Data Protection and Humanitarian Emergencies

Fred H. Cate  
*Indiana University Maurer School of Law, fcate@indiana.edu*

Christopher Kuner  
*Brussels Privacy Hub*

Dan Jerker B. Svantesson  
*Bond University*

Orla Lynskey  
*London School of Economics*

Christopher Millard  
*Cloud Legal Project*

Follow this and additional works at: [https://www.repository.law.indiana.edu/facpub](https://www.repository.law.indiana.edu/facpub)

Part of the Information Security Commons, International Humanitarian Law Commons, and the National Security Law Commons

**Recommended Citation**  
Cate, Fred H.; Kuner, Christopher; Svantesson, Dan Jerker B.; Lynskey, Orla; and Millard, Christopher, "Data Protection and Humanitarian Emergencies" (2017). *Articles by Maurer Faculty*. 2644.  
[https://www.repository.law.indiana.edu/facpub/2644](https://www.repository.law.indiana.edu/facpub/2644)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.
Data protection and humanitarian emergencies

Christopher Kuner*, Dan Jerker B. Svantesson**, Fred H. Cate***, Orla Lynskey*** and Christopher Millard***

Data protection can play a crucial role in humanitarian action, meaning assistance, relief, and protection operations in response to a humanitarian emergency (in particular arising out of armed conflicts or natural disasters) that poses a critical threat to the health, safety, security or well-being of a community or other large group of people over a wide area. This is the subject of the Handbook on Data Protection in Humanitarian Action published jointly in June 2017 by the International Committee of the Red Cross (ICRC) and the Brussels Privacy Hub (BPH) of the Vrije Universiteit Brussel (VUB), and available for free download1 (in the interest of full disclosure, we should mention that Christopher Kuner is director of the BPH and was one of the co-editors of the Handbook). The Handbook illustrates a number of important issues about the implementation of data protection in humanitarian emergencies, and the balance to be struck between data protection and other important values.

Humanitarian organizations (including international organizations, governmental entities, NGOs, and others) work in emergency situations to protect refugees, asylum-seekers, returnees, stateless persons, internally displaced people, and other highly vulnerable individuals. They increasingly need to process large amounts of personal data for activities such as protection monitoring, provision of assistance, voluntary repatriation, restoring family links, and resettlement. At the same time, pressure is growing for them to process and share personal data, because of factors such as the need to deliver more sophisticated forms of assistance, cooperation with the private sector, and the development of technology. Law enforcement and national security authorities also routinely press humanitarian organizations to grant them access to the data they hold.

All these factors have made compliance with data protection principles, and specific legal requirements where applicable, an essential element of the protective mandate of humanitarian organizations, that need to perform their functions while protecting the personal data they process. Many humanitarian organizations are desperate for guidance on how to implement data protection in their operations, since disclosure or misuse of the data that they process may create risks for the security and lives of the vulnerable individuals they assist and for their own employees and contractors. In the context of humanitarian action, data protection can literally be a matter of life and death.

Producing data protection guidance for use in humanitarian emergencies requires bringing together the data protection and humanitarian worlds, which have traditionally had little contact with each other. In order to bridge these two worlds, the Handbook was drafted in a process of intensive consultation between actors in both communities. Besides the ICRC and BPH, the drafting committee included organizations such as the Swiss Data Protection Authority; the European Data Protection Supervisor; the French-speaking Association of Data Protection Authorities (AFAPDP); the UN High Commissioner for Refugees (UNHCR); the International Organisation for Migration (IOM); and the International Federation of Red Cross and Red Crescent Societies (IFRC). In addition, participants from academia, the private sector, and NGOs from around the world were also involved.

Implementing data protection in humanitarian action requires guidance on issues such as the identification of suitable legal bases for data processing; the data protection rights of individuals; the accountability of data controllers for responsibilities such as data security; the use of data protection impact assessments; and international data sharing. It is also necessary to deal with data protection issues that arise in the context of specific new technologies that are increasingly used in the context of humanitarian action, such as data analytics and

* Editor-in-Chief.
** Managing Editor.
*** Editor.

'Big Data'; drones and remote sensing; biometrics; cash transfer programming; cloud services; and mobile messaging apps.

Humanitarian organizations typically operate across multiple continents. They often work in situations where there may be no rule of law, and only limited, if any, access to justice, and where data protection law may be embryonic, non-existent, or not entirely enforceable. While privacy is recognized in international human rights law, data privacy or data protection is of more recent vintage and is not explicitly mentioned in the main international human rights treaties, despite its spread around the world over the last few decades. Some humanitarian organizations enjoy privileges and immunities under public international law that exempt them from the application of data protection law. These factors raise the issue of what data protection law and principles should apply to the processing of data in humanitarian emergencies.

The Handbook deals with this issue by basing its guidance on a synthesis of some of the most important international legal instruments and guidance documents, such as the UN General Assembly Resolution 45/95 of 14 December 1990 adopting the Guidelines for the Regulation of Computerized Personal Data Files; relevant resolutions of the International Conference of Data Protection and Privacy Commissioners (ICDPPC), including the International Standards on the Protection of Personal Data and Privacy (The Madrid Resolution) adopted in Madrid in 2009, the Resolution on Data Protection and Major Natural Disasters adopted in Mexico City in 2011, and the Resolution on Privacy and International Humanitarian Action adopted in Amsterdam in 2015; the 2013 OECD Privacy Framework and the Council of Europe Convention 108. Other important regional instruments (such as the forthcoming EU General Data Protection Regulation) were also considered. The resulting guidance takes inspiration from each of these sources, without being based completely on any one of them, and without replacing compliance with applicable norms of national or local law when they apply. This shows how international consensus on data protection may be reached even without the existence of an international treaty that is widely accepted in all regions of the world. It is possible that this consensus may gradually crystallize over time into binding legal standards, or serve as the basis for more formal legal instruments on an international scale.

Another important issue concerns the reconciliation of data protection with the need to provide humanitarian assistance. Data protection is a fundamental right in many legal systems, but humanitarian action is also based on human rights law and international law under instruments such as the Geneva Conventions and their additional protocols. While there may be occasional instances of friction between the two areas, data protection and humanitarian action in emergency situations should be viewed as complementary rather than contradictory. Data protection law provides sufficient flexibility to take the needs of humanitarian organizations into account, so that it need not hamper the delivery of essential assistance in humanitarian emergencies (eg the new EU General Data Protection Regulation recognizes in Recitals 46, 73, and 112 that data processing for humanitarian purposes may be justified based on important grounds of public interest or the vital interests of data subjects). And the framework under which humanitarian organizations operate requires them to protect vulnerable individuals, which in today’s data-driven world includes the implementation of data protection in their operations.

The above discussion demonstrates that data protection has vital implications that go beyond the circumstances in which people in developed countries may be accustomed to consider it. In a world where views on privacy and data protection are fragmented among different cultures and legal systems, it is possible to reach international consensus allowing both respect for data protection and the protection of vulnerable individuals in humanitarian emergencies.