion from the CJEU meant that a further negotiation will be necessary before such accession could be realized in the future.

4.1.2. Treaty on the Function of European Union (TFEU)

The TFEU is another founding instrument of the EU. It sets out the competencies of the EU and also reiterates the principle of respect and promotion of fundamental rights. More so, the TFEU specifically mentions some fundamental rights which are relevant in disaster situations – gender equality, the right against discrimination, and the right to the protection of personal data.

More specifically, the Treaty incorporates a provision on civil protection, and provides that the EU shall encourage cooperation between the Member States in order to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters. Importantly, the TFEU gives the responsibility to the EU to coordinate measures in cases of disasters. As well, the EU and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster.

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75 TEU, art. 6 (2) and (3).
76 TEU, art. 21.
77 See Additional Protocol 14.
79 Opinion 2/13 of the Court on Access of the EU to the ECHR (CJEU 18 December 2014); Joakim Nergelius, The accession of the EU to the European Convention on Human Rights A critical analysis of the Opinion of the European Court of Justice (SIEPS 2015).
80 TFEU, art 8.
81 TFEU, art 10.
82 TFEU, art. 16.
83 TFEU, art. 196.
4.1.3. The Charter of Fundamental Rights of the European Union (CFREU)

The CFREU enshrines into EU law a wide array of fundamental rights enjoyed by EU citizens and residents. It was proclaimed on December 7, 2000, but only became binding after the Treaty of Lisbon came into force on December 1, 2009. By incorporating the Charter into the Treaties, it is elevated to a primary law, having “the same legal value” as the founding Treaties of the EU.\(^{84}\)

The Charter makes clear that in so far as it recognises fundamental rights as they result from the constitutional traditions common to the member states, the rights in the Charter must be interpreted in harmony with those traditions.\(^{85}\) Overall, the Charter guarantees several fundamental rights, both civil and political rights as well as social and economic rights that are relevant in disaster situations as grouped by the IASC. These include:

(A) Rights related to physical security and integrity

The Charter contains several rights that are geared towards protecting physical security and integrity in disaster situations. These rights are found in Title 1 of the Charter on Dignity:

1. The right to human dignity
2. The right to life
3. The right to the integrity of the person
4. Right against torture and inhuman or degrading treatment or punishment
5. Right against slavery and forced labour

(B) Rights related to basic necessities of life

1. Right against discrimination
2. Social security and assistance
3. Right to health care
4. Right to environmental protection
5. Consumer protection

(C) Rights related to other economic, social and cultural protection needs

1. Freedom of thought, conscience and religion

\(^{84}\) TEU, art 6.
\(^{85}\) CFREU, art 52(4).
2. Right to education
3. Freedom to choose an occupation and right to engage in work
4. Right to property
5. Right to cultural, religious and linguistic diversity
6. The right of the elderly
7. Integration of persons with disabilities

(D) Rights related to other civil and political protection needs
1. Right to liberty and security
2. Respect for private and family life
3. Right to the protection of personal data
4. Freedom of expression and information
5. Freedom of assembly and of association
6. Protection in the events of removal, expulsion or extradition
7. The right of the child
8. Equality before the law
9. Right to good administration
10. Right of access to documents
11. Right to European Ombudsman
12. Freedom of movement and of residence
13. Right to effective remedy and to a fair trial

It is arguable that when mapped against the grouping of the IASC on human rights relevant in a disaster situation, the CFREU contain ample provisions for each group of rights. However, it has to be noted that the right and freedoms recognized by the Charter may be limited in certain circumstances as indicated in Article 52.

4.2. Council of Europe Instruments
4.2.1. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

The European Convention on Human Rights (ECHR) was adopted in 1950, and is seen as is one of the mechanisms deployed by the Council of Europe to realise its objective to protect human rights. States must ratify the Convention in order to join the organisation, and there are ongoing negotiations for the EU to accede to the Convention.

The ECHR contains many provisions which are relevant to disaster situations. For instance, Article 2 (right to life) has been ruled on many occasions to be applicable in cases related to deaths caused by disasters. Article 8 (right to respect for private and family life) has particular significance in relation to effects of disasters on family life. Furthermore, Articles 13 (right to an effective remedy) and Article 1 (protection of property) of its Protocol No. 1 have also been invoked in cases of disaster. Against this background, it is arguable that the right to enjoy the effective protection of the rights provided for in the Convention are applicable in disaster incidents, and States are obligated to take measures that deter foreseeable hazards from having disastrous consequences on these rights.

A number of rights found in the Convention could also be mapped against the IASC grouping mentioned earlier. In summary, the following provisions appear relevant in disaster situations:

1. Right to life
2. Prohibition of torture
3. Prohibition of slavery and forced labour
4. Right to liberty and security
5. Right to respect for private and family life
6. Freedom of thought, conscience and religion
7. Freedom of expression
8. Freedom of assembly and association
9. Right to an effective remedy
10. Prohibition of discrimination

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86 Budayeva and Others v Russia App. Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR 29 September 2008).
87 Tatar v. Romania App. No. 67021/01 (ECtHR 27 January 2007).
88 Kolyadenko and Others v. Russia App. No 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (ECtHR 28 February 2012).
Additionally, the ECtHR case-law has made the Convention a living instrument in the face of new challenges, and has in some cases relating to violation of rights in disaster scenarios rules that the State has breached its obligations. Similar to other related instruments, the Convention allows the limitation of some rights in times of emergency. But the circumstances under which rights can be circumvented have been circumscribed through the jurisprudence of the ECtHR and the European Commission of Human Rights.

4.2.2. The European Social Charter (ESC)

The European Social Charter, adopted in 1961 and revised in 1996, embodies fundamental social and economic rights of all individuals within the Parties that signed the Charter, including its additional Protocols. A number of provisions found in the ESC appear relevant in disaster situations including:

1. The right to protection of health
2. The right to social security
3. The right to social and medical assistance
4. The right to benefit from social welfare services
5. The right of persons with disabilities to independence, social integration and participation in the life of the community
6. The right of the family to social, legal and economic protection
7. The right of children and young persons to social, legal and economic protection
8. The right to engage in a gainful occupation in the territory of other Parties
9. The right of elderly persons to social protection
10. The right to protection against poverty and social exclusion
11. The right to housing
12. Non-discrimination

Similar to the other instruments, the ESC also contain a derogation provision in Article F, which applies in time of war or public emergency threatening the life of the nation to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent

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89 ECHR, Arts 8, 11, 15.
with other obligations under international law. There is also a procedural obligation to inform the Secretary General of the Council of Europe when derogation is made. The ESC establishes a supervisory mechanism guaranteeing their respect by the States Parties, which include two basic elements: the European Committee of Social Rights (a quasi-international Court) and the collective complaints procedure.91

4.2.3. Recommendation Rec (2006)6 CoE

The Committee of Ministers of the Council of Europe noted in 2006 that the “United Nations guiding principles and other relevant international instruments of human rights or humanitarian law” are applicable to displaced persons and recommended that nations should develop measures to ensure their human rights.92

Overall, the recommendation suggests that internally displaced persons must be treated equally, and their rights and freedoms have to be respected as well as given the means to enforce their rights. The Member States are called upon to guarantee these rights and to protect the displaced persons sufficiently.

4.3. National Law of European States

European States are bound by their treaties obligations to protect, respect and fulfil human rights. An essential step in guaranteeing these rights, is ensuring that they are properly protected at national level, in particular through the Constitution and other legislation, and indeed, most European States have their own Constitution with provisions on fundamental rights, which are shaped not only by European Law, but also by constitutional traditions of these States. This is why national Constitutions may also provide additional protection beyond the scope of the European instruments.93 These constitutional provisions and other legislation form a source of fundamental rights protection among European States. A detailed analysis of fundamental right protection in a disaster situation in selected European States will be undertaken in Deliverable 6.2. Apart from this, the responsibility for civil protection rests with the EU Member States. They can adopt their own disaster laws and are responsible for organizing intervention teams.

91 See Chapter 6 below.  
92 Recommendation Rec(2006)6 CoE.  
93 Discussion on national Constitutions and the protection offered by them will be part of D.6.2.
<table>
<thead>
<tr>
<th>Rights related to physical security and integrity</th>
<th>Rights related to basic necessities of life</th>
<th>Rights related to other economic, social and cultural protection needs</th>
<th>Rights related to other civil and political</th>
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<tr>
<td>Human dignity</td>
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<td>Right to life</td>
<td>Right to health care</td>
<td>Right to education</td>
<td>Respect for private and family life</td>
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<td>Right to the integrity of the person</td>
<td>Right to social security and assistance</td>
<td>Freedom to choose an occupation and right to engage in work</td>
<td>Protection of personal data</td>
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<td>Prohibition of torture and inhuman or degrading treatment or punishment</td>
<td>Right to social and medical assistance</td>
<td>Freedom to conduct a business</td>
<td>Freedom of expression and information</td>
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<tr>
<td>Prohibition of slavery and forced labour</td>
<td>Right to housing</td>
<td>Right to property</td>
<td>Freedom of assembly and of association</td>
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<td>Consumer protection</td>
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<td>Right to benefit from social welfare services</td>
<td>Right of the elderly</td>
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<td>Integration of persons with disabilities</td>
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<td>Equality before the law</td>
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<td>Right of persons with disabilities to independence, social integration and participation in the life of the community</td>
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<td>Freedom of movement and residence</td>
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<td>Right to effective remedy and fair trial</td>
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Table 1: A Mapping of European Fundamental Rights against IASC grouping of human rights principles relevant to disaster situations
4.4. Obligation to Prevent, Respond and Investigate Incidents of Disaster under European Law

As indicated in Chapter 3, existing international human rights laws create an obligation on States to take measures that prevent (assuming they are preventable) or mitigate hazards that manifest into disasters. European law also follows a similar approach as shown by decisions of Courts in a number of cases.

4.4.1. Obligation to Prevent Disasters

The obligation to prevent or mitigate disasters has been acknowledged in European law. The ECtHR jurisprudence, for example, shows that this obligation covers not only man-made disasters, but also natural disasters.\textsuperscript{94} The Court has clarified this within the ambit of protection of the right to life, and has ruled that the failure of the State to prevent or mitigate the consequences of foreseeable disasters amount to a violation of the right to life, if such result to the death of victims either from natural hazards,\textsuperscript{95} or from a man-made hazards.\textsuperscript{96}

In \textit{Budayeva v. Russia} involving six applicants who lived in the town of Tyrnauz, situated in the mountain district adjacent to Mount Elbrus in the Republic of Kabardino-Balkariya (Russia) who brought an action against Russia, following the death of several people. They allege that the authorities had failed to heed warnings about the likelihood of a large-scale mudslide that could devastate Tyrnauz in July 2000, to warn the local population, to implement evacuation and emergency relief policies or, after the disaster, to carry out a judicial investigation. The ECtHR found a violation of the right to life, stressing that the duty to protect life entails an obligation on the State to take positive measures to protect people against the dangers of imminent natural disasters.

With respect to man-made disasters, the Court emphasized in \textit{Ӧнeryıldız v. Turkey} that lack of appropriate steps to prevent accidental deaths from man-made disasters amount to a breach of State obligation to protect life. It has to be stressed that violation can also occur even in the absence of death; failure to prevent or mitigation potential risks that threaten life could also amount to a breach of this right.\textsuperscript{97}

\textsuperscript{94} See \textit{Ӧнeryıldız v. Turkey; Budayeva v. Russia}.

\textsuperscript{95} See \textit{Budayeva v. Russia; Kolyadenko and Others v. Russia}.

\textsuperscript{96} See \textit{Ӧнeryıldız v. Turkey}.

\textsuperscript{97} Ibid.
Kälin and Dale (2012) have summarized the State’s obligation to protect life according to the Courts jurisprudence with respect to disasters as implying the following:

1. Enacting and implementing laws dealing with all relevant aspects of disaster risk mitigation and set up the necessary mechanisms and procedures

2. Taking the necessary administrative measures, including supervising potentially dangerous situations

3. Inform the population about possible dangers and risks

4. Evacuating potentially affected populations

5. Conducting and prosecuting those responsible for having neglected their duties in case of deaths caused by a disaster

6. Compensating surviving relatives of victims killed as a consequence of neglecting these duties.98

The ECtHR has also found the obligation to prevent or mitigate disasters with respect to other fundamental rights such as the right to respect for private and family life (Article 8) and the right to property (Additional Protocol 1). In Tatar v. Romania, where the cyanide contamination of some farmlands and river as a result of the activities of a State licensed gold mining company was a violation of the right to private and family life under Article 8 ECHR. A similar breach was found in Lopez Ostra v Spain99 where pollution from a waste treatment plant near the applicant’s home exceeded the permitted limit and could endanger the health of people living nearby the plant. Other instances include: Bacila v Romania;100 Brândușe v Romania;101 Taskin v Turkey,102 etc.

The ECtHR also found violations of Article 2 (right to life), Article 8 (right to respect for private and family life and the home) and Article 1 of Protocol No. 1 (protection of property) of the ECHR in the case of Kolyadenko and Others v Russia. This case was about the complaint by victims of a flash flood in Vladivostok in 2001 who alleged that the authorities were responsible for the flood


100 App. No 19234/04 (ECtHR, 30 March 2010).

101 App. No 6586/03 (ECtHR, 7 April 2009).

102 App. No 46117/99 (ECtHR, 10 November 2004).
because of an urgent massive evacuation of water from the reservoir in order to save the dam from breaking. No emergency warning was given to them before this action and the resultant flooding damaged their homes, even when there had been an expert report warning about the risk. The ECtHR found that there was a clear violation of the State’s responsibility by the authorities failing to apply any town planning restrictions or taking any necessary steps to protect people living in the area. Even when the authorities had been aware of the poor state of the river channel before the flood, they never warned the inhabitants of the area about the flood risks they faced. The Court also found a causal link between the negligence attributable to the State under Article 2 to the damage caused to the applicants’ homes and property by the flood.

4.4.2. Obligation to Respond and Investigate Disasters

Lauta and Rytter (2016) point out that the State’s obligations to respond and to investigate disasters are comprehensive and undisputed under the ECHR as interpreted by the ECtHR.103 Once a disaster is unfolding, they argue, the obligation of the State to protect life seems absolute, irrespective of the source the disaster. At such instance, States are obliged to do everything within theirs power to respond to the disasters and even after disasters have occurred, they are still responsible for establishing an effective enquiry and remedy irrespective of the type of originating hazard.104

The ECtHR jurisprudence buttresses these facts in a number of cases. In Budayeva, the Court noted that the duty to protect entails a corollary duty to provide disaster victims opportunity to seek redress in cases where persons are killed as a consequence of negligence on the part of the authorities.

It has to be noted, however, that in fulfilling their obligations, States are generally allowed a broad margin of appreciation to avoid an impossible or disproportionate burden.105 A State is not required to spend all its resources on disaster prevention, but could prioritize the use of its resources to cater for other competing needs. Lauta and Rytter (2016) also note that “in designing disaster prevention efforts States are presumably allowed to take into account, and to weigh in the balance, other important societal interests or individual rights that might call for less than optimal protection.”106 This approach has been sanctioned by the ECtHR, and the practical effect might be for example that “a scheme for evacuations in disaster situations – providing effective

103 Lauta and Rytter (n 95) 113.
104 Ibid.
105 See Hatton v. United Kingdom App. No 36002/97 (ECtHR, 8 July 2003). The ECtHR opines in Budayeva, (para 135) that this margin is even greater with respect to a meteorological event, which is as such beyond human control.
106 Lauta and Rytter (n 95) 118.
protection of the right to life – may be a disproportionate interference with other Convention rights, for example, the protection of family life and home, the right to free movement or the right to property.”\textsuperscript{107}

\textsuperscript{107} Lauta and Rytter (n 95) 118-119.
5. Privacy, Data Protection and Cultural Rights in Disaster Cases

In Chapter 4 of this report, we looked at the general human rights provisions that are relevant in disaster cases, especially, as grouped by the IASC. This Chapter will specifically address the right to privacy and data protection, as well as cultural rights in disaster circumstances. The choice of these two reflects the objective of the CARISMAND project which aims at developing culturally-informed and privacy-friendly solutions in disaster management.

As indicated in the previous Chapter, some of the fundamental rights have received judicial attention in disaster cases. But recently, discussions relating to privacy, data protection, and cultural aspects have begun to emerge. Issues such as disaster victims’ identification, use of innovative information and communication technologies, drones, etc., have brought attention to privacy and data protection in disaster cases.108

Similarly, researchers have begun to inquire into the impact culture in disaster risk reduction and resilience, and how protecting cultural rights of affected population could enhance their preparedness and recovery.109 At the policy level, the recent Sandai Framework recognises that in disaster situations, “Indigenous peoples, through their experience and traditional knowledge, provide an important contribution to the development and implementation of plans and mechanisms, including for early warning.”110 In the same vein, the Council of Europe’s Ethical Principles on Disaster Risk Reduction and People’s Resilience emphasise “that the human rights of indigenous communities and local populations require special protection, taking account of their customs, cultures and differentiated relations with the environment, which make them more vulnerable to the risks of disaster.”111

As both policy and academic discussions are emerging in these areas, this report aims to throw

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108 Levinson and Domb ‘Disaster Victim Identification and Privacy (n 10); Reidenberg et al, Privacy and Missing Persons after Natural Disaster (n 10); International Conference of Data Protection and Privacy Commissioners Resolution on Data Protection and Major Natural Disasters (n 11); International Conference of Data Protection and Privacy Commissioners Resolution on Privacy and International Humanitarian Action (Amsterdam, 27 October 2015).

109 Krügner et al., Cultures and Disasters: Understanding Cultural Framings in Disaster Risk Reduction (n 10); Hewitt, Culture and Risk: Understanding the Socio-cultural Settings that Influence Risk from Natural Hazards (n 10); IFRC, World Disaster Report 2014 Focus on Culture and Risk (IFRC 2014).

110 UN Sandai Framework (n 49) para 36 (v).

111 Council of Europe, Ethical Principles on Disaster Risk Reduction and People’s Resilience (n 9) 15.
more light on the gaps in the implementation of these rights in disaster settings, and hopes to elicit further discussions among stakeholder on the best avenue to protecting these rights.

5.1. Privacy and Data Protection Rights in Disaster situations

The TFEU provides for the competence of the EU to act in the area of data protection, and rights to privacy and data protection have also been provided for in Articles 7 and 8 of the CFREU respectively. However, the right is not absolute; a limitation could be made under Article 52 of the CFREU subject to the principle of proportionality, if such is necessary and genuinely meets the objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. Similarly, Article 8 of the ECHR provides for a right to respect for private and family life with an exception that it could be derogated from in accordance with the law, when it is necessary in a democratic society for the interests of national security among others. Although disaster situation is not expressly mentioned in the above provisions, such a situation could form the basis for imposing a limitation on the rights where it affects or threatens public safety, health, etc. In fact, there are instances where a state of emergency has been declared as a result of disasters such as in Greece in 2007 following wildfire across most of the Peloponnesus peninsula.

The Data Protection Directive which implements the rights mentioned above does not specifically mention disaster, but some of its provisions suggest that disaster situation could be a valid legal basis for processing personal data for public interest or for protecting the vital interests of the data subject or another person. Article 8 (2) (c) in particular indicates that special categories of data could be processed where it is necessary to protect the vital interests of the data subject or of another person in cases where the data subject is physically or legally incapable of giving his consent. A disaster scenario could be pictured here.

112 TFEU, art 16.
113 EU Humanitarian Aid and Civil Protection department (ECHO), ‘Greece Forest Fires - Summer 2007’ <http://ec.europa.eu/echo/files/civil_protection/forestfires_el_2007.htm> accessed 22 March 2016. Other instances include: Hungary in October 2010 due to a sludge flood caused by an accident in Ajka at the local alumina plant, causing a long lasting natural disaster; Portugal in August 2003 due to forest fires; Slovakia in January 2009 and November 2011 due to a natural gas supply shortage and mass medicare workers resignation respectively.
114 Articles 7 (e), and 8(4))
115 Article 7 (d) and 8 (2) (c ).
The new Data Protection Regulation seems to make an improvement in this area. Recitals 46 and 73 of the Regulation\textsuperscript{116} expressly indicate that a valid ground for processing of personal data or for relying on an exception to the of the rules in the Regulation could be natural or man-made disasters. Recital 46 points out that it shall be lawful to process personal data where it is necessary to protect an interest which is essential for the data subject’s life or that of another person, especially on grounds of public interest such as in humanitarian emergencies like disaster situations. Recital 73 further allows restriction on specific principles and certain rights of the data subject such as the rights of information, access, rectification and erasure or on the right to data portability, the right to object decisions based on profiling, right to the communication of a personal data breach to a data subject, as well as certain obligations of the data controller “as far as necessary and proportionate in a democratic society to safeguard public security, including the protection of human life especially in response to natural or man-made disasters” among others.

A number of provisions the Regulation reflect the above recitals. For example, Art. 6(1) provides that processing of personal data shall be lawful if any of the points stipulated therein apply, including:

- (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

Articles 9(2)(c); 9 (2) (g); and 9(2) (hb) also contain some provision making it lawful to process special categories of data in situations suggestive of disasters.\textsuperscript{117} While this reform is a positive development, some of the practical challenges in the context disaster management such as purpose limitation, data retention, the right to be forgotten, etc., still need to be addressed as discussed below.

5.1.1. Disaster Response Phase and Data Protection

Of all the phases of disaster, the response phase is the most crucial with respect to the privacy and data protection of the victims. It is at this phase that disaster exigencies oblige disaster

\textsuperscript{116} Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

\textsuperscript{117} Particularly, Art. 9 (2) (c ) permits the processing of special categories of data if it is “necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving consent.”
managers to act to save lives and reduce destructions to property where possible. Also at this moment, others who are not traditionally disaster managers could volunteer to assist in various ways, ranging from provision of material assistance to online information. Nowadays, disasters are represented by twitter hashtags, and real-time information could be obtained from social media platforms such as Facebook and Twitter. Pictures, personal data of missing or dead victims, are easily shared on the Internet. In some case, this information is retained or continued to be made public after the disaster has been put under control.

But the important question is to which extent there could be any expectation of privacy in disaster situations against the backdrop that privacy and data protection laws permit a limitation of such rights during such emergencies. This is pertinent because the contours of the limitation to privacy and data protection for the purposes of disaster response and management are hard to pin down. There seems to be no well-defined threshold at the EU level streamlining what is proportional within the operational dimension of disasters. In fact, there have been some instances of confusion as to whether data protection principles should apply in emergency situations. This was the case following the London bombing in 2007. Ambiguity as to the application of the data protect rules at such moment was identified as one of the things that hampered or delayed the connection of survivors to support services.

Furthermore, the deployment of new information technologies in disaster situations such as the use of social media or open source intelligence, drones, etc., have the potential of affecting privacy and data protection. These innovative technologies could potentially lead to an unnecessary intrusion into the privacy of disaster victims or others, or could be used for profiling the disaster-affected community through social media intelligence for instance.

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118 Some platforms such as Usahidi (https://www.ushahidi.com/) are dedicated for disasters management. Traditional disaster and humanitarian platforms such as the Red Cross also have huge presence on the Internet during disasters, and a lot of platforms offer people the opportunity to find missing relatives after disasters such as Google (https://google.org/personfinder/global/home.html); Facebook Safety Check (https://www.facebook.com/about/safetycheck/); Red Cross Restoring Family Link (http://familylinks.icrc.org/en/Pages/home.aspx), etc.


120 Reidenberg et al (n 10).


122 A good example is the use of open source intelligence (OSINT) during the Boston marathon bombing, where two persons where initially named as the bombers as a result of this intelligence which later turned out to be false. See Alexis Madrigal, ‘#BostonBombing: The Anatomy of a Misinformation Disaster’ (The Atlantic, 19 April 2013).
The scenario above raises some issues such as: to what extent should surviving disaster victims or relatives of deceased ones be entitled to a right of erasure or a right to be forgotten after the disaster response has elapsed in view of the statement in Recital 73 of the Regulation which limits such right? To what extent could data obtained for disaster response be used for other purposes such as crime investigation or financial solicitation, and how long should such data be retained? Should there be an obligation on data controllers and processors to censor certain data such as blurring facial images of victims before publication? What balance should be struck so that data protection rules do not hamper the efforts of disaster managers in practice?

Currently, very few guidelines could be cited for disaster managers and humanitarian organisations in this context, and most of them appear to be self-regulatory. The UN High Commissioner for Refugees (UNHCR) has also recently addressed this issue in a policy document. Similarly, the Council of Europe’s Ethical Principles on Disaster Risk Reduction and People’s Resilience partly considers issues of privacy. However, no EU-wide guidelines on the application of data protection in disaster situations exist.

In summary, even though such situations could permit the limitation of these rights, it is arguable that there is still a legitimate expectation of privacy by the victims and their relatives which warrant clear guidelines on how disaster managers should process personal information at the moments of disaster response and recovery. As this issue will have a general implication throughout Europe, it is recommended that the EU either through the European Commission or Article 29 Working Party issues EU-wide guidelines that would circumscribe the application of the limitation to the right to privacy and data protection. This should include clear examples of how to respect privacy and data protection in disaster situations. A similar approach could also be undertaken by the Council of Europe, as this would potentially bolster and strengthen the difficult tasks of disaster managers.

5.2. Cultural Rights and Disasters

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123 See for example, Guidelines for the Use of SMS in Natural Disasters by GSMA (2013); ICRC Professional Standards for Protection Work carried out by humanitarian and human rights actors in armed conflict and other situations of violence (2013 Edition); the Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response (2011). We however recognize the limitation that there may be other documents that are not made public, but only for internal use, as well as those in other languages.


125 Council of Europe (n 9).
Several international legal instruments contain references to cultural rights as could be found in the Universal Declaration of Human Rights (UDHR), the International Covenant on Social, Economic and Cultural Rights (ICSECR), the African Charter on Human and Peoples’ Rights (ACHPR), the American Declaration of the Rights and Duties of Man (ADRDM), the CFREU, etc. But there is no universally accepted definition of the term "culture". As rightly indicated by the International Federation of the Red Cross and Red Crescent Societies (IFRC) in its 2014 World Disaster Report, “Culture is complex and difficult to understand.” And as such, it poses some definitional problems because culture encompasses beliefs, attitudes, values and behaviours which differ from people to people and from place to place.

Notwithstanding this barrier, however, some attempts have been made at defining the term. The UNESCO Universal Declaration on Cultural Diversity states:

[...] culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.

A similar definition could be found in the Fribourg Declaration on cultural rights. Deer (2001) has however questioned such restrictive definitions, pointing out that from an indigenous point of view, culture is holistic – “comprising all aspects of life such as territories, traditional knowledge (including historic, technical, agricultural, biological, medicinal and other knowledge, but also “cultural expressions” such as music, arts and architecture), philosophic and spiritual concepts, customary law, medicine and healing arts, material expressions and so forth.” This raises an important question as to whether each and every human rights topic includes a cultural dimension.

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126 UDHR, art 27.
127 ICSECR, art 15.
128 ACHPR, arts 17 and 22.
129 ADRDM, art 13.
130 CFREU, art 22.
131 IFRC, World Disaster Report 2014 Focus on Culture and Risk (n 110) 19.
133 “The term ‘culture’ covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and the meaning they give to their existence and to their development.” Fribourg Declaration on Cultural Rights (2007) <http://www.culturalrights.net/descargas/drets_culturals377.pdf> accessed 12 April 2016.
While an analysis of all cultural dimensions and their relationship with human rights is beyond the scope of this report, it is, however, noteworthy that a complex relationship exists between culture and human rights. This relationship also includes some area of tension between certain cultural practices which may clash with human rights.\textsuperscript{135} Although some propositions tend to see culture from a broader perspective and as an integral part of human rights, which is universal, indivisible and interdependent,\textsuperscript{136} there is as well, no universally accepted legal definition of cultural rights. Rather, high-level descriptions of what is referred to as “cultural rights” exist in various legal documents as mentioned above.

In Europe, the idea of cultural diversity is cherished, and as such no harmonization has been made in this area. Thus, unlike the right to data protection which has a granular definition, with boundaries for its application and enforcement (as seen in the Data Protection Directive and its national implementations), no similar approach exists in the area of cultural rights. References to culture for instance, as made in Articles 3 and 6 of the TEU, Article 167 of the TFEU and Article 22 of the Charter were made to encourage the Union to respect and safeguard its rich cultural and linguistic diversity. In this respect, the contours of this right are be blurred in many circumstances.

For example, it may not be immediately clear what cultural practices should be incorporated into disaster management framework, as well as how to deal with certain cultural practices that cause or increase vulnerability to disasters. Regarding culture and disaster risk management, the IFRC observes:

\begin{quote}
Culture consists of beliefs, attitudes, values and their associated behaviours, that are shared by a significant number of people in hazard-affected places. Culture in relation to risk refers to the ways that people interpret and live with risk, and how their perceptions, attitudes and behaviour influence their vulnerability to hazards.\textsuperscript{137}
\end{quote}

Although some soft law instruments on disaster management consider cultural aspects, how to reflect this in practical terms is still a subject of discussion. The Hyogo framework, for example, states that “Cultural diversity, age, and vulnerable groups should be taken into account when planning for disaster risk reduction, as appropriate.”\textsuperscript{138} Similarly, the Operational Guidelines on Internally Displaced Persons provides: “Protection activities should be carried out in a manner that respects the cultural sensitivities prevailing in areas affected by the disaster, [provided] that they do not contravene existing international human rights standards.”\textsuperscript{139}

\textsuperscript{135} Ibid.
\textsuperscript{136} UNESCO Universal Declaration on Cultural Diversity (2001) art 5.
\textsuperscript{137} IFRC (n110) 14.
\textsuperscript{139} IASC (n ) 12
These show that cultural rights are not absolute. Cultural relativism, for instance, cannot be used as an excuse to violate or deny human rights. Where cultural rights potentially conflict with other rights, the right balance ought to be struck which would be in favour of protecting international human rights standards, and this may be a very difficult task in some cases.¹⁴⁰

In a number of instances too, cultural right is seen as inextricable part of other rights such as the right of minorities, the right of indigenous people, freedom of religion, etc., and cannot be completely guaranteed in isolation of these other rights. The International Covenant on Civil and Political Rights (ICCPR) recognises this intricate relationship and attempts to balance it thus: “in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”¹⁴¹

This brings to the fore the collective dimension of cultural rights, especially, minority rights¹⁴² and the rights of indigenous people, and how they should be protected in disaster scenarios. The UNHCR Emergency Handbook observes:

> Ethnic, religious and linguistic minorities and indigenous peoples are often overlooked in an emergency response, because humanitarian actors are not aware of their presence, and their possible weak socio-economic position, and their possible marginalization in the country of origin.¹⁴³

It further adds that “minorities may lose important elements of their cultural identity if they are separated by displacement. This can be particularly harmful to people who have experienced distressing events or must adjust to new surroundings”¹⁴⁴ As a safeguard measure, the Handbook stipulates the following protection objectives which should guide humanitarian assistance in emergency situations:

i. To ensure that minorities and indigenous peoples do not suffer discrimination and participate fully in decisions that affect them.

¹⁴⁰ See, Deer (n 146).
¹⁴¹ ICCPR, art 27.
¹⁴² The UNHCR define minority thus: “A minority is an ethnic, religious or linguistic group, significantly fewer in number than the rest of the population, whose members share a common identity. Members of minorities also commonly share ethnic, religious, linguistic or cultural characteristics that differentiate them from the majority, and they generally seek to maintain these distinguishing identities. At the same time, the characteristics that define minorities vary widely from one context to another.” UNHCR, “Ethnic, Religious and Linguistic Minorities and Indigenous Peoples’ (Emergency Handbook 4th Ed.) <https://emergency.unhcr.org/entry/44032/ethnic-religious-and-linguistic-minorities-and-indigenous-peoples> accessed 22 April 2016.
¹⁴³ Ibid, point 1.
¹⁴⁴ Ibid, point 4.
ii. To ensure that all aspects of a response take into consideration the specific needs and capacities of minorities and indigenous peoples.

iii. To affirm that minorities and indigenous peoples have the right to define themselves as belonging to a certain minority or indigenous people or not to do so. It is for persons of concern to decide whether it is safe to be open about their minority or indigenous status.\textsuperscript{145}

In Europe, a number of documents that refer to minority rights exist, even though they were not drafted in the context of disasters. For instance, the Council of Europe Member States in 1995 concluded a Framework Convention for the Protection of National Minorities (FCPNM).\textsuperscript{146} Article 1 of the FCPNM provides: “The protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.” Similarly, the EU explicitly recognises as one of its values in Article 2 of the TEU, the respect for the rights of persons belonging to minorities. Particularly, the CFREU prohibits discrimination on the basis of membership of a national minority,\textsuperscript{147} and EU institutions and the Member States are therefore obliged when implementing EU law to respect the principle of non-discrimination.

The question then is to what extent are cultural rights protection reflected in EU civil protection mechanisms? While the respect for cultural diversity and heritage is part of the hallmark of Europe, there seems to be no articulated policy on how this translates in disaster situations. However, Decision No 1313/2013/EU provides, “The protection to be ensured by the Union Mechanism shall cover primarily people, but also the environment and property, including cultural heritage, against all kinds of natural and man-made disasters […]”\textsuperscript{148} And one example of how this is realized is in the EU funding of certain projects that aims at protecting cultural heritage such as the Protecting Mediterranean Cultural Heritage during Disasters project (PRO MED HE).\textsuperscript{149} The project will develop and test common specialised civil protection capacities to be activated in case of need to protect the affected population and ensure the conservation of common heritage, as well as elaborate on Standard Operating Procedures (SOPs) for the

\textsuperscript{145} Ibid, point 2.


\textsuperscript{147} CFREU, art 21.

\textsuperscript{148} Decision No 1313/2013/EU on a Union Civil Protection Mechanism, art 1.

safeguarding of cultural heritage at national and regional levels based on national, European and international standards.\textsuperscript{150}

\footnotesize\textsuperscript{150} Alessandro Candeloro and Irene Zucconi, ‘Protecting Mediterranean Cultural Heritage During Disasters (PROMEDHE)’ presentation made at the project kick-off meeting in Brussels on 20 January 2016.

6.1. Enforcement of Fundamental Rights by EU Institutions

One of the values upon which the EU is founded is respect for human dignity and human rights, and as a cardinal principle of EU law, EU institutions and the Member States must respect these rights when implementing Union law. Article 7 TEU grants EU institutions the possibility to monitor and safeguard compliance of Article 2 TEU principles by the Member States.151 The mechanism in Article 7 TEU provides that on a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four-fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Evidence suggests that this mechanism has not been used since its inclusion in the Treaty.152

Fundamental rights also come into play in EU legislation in any other domain of EU competence. So when the EU institutions are initiating new legislation, they consider the fundamental rights implications. We will look at measures taken by these institutions that are aimed at strengthening fundamental rights, including a wide range of policy initiatives.

6.1.1. The European Commission

In 2010, the European Commission outlined its strategy for effective implementation of the

151 European Parliament, ‘The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU Towards an EU Copenhagen Mechanism’ (2013) 7
152 Ibid.
This strategy shows mechanisms through which fundamental rights could be implemented by the Commission as the guardian of the Treaties apart from the mechanism provided for in Article 7 TEU. Importantly, the Commission routinely checks its legislative and non-legislative proposals to ensure that they are compatible with the CFREU, including ex-post evaluation of Union instruments. The Commission also ensures that Member States respect the CFREU when implementing Union law through two approaches. First is a prevention approach where the Commission could remind authorities responsible for transposing legislation on the obligation to comply with the Charter. The other approach is a reactive approach where the Commission could initiate an infringement procedure against a Member State before the CJEU for failure to fulfil an obligation to respect fundamental rights when implementing Union law.\textsuperscript{154}

The European Commission also has an awareness framework for informing citizens about their fundamental rights and how they can enforce it. A good example is the e-justice portal of the Commission which is accessible in all the EU languages, and includes a section on fundamental rights.\textsuperscript{155} There is also an information and training programme targeted at legal professionals and judicial authorities.\textsuperscript{156} The Commission further publishes an annual report on the application of the Charter.\textsuperscript{157}

Furthermore, European citizens could write to the European Commission or to the other EU institutions in any language of the Union and expect reply under Article 24 TFEU.

\subsection*{6.1.2. The European Parliament}

The European Parliament also attaches great importance to fundamental rights, and through its legislative processes has ensured that fundamental rights are respected and implemented in the EU. Among others things, it had passed several resolutions on fundamental rights in the Union.\textsuperscript{158} It also ensures that legislation it passes respects fundamental rights.

\begin{footnotesize}
\begin{itemize}
\item[154] Ibid, 9-10.
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As well, European citizens have the right to petition the European Parliament and the right to apply to the Ombudsman appointed by the European Parliament concerning instances of maladministration in the activities of the Union institutions or bodies under Article 24 TFEU.\footnote{See also TFEU, arts 227 and 228.}

6.1.3. The Council of the EU

Like the other institutions of the EU, the Council also takes fundamental rights serious, and has among other measures adopted methodological steps necessary to identify and deal with fundamental rights issues arising in connection with proposals under discussion at the relevant Council preparatory bodies.\footnote{Council of the European Union, \textit{Fundamental Rights Compatibility Guidelines for Council Preparatory Bodies} (2015).} The Council also has a Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP). Citizens can also write to the Council under Article 24 TFEU.

6.1.4. The European Union Agency for Fundamental Rights

The European Union Agency for Fundamental Rights was established in 2007 with the specific task of providing independent, evidence-based advice on fundamental rights to the institutions of the EU and the Member States.\footnote{Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, art 2.} It is one of the EU’s specialised agencies, responsible for advice on fundamental rights.\footnote{<http://fra.europa.eu/en> accessed 1 May 2016.} The Agency, however, does not have the mandate to receive individual complaints from citizens, but rather plays an administrative role in proactively monitoring fundamental rights issues within the EU.\footnote{Alicia Hinarejos ‘A Missed Opportunity: The Fundamental Rights Agency and the Euro Area Crisis’ (2016) 22 \textit{European Law Journal}, 61.} It also cannot make a binding decision, and no evidence could be found that suggests that the Agency has given any advice concerning fundamental rights in disaster situations.

6.1.5. The Court of Justice of the European Union (CJEU)

The Court of Justice of the European Union (CJEU) has long emphasized the need to respect fundamental rights while interpreting the provisions of the Treaties, the CFREU, international
conventions, and fundamental rights as they result from the constitutional traditions common to the Member States.

The Court has the jurisdiction to hear cases where individuals or businesses consider that an act of any EU institutions directly affecting them violates their fundamental rights as enshrined in the Charter. Such parties can bring their case before the CJEU for a review of the complained action, and the Court has the power to annul it if it violates the Charter. The CJEU examines not only the compatibility of EU legislation and action with fundamental rights, but also the compatibility of measures taken at national level by the Member States.

With respect to EU legislation, some important decisions have been handed down by the CJEU annulling legislation for the reason that it breached fundamental rights. In Digital Rights Ireland, for instance, the Court ruled that the Data Retention Directive violated the principle of proportionality when limiting fundamental rights to privacy and data protection as provided for in Articles 7 and 8 of the CFREU, thereby annulling the Directive. A similar decision was reached in Schecke, where the Court annulled certain EU rules providing for the annual ex-post publication of the names and amounts received by beneficiaries of the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD). This was again on the ground that such violated privacy and data protection as provided for in the Charter. The CJEU also partially annulled another EU measure dealing with insurance services on account of discrimination between women and men, in violation of Articles 21 and 23 of the Charter in the Test-Achats. Regarding the Data Protection Directive, the CJEU clarified that a data controller has an obligation to respect EU data protection laws and to comply with requests to remove links to personal data under certain circumstances – Google case. Although this case was not decided in the context of disaster management, it provides a good authority for measuring what the attitude of the Court might be in similar cases.

Furthermore, where a national court has doubts as to the applicability of the Charter or the correct interpretation of its provisions, it can refer the case to the CJEU for a preliminary ruling. For instance, the Dutch Council of State referred the case A, B, C v Staatssecretaris van Veiligheid en Justitie concerning the interpretation of EU provisions on asylum in relation to the methods by which national authorities may assess the credibility of the declared sexual orientation of applicants for asylum. The CJEU in its ruling also emphasized on the need to respect fundamental rights - human dignity, private and family life in such cases.

164 Joined Cases C-293/12 and C-594/12 (CJEU, 8 April 2014).
165 Joined Cases C-92/09 and C-93/09 (CJEU, 9 November 2010).
166 Case C-236/09 (CJEU, 1 March 2011).
167 Case C-131/12 (CJEU, 13 May 2014).
168 Joined Cases C-148/13 to C-150/13 (CJEU, 2 December 2014).
6.2. Enforcement by Council of Europe’s Institutions

6.2.1. The European Court of Human Rights (ECtHR)

In addition to the EU mechanism described above, all EU Member States as well as others who are non-EU members are bound by their commitments under the ECHR, independent of their obligations under EU law as indicated in the Charter. The ECtHR is the judicial body of the Council of Europe for enforcing the rights enshrined in the ECHR. Cases can be brought directly by individuals or the Member States who believe their rights have been violated. But individuals can only resort to the Court after exhausting all national legal remedies.

As shown in Chapter 4, the ECtHR has given some remarkable decisions on the protection of human rights in the context of disasters. A few other cases could be highlighted further here to show the attitude of the Court in keeping the Convention alive and protecting the rights therein in appropriate circumstances. In Kolyadenko and Others v. Russia, the ECtHR found violations of the right to life, right to respect for private and family life and the home, and right to the protection of property under the ECHR and its Protocol. This was about the complaint by victims of a flash flood in Vladivostok in 2001 who alleged that the authorities were responsible for the flood because of an urgent massive evacuation of water from the reservoir in order to save a dam from breaking. No emergency warning was given before this action, and the resultant flooding damaged homes. Criminal investigations as a result of the flood were discontinued, and several civil proceeding against the region and city authorities by the victims yielded no positive results, except for small sums of money in extra-judicial compensation for the losses sustained as a result of the flood. Meanwhile, an expert report noted that the main reason for the flood had been the fact that the channel of the Pionerskaya River was overgrown with trees and bushes, and littered with household waste. The report also noted that under the relevant regulations no construction should have been allowed in the area downstream of the reservoir without measures to protect the area from flood.

The ECtHR found that there was a clear violation of the State responsibility by the authorities for failing to apply any town planning restrictions or taking any necessary steps to protect people living in the area, even when they were aware of aware of the poor state of the River channel before the flood. They never warned the inhabitants of the area about the flood risks they faced. As a result, the Court also found a causal link between the negligence attributable

169 App. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (ECtHR 28 February 2012).
to the State under Article 2 to the damage caused to the applicants’ homes and property by the flood.

Özel and Others v. Turkey\(^{170}\) also provide evidence of the Courts attitude towards protection of human rights in disasters. In this case, the ECtHR equally found a violation of the right to life following the death of the applicants’ family members, who were buried alive under buildings that collapsed in the town of Çinarcık – located in a region classified as “major risk zone” on the map of seismic activity – in an earthquake on 17 August 1999, one of the deadliest earthquakes ever recorded in Turkey. The Court found in particular that the national authorities had not acted promptly in determining the responsibilities and circumstances of the collapse of the buildings which had caused the deaths.

6.2.2. The Commissioner for Human Rights (CHR)

The Council of Europe’s Commissioner for Human Rights is a non-judicial independent official whose role is to promote education in, awareness of and respect for human rights in the Member States. The mandate of the Commissions according to the Resolution establishing the office include among others to:\(^{171}\)

a) foster the effective observance of human rights, and assist member states in the implementation of Council of Europe human rights standards;

b) promote education in and awareness of human rights in Council of Europe member states;

c) identify possible shortcomings in the law and practice concerning human rights;

d) facilitate the activities of national ombudsperson institutions and other human rights structures; and

e) provide advice and information regarding the protection of human rights across the region.\(^{172}\)

It has to be noted that the Commissioner is not authorized to decide individual complaints. Although the Commissioner may receive information related to specific violations, the office is not a judicial body and cannot make any decisions with respect to such allegations. The

\(^{170}\) App. Nos. 14350/05, 15245/05 and 16051/05 (ECtHR 17 November 2015).

\(^{171}\) Resolution (99) 50 on the Council of Europe Commissioner for Human Rights (adopted by the Committee of Ministers on 7 May 1999).

Commissioner has on several occasions issued opinions and recommendations on human rights issues,\textsuperscript{173} and has also referred cases to the ECtHR.\textsuperscript{174}

\subsection*{6.2.3. European Committee of Social Rights (ECSR)}

ECSR is an independent quasi-judicial body which interprets the rights enshrined in the European Social Charter. It has a monitoring function. Every year the States Parties submit a report indicating how they implement the ESC in law and in practice which the ECSR examines and decides whether or not the situations in the countries concerned are in conformity with the Charter. These decisions are published yearly.\textsuperscript{175}

The ECSR uses a powerful legal tool of monitoring known as the collective complaints procedure. Under the 1991 protocol, national and international organisations, such as trade unions, employers’ organisations and international NGOs may lodge complaints; individuals may not do so directly. There is also an opportunity for certain International Non-Governmental Organisations to lodge collective complaints.\textsuperscript{176}

In conclusion, it is arguable that Europe has a high standard in terms of the protection of human rights. The mechanisms indicated above that are geared towards enforcement of these rights give the citizens a strong position in the legal system. With independent institutions and strong Courts that monitor compliance of human rights, the European fundamental rights framework appears strongly guarded than in some other regions of the world. However, there may be a need for citizen education, as the complexity of the system may confuse those who are not well-informed in this area. Additionally, as history has shown, the promptness of some State in enforcing these rights are not always guaranteed due to political and economic components which are beyond the scope of this report.

\footnotesize\textsuperscript{173} For example, Recommendation of the Commissioner for Human rights on the Implementation of the Right to Housing, CommDH(2009)5.
\footnotesize\textsuperscript{174} See Lopez Ostra v. Spain
\footnotesize\textsuperscript{175} <http://www.epha.org/spip.php?article5909> accessed 1 May 2016.
\footnotesize\textsuperscript{176} The following organisations are allowed to lodge a complaint to the ECSR:
\begin{enumerate}
\item The European Social Partners: European Trade Union Confederation (ETUC) for employees, Business Europe and International Organisation of Employers (OIE) for employers;
\item certain international non-governmental organisations (INGOs) holding participatory status with the Council of Europe
\item Social partners at national level
\end{enumerate}
6.3. Mechanisms Aimed at Preventing, Mitigating and Responding to Disasters

At the European level, various measures have been implemented that aim at preventing, mitigating and responding to disasters. As will be shown below, these range from enacting legal instruments to providing infrastructure.

6.3.1. Legal Instruments

The TFEU gave the EU the competence to carry out action in the area of civil protection, and establishes a solidarity spirit between the EU and its Member States to act in cases of disaster. Against this background, various secondary legislation has been made with respect to disaster management in order to give these provisions effect. These include for example:

1. Council Regulation (EU) 2016/369 on the provision of emergency support within the Union;
2. Regulation No 375/2014 of the European Parliament and the Council on establishing the European Voluntary Humanitarian Aid Corps (‘EU Aid Volunteers initiative’);
5. Regulation (EC) No 1257/96 concerning humanitarian aid;
6.3.2. Scientific Research Funding

The EU aims to ensure an effective civil protection but this could only be achieved if the problems are tackled before they occur. Against this background, the EU funds research projects to be prepared for and possibly to prevent disasters, and has established numerous institutions and workgroups to reach this goal. This funding is organised in different stages. On the one hand is the DG ECHO which is responsible for disaster cases, and which funds a lot of projects under its responsibility.177 On the other hand is the central EU Joint Research Centre (JRC), which is an independent “science and knowledge service” for the EC.178 In 2015, another research centre which is part of the JRC was found, the Disaster Risk Management Knowledge Centre (DRMKC). The Research Center is to combine the resources in the field of civil protection research in order to be better prepared for disasters.179 As reported in a 2015 factsheet, the EU spent more than 47 Million Euro in 132 projects on disaster prevention and preparedness since 2007.180

6.3.3. Infrastructure Development and Civil Protection Mechanism

The EU has a strong Civil Protection Mechanism (CPM) for the delivery of civil protection assistance during the immediate phase of a disaster.181 By virtue of its competence under the primary law,182 the EU established in 2001 the first CPM and the current EU CPM was introduced in 2013. The CPM aims to strengthen the cooperation between the Union and the Member States as well as to facilitate coordination in the field of civil protection in order to improve the effectiveness of the systems for preventing, preparing for and responding to natural and man-made disasters.183

The mechanism includes various measures:184

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179 http://drmkc.jrc.ec.europa.eu/overview/About-the-DRMKC.
180 European Commission, (n 177).
182 See TFEU, arts 6 and 196, which give the EU a supporting, coordinating and complementary competence in disaster cases and art 222, which provides that the Member States act in a spirit of solidarity.
183 Decision No. 1313/2013/EU on a Union Civil Protection Mechanism.
- Training and Workshops for intervention teams\textsuperscript{185}
- Coordination of available intervention teams\textsuperscript{186}
- Coordination of in-kind assistance, deployment of specially-equipped teams\textsuperscript{187}
- Assessment and coordination by experts sent to the field\textsuperscript{188}

The Emergency Response Coordination Centre (ERCC) is the main operational tool of the EU CPM whose main goal is to facilitate co-operation in civil protection assistance interventions in the event of major emergencies.\textsuperscript{189}

With respect to adopting a rights-based approach in the CPM, although the legislation on CPM declares that the protection to be ensured by the Union Mechanism shall cover primarily people, there is no elaboration on the human rights dimension in that Decision. However, policy document of the ECHO indicates that DG ECHO promotes a people-centred approach to disaster risk reduction. Special attention is given to promoting gender equity and the full participation of vulnerable groups including boys and girls, older people, people with disabilities, and other marginalised groups.\textsuperscript{190} Similar statement is found in the European Commission’s Communication on the post-2015 Hyogo Framework for Action: Managing risks to achieve resilience: “Involvement of relevant actors and communities in decision-making processes should be ensured through inclusive participatory mechanisms and the promotion of a right-based approach”\textsuperscript{191} A more specific provision is however found in the Directive on the assessment and management of flood risks.\textsuperscript{192} It states in its preamble that the Directive respects the fundamental rights and observes the principles recognised in particular by the CFREU.\textsuperscript{193} Similar remarks can be found in the recitals of the Council Regulation of Emergency Support,\textsuperscript{194} and the Regulation on

\textsuperscript{185} See Art. 13 of Decision No. 1313/2013/EU on a Union Civil Protection Mechanism.
\textsuperscript{186} Art 8 of Decision No. 1313/2013/EU on a Union Civil Protection Mechanism.
\textsuperscript{187} European Commission, (no 181).
\textsuperscript{188} Ibid.
\textsuperscript{190} Ibid.
\textsuperscript{192} European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions The post 2015 Hyogo Framework for Action: Managing Risks to Achieve Resilience, COM (2014) 216 final, 8.
\textsuperscript{194} Ibid.
\textsuperscript{194} Council Regulation (EU) 2016/369 of 15 March 2016 on the Provision of Emergency Support within the Union.
the European Voluntary Humanitarian Aid Corps. These regulations are addition to the EU’s CPM and altogether provide an effective protection of fundamental rights.

6.3.4. Compensation and Solidarity Policy

The humanitarian tragedies such as disasters cause significant financial damage, and at such times, the Member States have a duty of solidarity. As a compensatory measure, the EU Solidarity Fund was established in the Year 2002. The fund grants financial aid when serious repercussions on living conditions, the natural environment or the economy occur in one or more regions of a Member State. Funding is primarily intended to restore infrastructure, to build temporary shelters, and to support the population.

Another compensation tool is disaster insurance. However, the insurance options available in the Member States are fragmented – it is mandatory and/or States coordinated in some States while not so in other States.

The EU guidelines on the insurance of disaster damage relate mainly to the financial aspects of reparation. The requirements arise from different Directives and the EU’s Green Paper on the insurance of natural and man-made disasters. The EU obliges the Member States to ensure that affected victims are compensated.

However, a compulsory insurance against disasters is not stipulated by the EU. This procedure has been criticized. So the State has on one side an insurance monopoly and is therefore exposed to high financial risks, on the other side, the people do not have the incentive to voluntarily insure themselves and carry out preventive measures against possible disasters (moral hazard).

In conclusion, there are compensation tools available, but it is doubtful whether they are

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196 TFEU, art. 222.
sufficient. At present mainly financial compensations are provided, primarily borne by the State. It may rather be more effective to combine the insurance and disaster prevention policy to support disaster risk reduction.  

6.3.5. Disaster Risk Reduction Policy

The disaster risk reduction (DRR) is a key factor in the EU’s disaster policy. The authorities have recognized that holistic disaster preparedness is indispensable and saves lives, livelihoods and reduces the economic damage. The EU is making its own efforts in DRR and is part of international networks for DRR.

The DG ECHO runs a programme called Disaster Preparedness ECHO Programme (DIPECHO), which provides global programmes to increase communities’ resilience and reduce their vulnerability. The programme is people-oriented and will help communities prepare for known disaster risks. Therefore, professionals are being trained, regional early warning systems are introduced and these help in emergency preparation plans.

Furthermore, the EU is part of the post-Hyogo-Framework, the Sendai Framework. While the Hyogo Framework was primarily designed to reduce disasters, the Sendai Framework pursues a proactive risk management in order to limit the impact of disasters. The current efforts are focused primarily on the reduction of global disaster mortality, of the number of affected people, of direct economic disasters losses and of disaster-related damage on critical infrastructures. It is hoped that the Framework will lead to an increase in the number of States with DRR strategies, enhance international cooperation and improve access to early warning systems and disaster risk information.

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205 SENDAI Framework (n 53).
7. Conclusions and Recommendations

This deliverable has in the main, shown how human rights and disasters/disaster management interact, especially in terms of how international, regional and national human rights laws could be activated to assist disaster victims and the affected community. Indeed, the plurality of sources of fundamental rights protection could be complex for the ordinary citizen to understand, and may be confusing for those who are not educated in legal affairs. Especially, as human rights were made to apply in all circumstances, which meant that no specific elaboration of these rights was made in major human rights instruments particularly for disasters. The complexity of the multiple sources has necessitated efforts at identifying specific rights which are relevant in disaster situations (as not all rights may be equally important at such intricate moments).

Nonetheless, international awareness towards a disaster response law is emerging, and at least two human rights instruments (the Convention on the Rights of Persons with Disabilities (2006) and the African Charter on the Rights and Welfare of the Child Convention on the Protection of Persons with Disabilities (1990)), now explicitly mention disaster situations. However, as shortcomings from States obligations to protect, fulfil and respect human rights are re-evaluated after disasters strike, it is equally important to educate citizen about their legal rights even at such emergencies.

European citizens and residents also enjoy human rights (or fundamental rights as it is used in the EU), not only as a result of the obligations their State incurred by partaking in international treaties that promote human rights, but also as a result of the regional and national obligations which apply to European States by virtue of the CFREU, ECHR, ESC, and constitutional provisions that protect fundamental rights. As indicated in this report, these rights could be sufficiently mapped against the IASC grouping of rights relevant in disaster scenarios, and arguably, Europe is not lacking legal sources of rights in this respect. Importantly, the CJEU and the ECtHR have interpreted and enforced these provisions in a forward-looking manner (including disaster cases), that give citizens the opportunity to seek redress when their rights are violated, even in emergency moments. However, not all the foreseeable instances of violation of rights in disaster situations have come before these Courts. As it appears, no cases related to violation of data protection and cultural rights in disaster contexts could be found so far, but potential instances of such scenarios could be seen in the literature.

In the same vein, the European operational mechanisms for disaster prevention and response appear to be strong, ranging from funding research to infrastructural development. However,
there seems to be no articulated policy in terms of incorporating a right-based approach in all the phases of disaster management. Only isolated references to rights protection could be found. While this does not mean that fundamental rights are ignored by disaster managers (and indeed, as it appears, no such cases have been brought before the European regional courts against any disaster management institution), it is desirable for a concrete policy to be seen in this area, as this will further guide disaster managers in developing a human rights culture in their operations. Such a policy guideline could be encompassing, including issues such as privacy and data protection in disaster response and recovery phases, and how to incorporate and observe cultural rights and practices as well.

Against this background, the following recommendations are made:

1. EU-wide guidelines that circumscribe the limitations of privacy and data protection rights in the context of a disaster should be considered and issued by the European Commission. Such guidelines could originate from the Commission or the new European Data Protection Board that will replace the Article 29 Working Party. Such a guideline would be necessary, especially, within the legislative competences of the European Union, for the operational aspects of disaster management.

2. Apart from a specific guideline on privacy and data protection, a concrete overarching policy on rights-based approach in the operational dimension of disaster management in Europe should be developed. Such a policy should show use-case based examples of good practices and practical guidelines as seen in the IASC operational guidelines, and should include issues on how to implement cultural rights in disaster management operations.

3. As the trend is now moving towards paying specific attention and explicit recognition of disaster victims rights, an action point for the European Union Agency for Human Rights as well as the Council of Europe’s Commissioner for Human Rights will be to give an opinion on disasters and fundamental rights in Europe. This will afford future opportunities to consider including specific provisions concerning human rights of disaster victims when amending any of the major European human rights instruments.

4. The complexities of human rights sources and their implementation in disaster situations mean that citizens’ education and awareness campaign should be a continuous process. It is recommended that the EU provides detailed information e.g. online with the theme of human rights and disasters. This could be complemented by citizens’ summit to be constantly organized across Europe, where citizens would be exposed to the legal framework as it related to civil protection, human right, and disaster management.
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