Humanitarian assistance and state sovereignty in international law: towards a comprehensive framework

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CHAPTER I
INTRODUCTION

'Humanitarian assistance' has increasingly been brought to the attention of the international community over the past years. The United Nations General Assembly declared in the Spring of 2009 that it:

> "*Decides* to designate 19 August as World Humanitarian Day in order to contribute to increasing public awareness about humanitarian assistance activities worldwide and the importance of international cooperation in this regard, as well as to honour all humanitarian and United Nations and associated personnel who have worked in the promotion of the humanitarian cause and those who have lost their lives in the cause of duty, and invites all Member States and the entities of the United Nations system, within existing resources, as well as other international organizations and non-governmental organizations, to observe it annually in an appropriate manner".

What are the rights and duties under international law involved in the provision of humanitarian assistance? Which actors are involved, and how can the provision of assistance be enforced? This thesis addresses the legal framework on the provision of humanitarian assistance in a humanitarian crisis.[1]

1.1 Introduction

In the 21st century, whenever a humanitarian crisis[2] unfolds, the entire world watches closely. With today's media and global communication methods, the crisis can unravel before our very eyes. As a result, we are confronted with humanitarian crises on an almost daily basis. As the images of persons in need of emergency aid appear in our newspapers, on our television screens and through social and online media sources, these crises cannot but become of global concern.

In 2013, the Centre for Research on the Epidemiology of Disasters (CRED) reported a total of 330 disasters, affecting over 96 million people worldwide.[3] These reported disasters do not include the humanitarian emergencies arising from conflict situations around the globe, but only refer to natural disasters such as droughts, earthquakes and floods, and technological disasters. Indeed, the past decade has

[1] United Nations General Assembly (UNGA) Res 63/139 (5 March 2009) UN Doc A/RES/63/139 'Strengthening of the coordination of emergency humanitarian assistance of the United Nations' §26.
[2] All legal concepts relevant to this research will be fully defined in Chapters 2 and 3. A full definition of a 'humanitarian crisis' will therefore be discussed in Section 3.3.3. Defining a Humanitarian Crisis.
[3] Debarati Guha-Sapir, Philippe Hoyois and Regina Below *Annual Disaster Statistical Review 2013: The numbers and trends* (CRED 2014) 21.

shown a wide array of circumstances that may warrant the delivery of humanitarian assistance. Several of these circumstances quickly spring to mind, such as the devastating tsunami in the South Pacific Ocean in 2004, the earthquake in Pakistan in 2005 in the conflict area of Kashmir, and the earthquakes in l'Aquila (Italy) and Haiti in 2009 and 2010, respectively. More recently the world has seen the disastrous effects of the earthquakes in Japan in March 2011 (including the ensuing tsunami) and Nepal in 2015, as well as the consequences of the on-going droughts in east Africa, particularly in Somalia.

Adding to the millions of people affected by (natural) disasters, over 30 severe crises involving the use of massive force were counted by the Heidelberg Institute for International Conflict Research.[4] Of these crises, the vast majority can be classified as *intra*state conflicts, often resulting in a non-international armed conflict, as opposed to *inter*state conflicts, which may lead to an international armed conflict.[5] Indeed, over the past century, a change in the nature of conflicts has taken place, as the traditional interstate 'war' has increasingly come to be replaced by circumstances of non-international armed conflicts. Examples over the past few years include the recent 'Arab Spring', resulting in conflicts in Libya and Syria, but may also include the more complex situation in the Sudan. In fact, when considering the provision of humanitarian assistance, often an overlap is found between circumstances of conflict and natural disaster, resulting in more complex emergencies. Humanitarian assistance is not provided in a legal vacuum: conflicts, (natural) disasters, complex emergencies and other potential crises warrant legal regulation, as does the provision of assistance within these circumstances. Indeed, natural disasters and non-international armed conflicts are two circumstances in which the provision of aid is increasingly needed, whilst regulation is lacking.

Standing idly by in the face of devastation is challenging for many people. When images of hungry, thirsty and distraught people come into our homes through modern media, cries for the provision of humanitarian assistance to these persons in need become louder and with time, more organised. Indeed, the second half of the 20th century, in the aftermath of World War II and with a proliferation of natural disasters and non-international armed conflicts, has witnessed growing international concern for the protection of persons in crisis, increasingly resulting in international attention.[6] Humanitarian assistance cannot *make* peace, nor can it *prevent* disasters. Yet, it can *contribute to the survival of millions during a crisis or emergency*, as well as in its immediate aftermath. The prompt delivery of emergency assistance can furthermore assist in the mitigation of displacement issues and the creation of refugees. Failing to provide humanitarian assistance to those in need can result in starvation and death.

[4] Heidelberg Institute for International Conflict Research, C*onflict Barometer 2009: Crises - Wars - Coups d'État Negotiations - Mediations - Peace Settlements*, (University of Heidelberg 2009) 1.
[5] Ibid. 4. For a definition of these concepts, see Section 3.2.1 Defining an Armed Conflict.
[6] Heike Spieker, 'The Right to Give and Receive Humanitarian Assistance', in HJ Heintze & A Zwitter (eds), *Humanitarian Assistance and International Law* (Springer 2011) 7.

As such, the United Nations (UN) Charter calls upon states to cooperate in solving problems of amongst others a 'humanitarian character'.[7] This call has been translated into action over the years, especially following the end of the Cold War, upon which many international actors have become involved in the delivery of humanitarian assistance.[8] When various actors in the international community wish to participate in the alleviation of human suffering resulting from a variety of emergencies such as conflicts or natural disasters and provide humanitarian assistance, international law becomes a factor of major importance. The roles of the affected state, on whose territory the crisis is occurring, and other potential third parties must be legally ascertained. Indeed, recent crises such as in Iraq and Syria demonstrate the need to determine the legal boundaries of the state sovereign in the legal framework pertaining to the delivery of humanitarian assistance. The concepts of state sovereignty and humanitarian assistance must be brought into balance.

In light of the abovementioned changes in circumstances in which humanitarian assistance is needed, as well as the proliferation of actors involved in its provision, international law regulating humanitarian assistance is in need of clarity and potentially development. This need for clarity (and development) of the law follows from these factual changes: the protection granted by the law to persons in times of a crisis must be adapted to encompass these new movements in the world concerning humanitarian assistance. What rights do persons have to receive assistance? Which duties do states have to provide aid? What role do third parties have in the delivery of assistance, and how might access to a territory be obtained? Can humanitarian assistance be enforced? Such questions are raised through the increase and developments in crises over the past decades, whilst international law has also continued to develop. Determining which rights and obligations the current legal framework encompasses and whether improvements are necessary, is therefore particularly relevant. The current international law issues in the field of humanitarian assistance are in essence fourfold and cumulative.

Firstly, the need for humanitarian assistance may exist in a variety of *circumstances*, such as international and non-international armed conflicts, occupation and (natural) disasters, resulting in fragmented legal regimes and a risk of fragmented protection.[9] In each of these various circumstances, there are indeed different applicable legal regimes and as a result, also different legal regulations that exist for the provision of humanitarian assistance. For example, the legal regime applicable to an international armed conflict is not the same as the regime applicable in times of a natural disaster, resulting in disparate and divergent regulations for the

[7] Article 1(3) UN Charter states: "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

[8] Kate Mackintosh, 'The Principles of Humanitarian Action in International Humanitarian Law: Study 4 in: The Politics of Principle: the principles of humanitarian action in practice', *Humanitarian Policy Group* Report 5 (March 2000) 1.

[9] For a definition of these concepts, see Section 3.2 The Circumstances that may Require Humanitarian Assistance.

provision of humanitarian assistance in both circumstances. Thus, to what extent an individual may be provided with humanitarian assistance is today commonly determined by the nature of the humanitarian crisis, which determines the applicable regime and the available law. The bulk of existing legal regulations concern international armed conflicts, given the developments following World War II. As seen above however, in today's world victims of natural disasters or of non-international armed conflicts greatly outnumber the victims of international armed conflicts and are in need of legal protection.

Secondly, the provision of humanitarian assistance is subject to a variety of *actors*, resulting in a variety of potential rights-holders and duty-bearers. Major roles in the provision of humanitarian assistance are played by the affected states, international organisations, other (coalitions of) states, non-governmental organisations (NGOs) and individuals.[10] All these actors have different responsibilities in international law with regard to the provision of humanitarian assistance. These responsibilities may vary according to the nature of the crisis. In the event of a natural disaster the assumption will often exist that the affected state will take charge in assisting those individuals affected by said disaster and may welcome foreign assistance, contrary to conflict situations where this may not regularly be the case. However, cyclone Nargis, hitting Myanmar in 2008, sadly demonstrated that governments may not always be *willing* to allow for the provision of humanitarian assistance from abroad, even in the event of natural disasters.[11] Thus, the various actors are not only rights-holders or duty-bearers, in turn, they are also stakeholders in the (non-)provision of humanitarian assistance.

Particularly poignant is therefore the third issue of *state sovereignty* in relation to the provision of humanitarian assistance. State sovereignty issues are related to both the first issue of 'circumstances' as these issues may arise in all three situations (occupation, conflict and (natural) disaster) that are addressed in this research concerning legal regulations affecting the provision of humanitarian assistance. The notion of sovereignty however is also related to the rights and duties third actors may potentially have within this legal framework. A study into the rights and obligations with regard to the provision of humanitarian assistance by all potential actors therefore always also includes the relationship with the state sovereignty of the affected state, more particularly with regard to the boundaries of this notion. Given the variety of actors and circumstances relevant to the provision of humanitarian assistance, the eventual problems with sovereignty will also vary according to the specific situation. It has been stressed by various states that humanitarian crises, non-international armed conflicts and the influx of refugees may be more readily addressed if and when underlying political crises in a territory were also to be

[10] For a definition of these concepts and a discussion of their role see Section 2.3 Actors Involved in Humanitarian Assistance. In referring to 'international organisations' throughout this research, inter-governmental organisations are interchangeably meant.

[11] Rebecca Barber, 'The Responsibility to Protect Survivors of Natural Disaster: Cyclone Nargis, a Case Study' (2009) 14 *Journal of Conflict and Security Law* 4.

addressed.[12] Sovereignty-related issues such as the offering and refusal of humanitarian assistance can indeed often be politically motivated, which will also be addressed, as part of the study into legal obligations concerning humanitarian assistance.

Proliferation of regulations is a fourth and final problem that has arisen regarding the legal framework concerning the provision of humanitarian assistance, as a result of the three abovementioned problems. The fourth issue is not only related to both the variety of circumstances in which humanitarian assistance may be relevant and legal regulations pertaining to this such as humanitarian law and human rights. It is also related to the variety of actors involved in the provision of assistance that have mushroomed in recent years, resulting in the application of fields such as refugee law and provisions concerning internally displaced persons (IDPs). Many actors have, in attempting to regulate issues concerning state sovereignty and the circumstances in which they operate, established their own set of applicable (soft law) regulations.[13] Unfortunately, proliferation of regulations often leads to ambiguity rather than legal clarity. In the case of the scope of rights and obligations relevant to the provision of humanitarian assistance, this is no different.

As this research will show, the variety of legal regimes, actors and applicable legal regulations has resulted in gaps and overlaps concerning the rights and obligations related to the provision of humanitarian assistance in various circumstances and particularly related to the notion of state sovereignty. With the lack of one common, comprehensive, overarching international legal framework regulating rights and obligations pertaining to humanitarian assistance in today's world, combined with the growing number of emergencies and actors, it is apparent that a thorough study into the *entire* current legal framework on humanitarian assistance, encompassing armed conflict, occupation and (natural) disasters, is demanded. Comprehensive and coherent international regulation of the provision of humanitarian assistance is desperately needed, to ensure adequate and equal protection for all individuals suffering during or after a humanitarian crisis. Clarity regarding the body of law to serve all circumstances and actors would be a relevant contribution to the existing legal regulations currently in place concerning the provision of humanitarian assistance. In other words, in this particular area of law, further clarification of the *lex lata* is necessary.

[12] Repertoire of the Practice of the Security Council (1996-1999), Chapter VIII, 'Consideration of questions under the responsibility of the Security Council for the maintenance of international peace and security', Section 37 Protection for humanitarian assistance to refugees and others in conflict situations, Initial proceedings Deliberations of 21 May 1997 (3778th meeting) 1023-1024.

[13] Examples include the UN International Law Commission's study on the protection of persons in the event of disaster, including Draft Articles on the protection of persons in the event of disaster currently in the making; the 1993 San Remo 'Guiding Principles on the Right to Humanitarian Assistance' of the International Institute of Humanitarian Law; and the Bruges 2003 Resolution on 'Humanitarian Assistance' of the Institut de Droit International. All will be discussed more in depth at a later stage throughout this research.

1.2 Aim of the Research and Research Questions

From the above, the topicality of the research can be easily discerned. There is no question that the notion of humanitarian assistance plays and will continue to play a role in international law given the various circumstances in which it may be relevant, and the various legal actors involved in its provision. The role of international law however remains somewhat undetermined, as there appears to be a lack of consistency and clarity with regard to the rights and obligations surrounding humanitarian assistance in all its relevant circumstances; namely armed conflict, occupation and natural disaster, as well as all actors in this particular international legal arena concerning humanitarian assistance. Due to the vast amount of actors and the proliferation of (soft law) regulations, a necessity arises to establish the core of the binding legal regulations applicable to the provision of humanitarian assistance, to enhance both legal certainty and practical applicability on the ground.

1.2.1 Aim of the Research

The aim of this research is to determine *what* the status and scope of the existing legal framework regarding humanitarian assistance is, and to discern *whether* clarification of and improvements to the current legal framework are necessary or desirable. Answering these questions will enhance the embedding and enforcement of humanitarian assistance in international law through the creation of a comprehensive legal framework. If such improvements are indeed necessary or desirable, the research in this thesis will have provided the background to make recommendations towards that end. In order to reach this aim, it will be relevant to firstly examine what the current existing legal framework is concerning the rights and obligations surrounding the provision of humanitarian assistance. Issues concerning sovereignty form a large part of the examination of this framework and they will be addressed in relation to the potential improvements. To this end, this thesis will examine what the prevailing law is, and what potential obstacles to the provision of assistance must be overcome in the current framework. The purpose is to analyse the existing international law with regard to the provision of humanitarian assistance in times of humanitarian emergencies and crises. Only upon establishment of the current legal regime, can the possible problems and need for improvement be discerned. Furthermore, only upon the establishment of such a possible need, can an endeavour be made towards finding improvements and proffering suggestions for new regulations. As part of this thesis, such improvements and suggestions are offered in Chapter 9. These potential improvements will contribute to the notion of a singular legal framework for the provision of humanitarian assistance. Meeting the aim of this research will contribute to the clarification of an aspect of international law – the law related to humanitarian assistance – and possibly help towards its development. Eventually this will then also aid persons in the midst of a humanitarian crisis to receive the assistance they desperately need, which is the ultimate goal of this legal research.

The approach of this research to such a framework will be comprehensive and will consider the provision of humanitarian assistance in all circumstances in which it may take place, namely in times of armed conflict, occupation and (natural) disaster if and when these circumstances amount to a humanitarian crisis. This *inclusive* approach of the research, taking into account the various circumstances, is a novel method and approach in itself – as opposed to existing legal research dealing usually with one of the respective fields – thereby providing added value. Given the fact that, as stated above, the (legal) circumstances of armed conflict, occupation and (natural) disaster are quite dissimilar, so are the legal regimes applicable to each situation. As a result, most research projects have focused on their *separate* legal frameworks, studying humanitarian assistance either in natural disasters, or occupation and conflicts.[14] Yet, a need for food, water, shelter and medicine remains a need for food, water, shelter and medicine in any humanitarian crisis, regardless of the legal differentiation between a natural disaster, a conflict or a situation of occupation. A person in need is a person in need, regardless of whether a cyclone, tsunami or armed attack has taken place, and the loss of a human life due to a lack of humanitarian assistance should not be categorised.

As relevant as a legal distinction therefore may be to determine whether or not the law of war is applicable in a certain situation, such a distinction should not be as pertinent to the rights and obligations amounting to the legal framework regarding humanitarian assistance. If the needs of a person in a humanitarian crisis or emergency are always similar; namely food, water, shelter and medicine, so then should the rights and obligations regarding the provision of humanitarian assistance be equal in all circumstances, rather than being dependent on the legal qualification of the circumstances.[15] This research will therefore determine in an *inclusive* manner what the current rights and obligations in the international legal framework are upon which the provision of humanitarian assistance is built, looking into armed conflict, occupation and circumstances of disaster in a truly comprehensive manner to establish an overview in its entirety, rather than separately. It is important to find synchronisation between the legitimate needs of persons facing a crisis, and the realities on the ground, at the times of such a crisis. These practical issues will also

[14] Examples include the International Federation of the Red Cross' International Disaster Relief Law Programme; the International Law Commission's study on the protection of persons in the event of disaster, including draft articles currently in the making; the 1993 San Remo 'Guiding Principles on the Right to Humanitarian Assistance'; and the Bruges 2003 Resolution on 'Humanitarian Assistance'.

[15] For a similar approach with regard to the qualification of a person as 'protected person' in the sphere of Article 4 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, see *Prosecutor v. Tadić* IT-94-1A (ICTY Appeals Chamber 15 July 1999) § 164-168. In this instance, the Appeals Chamber stated that a nationality-nexus could not be argued as a manner to avoid application of Article 4 of the Geneva Convention (IV), as its applicability should be seen in light of its object and purpose, rather than be made dependent on formalities and purely legal relations. The object and purpose of this Article is the establishment of the largest degree of protection possible for a civilian population. As such, according to the Appeals Chamber, the Article intends to look not to legal characterisations of relations, but rather their substance. In a similar manner, rights and obligations pertaining to humanitarian assistance should not be made dependent on legal qualifications, but rather on the suffering of persons the assistance attempts to alleviate.

guide the solutions sought in the existing legal framework and contribute to the new insights offered.

An inclusive approach will also create more clarity on the status of the law in any given situation, and provide a comparison of the rights and obligations in the various circumstances relevant to the provision of humanitarian assistance. From such a comparison, insights can be gained into possible gaps and overlaps in the existing framework. Regulations existing in one area may be absent in another domain, or *vice versa*. For example, circumstances such as 'internal disturbances' not meeting a threshold of armed conflict, often lack specifically tailored regulation whilst they may amount to a humanitarian crisis. This holds particularly true for the abovementioned increase of non-international armed conflicts where the state sovereign is often unwilling to recognise the conflict as such, in an attempt to avoid the application of humanitarian law. With a comprehensive approach to the provision of aid, these circumstances can also be incorporated and it can be determined what law is applicable in *all* potential circumstances warranting the provision of assistance. As a result of this comprehensive approach, a possible need for improvements can be established, and suggestions can be made for the development of such improvements to the entire legal regime concerning humanitarian assistance. Ultimately, legal rights and obligations relevant to the provision of humanitarian assistance may be seen as the body of 'law of humanitarian assistance' rather than several provisions dispersed over various legal fields. From this research, a *core* set of regulations will then be derived in Chapter 9, upon which actors involved can base themselves with regard to legal rights and legal responsibilities in the provision of humanitarian assistance.

1.2.2 General Research Questions and Boundaries

The general research question posed in this legal research is: *what are the existing rights and obligations concerning the receipt, provision, denial and enforcement of humanitarian assistance, and is development or improvement of international law necessary for the creation of a comprehensive legal framework?* This question can be broken down into several more narrow research questions, each to be addressed in various parts of this research to eventually reach the general aim of the research.[16] In a general sense, this question can be divided into three separate issues. Firstly, this research will address what the current rights and obligations regarding the receipt, provision and denial of humanitarian assistance are. In doing so, this research will discern what gaps and/or overlaps may emanate from this assessment. This will secondly enable the identification of areas of development and/or improvement, to enhance the embedding and enforcement of humanitarian assistance in international law should withholding or denial of assistance be wrongful. Lastly, and resulting from the former two, the creation of a comprehensive, synchronised core legal framework will be discussed that may function as a basis in all circumstances of humanitarian crisis.

[16] See Section 1.3 Research Structure.

As a result of the general research question, the various sub-questions discussed in the following chapters are addressed in a tiered manner. These questions will include amongst others *what* the various legally delimited circumstances are in which emergency aid is necessary, and *how* the matter of state sovereignty can be incorporated as part of the provision of humanitarian assistance. Furthermore, the question *whether* a possible human right to humanitarian assistance exists is addressed, to determine the applicability of human rights law. Research is needed to determine on which legal grounds a claim for assistance can be made by those enduring a humanitarian crisis. Subsequently, the matter whether an obligation to provide assistance exists, as well as alternatively a right to receive assistance, is considered in the various specific circumstances. Following on from this, addressing the possible right to access for its provision and a possible obligation to allow such access is relevant. Lastly, the research questions warrant a closer look at enforcement options, consequential to the possible withholding or denial of the provision of assistance.

Having discussed the questions that are addressed within this research, it remains relevant to establish what will *not* be addressed in order to clearly establish boundaries. This research into the legal framework regarding the provision of humanitarian assistance is *international* by nature. As a result, the domestic legal frameworks of various states will not be specifically addressed. Such frameworks vary, and this research seeks to establish a core, overarching baseline and framework from which may not be deviated and upon which may be relied in all circumstances. An aspect of such domestic variations pertain to practical issues relating to the delivery of aid, such as placing search and rescue dogs into quarantine, visa issues for persons from a variety of nationalities, etc. It is not possible as part of this research into the international legal rights and responsibilities relating to the provision of assistance to address these matters in depth. As such, a focus will be placed upon sources of international law like treaties and customary norms that have a broader scope.[17] This approach also aligns with the practical circumstances that both conflicts and disasters often have cross-border effects, warranting binding international regulation.

This research is furthermore built on two distinct premises. As a point of departure, it is presumed in this research that in the discussion of sovereign duties or third party rights and responsibilities to provide assistance, the affected persons indeed wish to *receive* such aid. Whereas in certain instances persons affected by emergencies are indeed not willing to engage with authorities or third parties, this is not the common denominator in circumstances of crisis. Thus, this research assumes the position that the delivery of assistance is not in fact only *necessary* for the immediate survival of persons in crisis, but also *desired* by those in need. Secondly, this research accepts that the provision of humanitarian assistance may in reality at times also have a negative impact on the ground, due to conflicting interests of sovereign authorities, third parties, international organisations and persons in need. Indeed, there is no singular solution in times of crisis, and this research cannot

[17] See Section 1.4.1 Primary Sources.

provide all the answers needed to resolve humanitarian emergencies. This research attempts to provide legal clarity regarding the existing framework, and to assist those affected by humanitarian crises through such legal means. Thus, from the outset, it is assumed in this research that the positive effects of the provision of humanitarian assistance to persons in need outweigh the potential occasional negative effects.

1.3 Research Structure

In order to determine the existing legal framework in the provision of assistance, this research is separated into three distinct parts. Part I addresses the delimitations and boundaries of the framework, and establishes the relevant legal definitions. Part II then discusses the current rights and duties of involved actors in the provision of assistance, and Part III lastly examines the rights and duties of third parties in the delivery of aid when such initial provision is absent. These three parts are explained in more detail below to portray the structure of this research.

Given the aim of this research, namely to establish in a comprehensive manner which rights and obligations regarding humanitarian assistance and international law are currently in place, a structure divided according to the various rights and obligations is necessary. Only in this manner will it be possible to adequately establish what differences and similarities exist in the three circumstances relevant to the law regarding humanitarian assistance: armed conflict, occupation and (natural) disaster and possibly synchronise them. A distinct choice has been made with this structure, so as to approach the legal framework of humanitarian assistance per legal question, in order to contribute to the aim of the research, as a situational structure (according to the law in each circumstance, rather than according to the rights and duties per actor cumulatively) would have provided a more fractioned overview of the framework that is currently in place. Reduction of fragmentation and enhancement of unification of protection is a distinct aim of this legal research.

To realise the first aim of this research; namely examining and establishing the scope of the current legal framework concerning humanitarian assistance, delimitation of the framework is necessary, which is the subject of Part I. This research therefore commences in Chapter 2 with a historical overview of the framework and of definitions of the concepts relevant to this framework. These include the definition of humanitarian assistance itself, as well as a discussion of the principles by which it is provided. Furthermore, the various actors involved in its provision are addressed. Subsequently, Chapter 3 provides the scope of application of the legal framework; namely the circumstances in which humanitarian aid is generally provided. These circumstances include armed conflict, occupation and (natural) disaster. As a result, whilst proffering the notion of a ‘humanitarian crisis’ in this Chapter, the research will subsequently address the rights and obligations under international law according to these three distinct circumstances. In this regard, Chapter 3 concludes with a discussion of the applicable law in times of crisis, and the relationship between these *corpora juris* to provide a basis for more in depth analysis of individual provisions relating to the delivery of humanitarian aid in further

Chapters. Chapter 4, the final Chapter of Part I, discusses the notion of state sovereignty as a contextual concept in relation to the legal framework on the delivery of humanitarian assistance. The concept of sovereignty plays a distinct role throughout the discussion of the legal framework on humanitarian assistance, and is therefore critically examined at the outset. Chapter 4 provides a historical overview of the developments of the concept, its reconceptualisation following the development of the 'Responsibility to Protect' doctrine, and its current status in international law.

Having established the (legal) definitions to be used within this research, as well its scope of application, Part II addresses the legal rights and duties in the provision of assistance. Part II commences with Chapter 5 concerning the possible (human) right to *receive* humanitarian assistance, as well as corresponding *obligations* of the affected state under human rights law. This Chapter considers whether a possible (human) right to receive humanitarian assistance exists independently in human rights law or results from existing human rights. Human rights law, as discussed in Chapter 5, maintains applicability in times of crisis, warranting a discussion of the protection it offers to those in need of assistance. With the approach taken by this research; namely a structure according to rights and obligations that are applicable in this framework, Chapter 6 subsequently addresses the existing duties of the sovereign authorities to provide assistance and the rights of persons to receive it in the three circumstances of armed conflict, occupation and (natural) disaster, whilst differentiating between international armed conflicts and non-international armed conflicts. This Chapter provides an overview of the current rights and duties of the primary actors involved, as well as revealing gaps in protection that may exist.

Having established what rights and duties initially exist for the persons in need and their sovereign authorities under the current legal framework, Part III examines the role of third parties in the provision of assistance, as well as enforcement mechanisms. Thus, Part III addresses the aspects of the legal framework that become relevant when the initial provision of aid remains absent. Chapter 7 in this regard addresses the provision of humanitarian assistance from the perspective of third parties wishing to deliver aid. This Chapter considers the rights and obligations of external actors, such as states and international organisations, to offer and provide humanitarian assistance. Related to this is the possible right to access of those providing assistance in the aforementioned three circumstances of armed conflict, occupation and (natural) disaster as well as the potential duty of the affected state to allow such access. With an assessment of whether access to a territory can be obtained through existing rights and obligations under international law, a completion of the comprehensive framework regarding the provision of humanitarian assistance will have been put in place, laying bare the potential problems in the provision of aid. Having established what rights and obligations exist, Chapter 8 examines the possibility of enforcement of these rights and obligations, should assistance remain lacking. Enforcement options exist at various levels, varying from the use of force to legal enforcement before international courts or other bodies, both at the inter-state level and at the level of individual responsibility. This Chapter adds

to the existing legal framework in the assessment of manners in which humanitarian assistance may be enforced, when aid is not delivered.

With the described structure and method of research, the current legal framework will be established in a truly comprehensive manner. These Chapters, in establishing the existing framework, will simultaneously have led this research towards its second aim. It will thus also have become clear what gaps, problems and/or overlaps exist in the law between the various circumstances, and therefore also if potential developments are necessary for the clarification and possible improvement of the law, in order to enhance the embedding and enforcement of humanitarian assistance in international law. These conclusions regarding the overarching, comprehensive legal framework in times of humanitarian crises are offered in Chapter 9. This Chapter addresses the foundations available in international law *at all times*, explicating the existing rights and duties upon which can be relied in times of armed conflict, occupation and (natural) disaster amounting to a humanitarian crisis. The Chapter furthermore addresses potential synchronising developments and improvements applicable to the legal framework that may be necessary and practically achievable.

1.4 Methodology

This legal research makes use of a variety of sources of international law. The broad topic of humanitarian assistance, which can be needed in a variety of legally delimited circumstances, warrants the applicability of multiple bodies of law. Furthermore, the developments as described above in Section 1.1 concerning the proliferation of regulations warrant a discussion of both primary sources of law and secondary sources of law, both discussed in more detail below. The generally accepted primary sources of public international law are stated in Article 38(1) of the Statute of the International Court of Justice (ICJ) and include treaties, customary international law and general principles of law.[18] The subsidiary sources of international law, mentioned in Article 38 (1)(d) the ICJ Statute, namely case law and legal scholarship, remain relevant to this research related to humanitarian assistance, in particular in consideration of the potential gaps in protection. Other suggested subsidiary sources of international law include unilateral acts and resolutions of UN bodies such as those of the Security Council and General Assembly, as well as soft law.[19] In the subsequent Sections, a more in-depth

[18] Article 38(1) of the ICJ Statute states: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

[19] Hugh Thirlway, 'The Sources of International Law' in Malcolm Evans (ed) *International Law* (Oxford University Press 2010) 115-118.

perspective is provided regarding the specific sources that are of particular relevance to the legal framework concerning the delivery of humanitarian assistance.

First however, the manner in which the abovementioned sources are studied must also be briefly clarified. Different methods of interpretation may lead to different outcomes in research. Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties set out the general methods of interpretation. The primary method according to the Vienna Convention is to interpret according to a treaty term's ordinary meaning, in light of its object and purpose.[20] This approach, which can be considered to reflect customary international law, encompasses aspects of the three main interpretation techniques accepted in international law.[21] A first technique is the grammatical or objective method, where the factual text and analysis of the words is emphasised. A second technique is the subjective approach in which the intention of parties to an agreement is underlined. Finally, the teleological interpretation stresses the object and purpose in its determination of the meaning of an agreement.[22] All abovementioned manners of interpretation play a role in this research in order to ensure the proper interpretation of the sources at hand. In the discussion of the various sources relevant to the legal framework relating to the provision of assistance, the factual text primarily provides means for analysis, yet upon a need for clarity the subsequent methods are utilised. The *travaux préparatoires* of various international treaties provide a source for the subjective approach, whilst available public statements or treaty reservations by states as well as official *Commentaries* allow for a teleological interpretation.

Furthermore, Article 31(3)(c) of the Vienna Convention on the Law of Treaties, states that as a basic interpretative rule, together with the object, purpose and context of a treaty, also 'any relevant rules of international law applicable in the relations between the parties' must be considered. This provision is considered a general rule of interpretation, with a view to the continuous development and evolution of the law and remains equally relevant to the legal framework concerning the provision of

[20] Article 31 of the Vienna Convention on the Law of Treaties states: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended". Article 32 of the same Convention states: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".
[21] Malcolm Shaw, *International Law* (Cambridge University Press 2008) 932-933.
[22] Ibid.

humanitarian assistance.[23] Indeed, with developments over the past century in types of crises and the proliferation of actors and regulations as discussed above, each source of international law, as well as each distinct body of law, must be interpreted in consideration of other relevant applicable rules of international law. As discussed in Chapter 3, this method of interpretation is particularly relevant to the consideration of human rights law and humanitarian law that according to Article 31(3)(c) Vienna Convention should also be interpreted with the *other* body of law in mind. Chapter 3 furthermore addresses at a more in depth level the concept of the *lex specialis* principle as a method of interpretation, and its applicability to the various bodies of law relevant in the provision of humanitarian assistance.

Lastly, before addressing the various primary and secondary sources applied in this research, a differentiation must be made between types of obligations in international law, as relevant to the provision of humanitarian assistance. In discussing the existing legal framework, the relevant responsibilities are addressed. Under international law, a distinction is made between 'obligations of result' and 'obligations of conduct' (also called obligations of 'effort'). Chapter 5, exploring human rights law in relation to the provision of humanitarian assistance, and subsequent Chapters address the effects of these two types of obligations in relation to the provision of assistance. At the more theoretical level, it is relevant to note that an obligation of 'result' requires a duty-bearer to ensure a specific *outcome*, whereas an obligation of 'conduct' requires a duty-bearer to *act* in a specific way.

1.4.1 Primary Sources

The primary sources of international law applied in this research include international treaties and customary law, as well as general principles of international law.[24] Within treaty law, at a general level the UN Charter is relevant, but given the fact that humanitarian assistance is addressed in a variety of circumstances, including in times of armed conflict, occupation and (natural) disaster, various treaties within the fields of international law are relevant. Particularly, the focus in Chapters 5, 6, 7 and 8 will lie on international humanitarian law and human rights law. Analysis regarding the field of international humanitarian law centres around the four Geneva Conventions of 1949 and their Additional Protocols. With regard to human rights law, specific human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) will play a role. Specific rights relevant to humanitarian assistance, such as the right to life, the right to food and the right to health, are studied.[25] Next to these major treaties, regional treaties are furthermore considered.

[23] Commentary to the Vienna Convention, *Yearbook of the International Law Commission*, Vol. II (1966) 222 (Draft Article 27).
[24] Article 38(1) ICJ Statute.
[25] The right to adequate housing is distinctly left outside the realm of this research, as the concept of humanitarian assistance is considered to encompass those aspects of emergency aid needed for the immediate survival in times of a crisis.

Also relevant are the Refugee Convention and the framework concerning internally displaced persons (IDPs). When considering treaty law, the *travaux préparatoires* of the relevant treaties are of importance, as an additional method of interpretation, to assess the intentions of states parties in relation to the provision of assistance. Given the aim of this research, comparative analysis of treaty law and of *corpora juris* takes place throughout the Chapters, in order to establish the overarching applicable legal framework in times of crisis.

With the abovementioned proliferation of regulations and actors in the area of humanitarian assistance, ascertaining the existence of particular rules of customary international law may be invaluable to the determination of existing rights and obligations within the framework of the provision of humanitarian assistance. Due to its characteristics regarding legal developments, customary international law can thus be of specific relevance. As a source of law, Article 38(1)(b) of the ICJ Statute has declared it to entail a 'general practice accepted as law'.[26] Traditional doctrine considers customary rules of international law to result from two particular elements, namely widespread and consistent state practice, and a more normative component '*opinio juris sive necessitatis*'; the conviction that this practice indeed flows from a rule of law.[27] Furthermore, established customary international law is binding upon all states and is therefore particularly relevant to the study of rights and obligations concerning the all-encompassing legal framework pertaining to humanitarian assistance.[28] Throughout the following Chapters, these requirements: state practice and *opinio juris*, are used in the context of various norms under consideration, in order to determine whether a particular norm can be considered to have binding customary international legal status. In this regard, aspects of the abovementioned human rights treaties but also the 1948 Universal Declaration of Human Rights, and humanitarian law provisions that have near universal accession, are considered in particular.

Of the general principles of international law, one in particular is of the utmost importance to this particular field of research regarding the provision of humanitarian assistance. Circumstances in which humans are involved, should be guided by the principle of humanity.[29] As a general principle, the principle of humanity functions as a baseline throughout this research, given that the provision of humanitarian assistance aims at ensuring basic human dignity for those persons affected by humanitarian crises. The essence of the delivery of humanitarian aid is, after all, the insurance that those affected by crises do not starve and perish.

These three primary sources of law are, as primary sources, of equal standing in international law. Outside of the realm of the ICJ Statute, binding decisions of the

[26] See Article 38(1) of the ICJ Statute (n 18).
[27] Thirlway, 'The Sources of International Law' (n19) 102; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment 27 June 1986 I.C.J. Reports 1986, p. 14 § 175-177 and 186; as well as more generally the North Sea Continental Shelf cases (Federal Republic Of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgment Of 20 February 1969, I.C.J. Reports 1969, p. 3.
[28] Shaw, *International Law* (n 21) 91.
[29] See Section 2.2.3.1 The Principle of Humanity.

Security Council, as discussed in Chapters 6, 7 and 8 are furthermore a source of international law. Such binding decisions, unlike other decisions of a non-binding nature adopted by international organisations and their organs, are not considered secondary sources. As stated in Article 38 ICJ Statute, *subsidiary* sources of law are relevant in consideration to aid the interpretation of the abovementioned primary sources.

1.4.2 Secondary Sources

Secondary sources including case law and legal scholarship, as well as soft law, form a large part of the current available (semi) legal resources regarding humanitarian assistance and are therefore of relevance to this research. Of particular relevance is the jurisprudence of the ICJ, as well as of specific judiciary bodies such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and regional bodies like the European Court of Human Rights (ECtHR). ICJ judgements such as in the 1986 case concerning Military and Paramilitary in and against Nicaragua, the 2007 case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) and the 2011 case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) are particularly relevant throughout this research. Numerous ICTY and ECtHR decisions are also considered in the interpretation of various primary sources of international law.

Soft law can then be considered in two distinct categories, both of which are relevant to this research. A first category is that of non-binding actions by states, such as resolutions or declarations in international settings, amongst which the UN. Indeed, UN resolutions of a non-binding character and other documents adopted within the UN framework form another major aspect of available secondary legal resources, especially with regard to humanitarian assistance in the event of natural disasters. Such resolutions are often indicative of developments in the perspectives of states on the law, and can add to the existence of *opinio juris* on a matter, or even state practice in the case of for example General Assembly Resolutions through consistent voting patterns. An example specifically concerning the provision of humanitarian assistance includes the widely known United Nations General Assembly Resolution 46/182 ‘Strengthening the coordination of humanitarian emergency assistance of the United Nations’.[30]

A second category of soft law instruments is that of international bodies, not compiled of states, attempting to add to the existing hard law and state action by means of standard-setting. With a view to the provision of humanitarian assistance, these include various non-binding decisions and comments of treaty body mechanisms existing in human rights law, as well as the work of the International

[30] UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182 ‘Strengthening the coordination of humanitarian emergency assistance of the United Nations’.

Law Commission's (ILC).[31] In particular the ILC's current work (in progress) on the 'Protection of persons in the event of disasters' is relevant, and throughout this research, the ILC's Draft Articles of May 2014 are utilised. Furthermore, the ILC's adopted Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) form a major source of law in the discussion of the law on state responsibility, as they are largely an attempt at codification of existing customary international law, as discussed in Chapter 8. Both the Draft Articles on the 'Protection of persons in the event of disasters' and the ARSIWA have not yet been adopted by the UN General Assembly, although their various stages of development are clearly distinct, given that the drafting of the 'protection of persons in the event of disasters' is still ongoing. Furthermore, outside the UN realm, many organisations have created their own semi-legal frameworks with regard to certain aspects of humanitarian assistance, as well as functioning as practical benchmarks for practitioners in the field. Whether they be named guidelines, principles, or rules of procedure, it is clear that they do not form part of the primary sources that shape the hard body of law concerning humanitarian assistance. The various documents of these organisations discussed within this research furthermore differentiate in their goal, which is of relevance to their potential consideration as a secondary source. Within this context of particular importance are the 'International Disaster Response Law Guidelines' (IDRL Guidelines) of 2007, reviewed at length in Chapters 6 and 7. Whilst these Guidelines are of great relevance, they are not a codification attempt, and merely attempt to be of practical use; therefore within this legal research, they must be treated as such. Various other organisations, such as the UN and the European Union (EU) concerning their member states, *do* attempt to create legislation, or at least binding regulations. As discussed in the above, the work of NGOs, given their contested status in international law and the fact that they do not create legal norms themselves, falls largely outside the scope of this research into the international legal framework pertaining to the delivery of humanitarian assistance.

These relevant secondary sources – namely case law, UN documents and frameworks from other organisations – form the bulk of materials available for additional legal analysis for the purpose of this thesis, next to the primary sources of international law. Whereas the existing hard law may be sufficient for the establishment of an overarching framework concerning humanitarian assistance, secondary sources and soft law contribute to the further development of this framework. Indeed, soft law contributes to the body of international law in its entirety and can be considered supplementary evidence of existing law, or reflecting one of the formative components of customary international law.[32] As such, these additional

[31] The work of the ILC will be discussed at length in later Chapters, but it is relevant to note that the purpose of the Commission is "the promotion of the progressive development of international law and its codification"; Article 1 of the 1947 Statute of the International Law Commission (Adopted by the General Assembly in resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981).

[32] Alan Boyle, 'Soft Law in International Law-Making' in Malcolm Evans (ed) *International Law* (Oxford University Press 2010) 122-123.

sources can be of aid in the determination of potential solutions to the problems within the existing legal framework on the delivery of humanitarian assistance that this research may uncover. However, this research does not consider soft law instruments in any way to be a source containing binding rights and duties in the international legal sphere.[33]

Soft law however can also aid in the explanation and interpretation of existing law.[34] A distinction must furthermore be made between existing soft law and *lex ferenda*. Whilst both are not *lex lata*, a differentiation is possible between soft law and the scope of *lege ferenda*. At which point in creation soft law potentially becomes binding is arguable, and moreover largely dependent on which form of hard law it could eventually take; such as a formal treaty, or development into customary international law.[35] Many soft law instruments however never develop into hard law and as such do not form part of the body of existing law. Yet resolutions, guidelines and principles are often the result of careful drafting and negotiations. The *intent* with which many such documents are created can be seen as evidence towards a commitment to law-making.[36] This holds true in particular when states are party to such negotiations. Indeed, it is these efforts that can be seen as *de lege ferenda*; as what the law ought to be. With greater and widespread commitment towards law-making, opposing positions may be more difficult to legally uphold. As such, these various resources may be invaluable in particular with respect to the analysis of current rights and obligations, as well as the development of a comprehensive legal framework regarding humanitarian assistance. Thus, although not hard law in itself, these sources will play a role throughout this thesis, as their application will be relevant to all aspects of the research questions.

1.4.3 Character of the Research

Lastly, prior to commencing the discussion of the legal framework concerning the provision of humanitarian assistance, the character of this research needs to be addressed. This character is dual in its nature. The duality of the research holds true at various levels. As such, the main research question holds elements pertaining to the *lex lata*, as well as *de lege ferenda* and furthermore is dual in its addressing of

[33] For a discussion on soft law more in general, see amongst others Alan Boyle & C M Chinkin, *The Making of International Law* (Oxford University Press 2007); Gregory C Shaffer and Mark A Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94 *Minnesota Law Review*, 706-799 and with a more objecting perspective Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 *Nordic Journal of International Law*, 167-182. Whilst being aware of the discussion that exists regarding the inherent value of soft law, this discussion remains outside the scope of this research, as these non-binding documents are merely used in a supplementary manner to form part of a discussion of existing law.

[34] Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) 4 *European Journal of International Law*, 313-314.

[35] C M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', (1989) 38 *International and Comparative Law Quarterly* 856-857.

[36] Boyle, 'Soft Law in International Law-Making' (n 32) 124-125.

multiple potential rights and duties and their respective rights-holders and duty-bearers.

In this research, a focus is firstly placed on the determination of the existing law, making it descriptive and comparative in nature. With this critical legal analysis, the current legal framework regarding humanitarian assistance will be brought into place. At the same time, a supervisory element will also be present, as part of this research is to uncover whether or not compatibility exists between the law concerning humanitarian assistance in times of armed conflict, occupation and (natural) disaster. This duality furthermore applies to the various right-holders and duty-bearers concerned with the provision of assistance, varying from the affected persons and states, to third parties.

Having established whether or not gaps, overlaps or other potential problems stand in the way of such compatibility, this research then proceeds towards different questions. Fundamental questions, such as how the law may be adapted to better match underlying legal principles concerning humanitarian assistance (such as the principle of humanity) are discussed, as well as how the existing law could be further synchronised in the three circumstances in which humanitarian assistance is potentially relevant, when amounting to a humanitarian crisis. Lastly, the drafting and formulating of recommendations for potential future development is relevant to the research. Therefore, instrumental questions, trying to develop suggestions for the issues encountered in the current framework on the delivery of humanitarian assistance will be raised.

The character of this research is however distinctly geared towards an in-depth discussion of existing *lex lata*. When referring to the determination of 'one singular, comprehensive and overarching framework' this does *not* imply *lege ferenda* or soft law. The purpose remains the demonstration and evincing of the *existing* legal framework as a shared common legal basis in all circumstances in which the need for the provision of humanitarian assistance arises. There is no intention of merging existing legal regimes, or creating an entirely new regime. The character of this research, with a focus on *lex lata*, attempts to demonstrate that within existing international law, a foundation can be found to apply to *all* circumstances warranting the provision of assistance. As such, this framework is distilled from existing hard law. By doing so, an assessment can be made of the existing law governing the provision of humanitarian assistance at all times. Furthermore, with an analysis of *lex lata*, the necessity for and desirability of new developments can be assessed, based upon the potential uncovering of gaps in the existing law.