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

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CHAPTER VI

THE DUTY OF THE AFFECTED STATE TO PROVIDE, AND THE RIGHT OF PERSONS TO RECEIVE HUMANITARIAN ASSISTANCE

In the face of the humanitarian crisis in Libya in 2011, the Security Council called upon those involved in the conflict, stating it:

“Demands that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance”.

What exactly are these ‘obligations under international law’ that a state or sovereign may have to provide humanitarian assistance? To what extent does international law place obligations hereto on the affected state, and what rights can the affected persons claim? This chapter addresses these questions within the legal framework on the provision of humanitarian assistance.¹

6.1 Introduction

Where previous Chapters have assessed the background to the legal framework, such as the parties involved with humanitarian assistance, its scope of application and applicable law, matters of state sovereignty and the current developments in human rights law, this Chapter addresses at a more concrete level the *specific legal rights and duties* concerning the provision of humanitarian assistance in the *various potential circumstances*. The current Chapter focuses on the *lex lata* involved in the actual provision of assistance. As part of this assessment, the current developments in international law are also considered, such as state practice, treaty law and Security Council resolutions, as well as General Assembly resolutions, soft law mechanisms and codification initiatives that are currently on-going. This study approaches the legal framework concerning the provision of humanitarian assistance from an overarching perspective, focusing on the premise that persons in need of food, water and shelter in times of a humanitarian crisis should be able to gain access to such provisions, regardless of what circumstance put them in such a need. This perspective finds support in various areas of international law, as set out below, as well as the contemporary concept of state sovereignty as discussed in Chapter 4. The approach to these rights and duties must be from the perspective of complementarity and the

¹ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 ‘The situation in Libya’ § 3.

principle of humanity, which aligns with the fundamental aspects of the concept of humanitarian assistance. The very notion of humanitarian assistance, as has been asserted in previous Chapters, warrants an overarching and inclusive approach. In fact, this approach has also been taken in the law itself on numerous occasions. Therefore, this Chapter commences the assessment of the legal framework from an overall and general legal perspective, reaching the more specific circumstances of provision at the end.

The legal framework regarding the provision of humanitarian assistance can be divided into certain *legal* rights and *legal* duties. Whilst the horrific images that often cross our path through various media sources may cause a desire to provide assistance, such assistance is regulated by specific legal boundaries. The affected state may be held to certain duties to provide assistance under international law, whereas the persons in need of assistance may hold rights to receive such aid under international law, dependent on the various *corpora juris* involved. This Chapter therefore concretely addresses the various potential legal duties of the affected state in the provision of assistance in times of a humanitarian crisis, as well as the rights of the persons in need. A focus lies on the duties of the *affected state* as primary responsible actor; Chapter 7 will address the rights and duties that may be discerned for *international* assistance, which may be provided by third states or international organisations. The potential unwillingness of the affected state to provide assistance will also be addressed in this regard, as the assessment of such a potential gap in the law, taking state sovereignty into account, is crucial to the protection of persons in need of aid.

6.2 Duties and Rights under General International Law

The legal framework pertaining to the delivery of humanitarian assistance bases itself on several bodies of law, as seen in Chapter 3. From a general perspective, the concept of state sovereignty provides a structural guide to the various actors involved in the provision of assistance; internally and externally. Therefore, it is relevant to assess which duties and rights flow directly from the concept of state sovereignty. State sovereignty as a notion must be considered from a more abstract and elevated level, in a different manner than the other bodies of law that contain specific provisions regarding the delivery of emergency aid. The law pertaining to state sovereignty does not contain substantive provisions concerning the provision of emergency aid. The assessment regarding the potential rights and duties therefore are at a more abstract level, but provide the basis upon which the more substantive provisions are founded.

6.2.1 State Sovereignty and the Duty to Provide Humanitarian Assistance

Chapter 4 has addressed the concept of state sovereignty as international society views it today. The premise taken in this research regarding the concept of state sovereignty, and elaborated in Chapter 4 is that in international law today,

sovereignty *can* and in fact *must* be seen to include responsibilities and obligations towards citizens by a sovereign.² When this concept is applied to the provision of humanitarian assistance, it stands to reason that the primary responsibility and duty to provide humanitarian assistance lies with the affected state on whose territory the humanitarian crisis takes place. This responsibility and duty naturally flows from the understanding of the concept of state sovereignty. Support for an overall and general responsibility of the affected state to provide assistance for persons within its jurisdiction when a humanitarian crisis arises can be found in the current notion of sovereignty, based on international humanitarian law, human rights law and UN Security Council and General Assembly resolutions as elaborated in more depth in this Chapter.³ In respect of more regional state practice, the EU has equally asserted such a primary responsibility of the affected state.⁴ This reasoning also follows from the analysis in Chapter 2 of the actors involved in the provision of assistance, where the affected state plays a primary role.⁵ More recently, this notion of responsibility and of the primary role have been supported by the work of the ILC in its development of draft articles on ‘Protection of persons in the event of disasters’. In particular Draft Article 12 declares a duty of the affected state ‘by virtue of its sovereignty’ to ensure those persons on its territory receive assistance.⁶

State sovereignty, as a legal concept, is a continued and constant standard throughout the entire fabric of international law, regardless of whether a (natural) disaster takes place, or a conflict.⁷ As stated earlier, humanitarian assistance may be necessary in various (legally qualifiable) circumstances, invoking a wide range of legal regimes, rights and duties. From a general perspective however, state sovereignty is a continuous thread in the discussion and determination of the legal rights and duties in the provision of assistance. The concept of state sovereignty and

² Section 4.2.3.3 Towards a new Definition of Sovereignty.

³ See the provisions of the Geneva Conventions and multiple human rights treaties in 6.5 Duties and Rights in Specific Circumstances under International Law; UNGA Res 38/202 (20 December 1983) UN Doc A/RES/38/202 § 4; UNGA Res 43/131 (8 December 1988) UN Doc A/RES/43/131 § 2 and UNGA Res 45/100 (14 December 1990) UN Doc A/RES/45/100 § 2, in which the Assembly reaffirmed “the sovereignty of affected States and their primary role in the initiation, organization, coordination and implementation of humanitarian assistance within their respective territories”; UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182 Annex § 4 (“Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory”); ILC ‘Protection of persons in the event of disasters’ Memorandum by the Secretariat (11 December 2007) UN Doc A/CN.4/590 § 23: “the receiving State has the primary responsibility for the protection of persons on its territory or subject to its jurisdiction or control during a disaster”. Such a position can also be derived from the fact that many states have adopted at a domestic level legislation pertaining to the provision of assistance in the event of a crisis occurring on their territory or under their jurisdiction.

⁴ ‘Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission’ (European Consensus on Humanitarian Aid) (30 January 2008) EU Doc 2008/C/25/01 § 4: “National authorities in countries faced with crisis retain the primary responsibility for protecting populations confronting disaster”.

⁵ 2.3.2.1 The Affected State and subsequent Sections in this Chapter.

⁶ ILC ‘Protection of persons in the event of disasters’ Draft Articles UN Doc. A/CN.4/L.831 (15 May 2014) Draft Article 12.

⁷ Article 2(1) UN Charter provides an example, with one singular concept of sovereignty.

the responsibilities found therein also support the perspective taken in this research concerning an overarching approach to the provision of humanitarian assistance. As the concept of state sovereignty including its legal responsibilities towards citizens remains one and the same throughout all aspects of international law and adapts as a whole with time, the notion places the same sovereign obligation in that regard upon states throughout the various circumstances in which humanitarian assistance must be provided. As such, the concept of state sovereignty and the legal obligations flowing from this support the overarching manner in which the provision of humanitarian assistance can be approached, focusing on the need to provide assistance regardless of specific circumstances.

The failure of proper execution of state sovereignty and its duties leads to state responsibility in international law, as Chapter 8 addresses. However, relevant to the establishment of the sovereign duties in this Chapter as pertaining to the provision of emergency assistance that might incur state responsibility, it is relevant to note at the outset that such duties are not refrained to the legal sovereigns *per se*. As the ICJ has addressed in its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*:

“physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States”.⁸

The duty-bearing responsibility or ‘title’ of sovereignty is then transferred from the state, to the *de facto* controller of a certain territory. This assessment is relevant to the provision of humanitarian assistance in particular in times of non-international armed conflicts, or for example natural disasters in conflict areas, resulting in complex emergencies. Indeed in such situations a power struggle often affects the potential to receive aid. The assertion that obligations may be transferred to non-state actors such as *de facto* regimes may furthermore be relevant in circumstances of a collapse of state authority. Such humanitarian crises warrant the delivery of humanitarian aid, but the state sovereign may be unable to provide this due to a loss of control in a specific area. Thus, *de facto* regimes or other non-state entities can be held responsible under international law, when adopting such a pragmatic view as done by the ICJ, for the provision of assistance. As such, when considering the obligations towards citizens, it has become more and more accepted in international law that regimes exercising *de facto* control, or non-state actors, must abide by the substantive provisions concerning the delivery of humanitarian aid in general international law, including human rights obligations, *as would* the state sovereign.⁹

⁸ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports (1971) p. 16, § 118.

⁹ See amongst others Andrew Clapham, ‘Human rights obligations of non-state actors in conflict situations’, (2006) 88 International Review of the Red Cross 863, 522; Christian Tomuschat, ‘The Applicability of Human Rights Law to Insurgent Movements’, in Horst Fischer, Ulrika Froissart, Wolff Heintschel von Heinegg and Christian Raap (eds), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berliner Wissenschafts-Verlag

Similarly, such entities must abide by international humanitarian law provisions, as for example common Article 3 of the Geneva Conventions and Article 1 of Additional Protocol II assert their applicability to armed forces not belonging to the state sovereign.¹⁰ More specifically the Kampala Convention *directly* addresses the responsibilities of armed forces, indicating a continuous increasing acceptance of the responsibilities of armed forces as acting ‘authorities’ within a certain territory, thereby taking on the responsibilities bestowed upon sovereigns, such as the provision of humanitarian assistance.¹¹

Similarly, it has been increasingly accepted that whilst states are the primary duty-bearers of obligations under human rights law, non-state actors can hold such responsibilities too. Indeed, the Security Council has for many years asserted the responsibility of armed groups as ‘parties to a conflict’ to abide by duties under human rights law.¹² Clearly, in such instances, the Security Council is addressing non-state actors in a conflict, as opposed to merely addressing states. The Council furthermore addressed the duties of these ‘parties’ under human rights law and international law in general, rather than confining their duties to those under humanitarian law. Where some believe that non-state actors should only be held accountable under international humanitarian law, Clapham aligns with the Security Council and argues this perspective to be untenable as the application of humanitarian law is often contested in circumstances involving non-state actors, warranting the application of obligations under human rights law.¹³ Alston concurs, declaring that although non-state actors may not be signatories to certain human rights treaties, they do remain ‘subject to the demand of the international community’ as expressed in the UDHR, stating that every organ of the international society should respect human rights.¹⁴ This stance is also supported by the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), declaring that a successful insurrectional movement shall be held responsible for violations of international law

(Berliner Wissenschaftsverlag 2004) 586; and H Steiner, P Alston & R Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press 2007) 675, 1420.

¹⁰ See for a more in depth discussion of the applicability of these treaties to non-state actors 3.2.1 Defining an Armed Conflict.

¹¹ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala 22 October 2009) Article 7.

¹² See amongst others UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 § 4; UNSC Res 1863 (9 July 2009) UN Doc S/RES/1863 § 19 and UNSC Res 2036 (22 February 2012) UN Doc S/RES/2036 §16 that provides an example, stating that the Council: “Demands that all parties and armed groups take appropriate steps to ensure the safety and security of humanitarian personnel and supplies, and further demands that all parties ensure full and unhindered access for the timely delivery of humanitarian aid to persons in need of assistance across Somalia, consistent with humanitarian, human rights and refugee law”.

¹³ Clapham, ‘Human rights obligations of non-state actors in conflict situations’ (n 9) 505.

¹⁴ ‘Civil And Political Rights, Including The Question Of Disappearances And Summary Executions: Extrajudicial, summary or arbitrary executions’ Report of the Special Rapporteur Philip Alston Addendum ‘Mission to Sri Lanka’ UN Doc E/CN.4/2006/53/Add.5 (27 March 2006) § 25. See also August Reinisch, ‘The Changing International Legal Framework for Dealing with Non-State Actors’ in Philip Alston (ed) *Non-State Actors and Human Rights* (Oxford University Press 2005) 71.

incurred *prior* to their evolvment as a new government or state.¹⁵ In relation to the provision of humanitarian assistance and responsibilities of non-state actors, support can also be sought in practice, when factual agreements are considered between states and non-state actors. In many of these agreements, it is stipulated that the recipients of humanitarian assistance are entitled amongst others to the right to receive assistance according to basic needs, the right to live in security and the rights to legal and effective human rights protection.¹⁶ Hence, in practice it appears that non-state actors are also taking voluntarily certain human rights obligations upon themselves, next to the existence of certain obligations under the law.¹⁷ The debate is continuous and on-going as to the extent of potential other obligations, but as Chapter 8 addresses in further detail, when in the exercise of control, armed groups or other non-state actors can be held responsible for violations of international (human rights) law.¹⁸

It must therefore be concluded at this point, however, that the current understanding of state sovereignty entails an overall and general obligation for the affected state to provide assistance to its population when in a humanitarian crisis. In the absence of such a sovereign, the non-state actor exercising control shall take up such duties (under human rights law). The specificities of such responsibilities will be discussed in more depth throughout this Chapter.

6.2.2 State Sovereignty and the Right to Receive Humanitarian Assistance

The law concerning state sovereignty is geared specifically towards the notion of the responsibilities of the sovereign state, and as such does not immediately spring to mind when considering a potential ‘right to receive assistance’. Yet, although much of the law focuses on a duty of the affected state, as *conduct* is required to provide the actual food, water and medicine, state sovereignty has developed to increasingly include rights of citizens. Chapter 4 has discussed that the concept of state sovereignty suggests a reciprocal relationship between the sovereign and society.¹⁹ As the concept of sovereignty is viewed as a ‘social contract’ between sovereign and citizens, the latter obtain rights in relation to the power they have transferred to the

¹⁵ Article 10 ARSIWA. See also Article 9 ARSIWA. For a more in depth discussion, see Section 8.2 The Law of State Responsibility and Enforcement of Humanitarian Assistance

¹⁶ Jean-Daniel Vigny and Cecilia Thompson, ‘Fundamental Standards of Humanity: What Future?’, (2002) 20 *Netherlands Quarterly of Human Rights* 192-194 concerning the codes of conducts in the situations of Burundi, Liberia, Somalia, Sierra Leone, Afghanistan, Sudan, Democratic Republic of the Congo, Angola, East and West Timor, Democratic People’s Republic of Korea and the Russian Federation.

¹⁷ See for example the Agreement between the Transitional Federal Government of Somalia (TFG) and the Alliance for the Re-Liberation of Somalia (ARS), (Djibouti 9 June 2008) § 8(a) and the Lome Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), (June 3rd 1999) Article XXVII and Annex 4.

¹⁸ See also Alston (ed) *Non-State Actors and Human Rights* (n 14); Clapham, ‘Human rights obligations of non-state actors in conflict situations’ (n 9); Sections 7.4.1 Security Council Resolutions and the Right to Offer Assistance and 7.4.2 Security Council Resolutions and the Right to Access.

¹⁹ 4.2.2 Reconceptualising Sovereignty?.

sovereign.²⁰ This reciprocity lies in the fact that sovereign rights, bestowed by the citizens, are not unlimited and therefore are curtailed to include certain responsibilities which those citizens may claim. Thus, the duty which lies upon the state to provide assistance by virtue of its sovereign responsibilities may translate into a right of individuals seeking such assistance. Indeed, the internal aspect of state sovereignty is curtailed and limited by those individuals within its territory that may claim invocation of their rights.²¹ These rights that may be claimed are in fact the direct consequence of the reciprocal relationship between sovereign and society. Yet, they are not distinctly formulated as such regarding the provision of humanitarian assistance, given the more abstract and general level upon which state sovereignty operates, allowing for substantive rights in the specific *corpora juris* relevant to the provision of humanitarian assistance. These specific rights therefore can be directly found in the more detailed provisions within the international legal framework that shall be discussed further below.

It must however be noted at the outset that although the enforceable legal provisions are stipulated in more specific fields of law, they flow directly from the reciprocal relationship between sovereign and society, and are the ‘other side’ of the two-sided coin of state sovereignty, entailing furthermore the rights of the sovereign in relation to third states. As such, the possibility of individuals to claim the receipt of humanitarian assistance also follows the overarching approach that is taken in this research into the legal framework on humanitarian assistance. This overarching approach suggests a common denominator and basis upon which *all* individuals can base themselves, regardless of the typology of the humanitarian crisis they may find themselves in. Indeed, whereas specialisation of the law is of relevance in order for individuals to base themselves on directly enforceable rights, this must not result in fragmentation of the law. Therefore, it is relevant to take into consideration that state sovereignty plays a role both as an aspect regarding duties of the sovereign, and concerning the rights of individuals on the territory of the affected state in the provision of humanitarian assistance.

6.3 Duties and Rights under Human Rights Law

This Section addresses at a more concrete level the various rights and duties under human rights law in the provision of humanitarian assistance, in reflection of the analysis that has taken place in previous Chapters concerning human rights law. A discussion of the current absence of a potential individual human right to humanitarian assistance has already taken place above in Chapter 5. Furthermore, the continued application of human rights law in times of conflict has been asserted, in recognition of the current stance regarding the *lex specialis* doctrine in relation to international humanitarian law, as well as the discussion on the current status of the

²⁰Ibid.

²¹Bosko Jakovljevic, ‘Right to Humanitarian Action and State Sovereignty’ in (eds) Stefania Baldini & Guido Ravasi, *Humanitarian Action and State Sovereignty; Refugees: a continuing challenge* (Institute of International Humanitarian Law 2000) 99.

potential extraterritorial application of human rights law.²² Whereas the previous Chapter has addressed that the provision of humanitarian assistance functions as a vehicle in the fulfilment of the rights to life, food, health (and water) by the sovereign state or non-state actor upon which such obligations are placed, this Section specifically assesses the various *substantive* rights and duties on the ground in times of a crisis as part of the current existing legal framework on the provision of humanitarian assistance.

At the outset, the consideration that the provision of humanitarian assistance functions on the basis of non-discrimination must be reiterated. As addressed in Chapter 5, Article 5 ICERD codifies that, in particular relation to the provision of humanitarian assistance, states are obliged to ‘prohibit and to eliminate’ all forms of racial discrimination in the enjoyment of (amongst rights) the right to security of person and the ‘protection against bodily harm’, economic, social and cultural rights; including the right to health.²³ Thus, the manner in which these substantive rights must be fulfilled, regardless of which human rights are specifically at stake, must be on the basis of non-discrimination. Such provision on the basis of non-discrimination has also been affirmatively held twice by the ICJ. Firstly in its *Nicaragua* Judgment, the Court addressed that ‘an essential feature of truly humanitarian aid is that it is given “without discrimination” of any kind’.²⁴ Secondly, placing it directly in the context of human rights however, the Court held in its 2008 Order in the case concerning the ‘Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Georgia v. Russian Federation)’ that:

“Both Parties shall facilitate, and refrain from placing any impediment to, humanitarian assistance in support of the rights to which the local population are entitled under the International Convention on the Elimination of All Forms of Racial Discrimination”.²⁵

Thus, the ICJ also observed that prior to addressing the substantive norms, the law dictates at a foundational level that the provision of humanitarian assistance must in all circumstances and at all times occur on the basis of non-discrimination, which would otherwise indeed be a violation of a norm of *jus cogens*.

6.3.1 Duties of the Affected State and Non-State Actor under Human Rights Law

Current international human rights law places several distinct obligations upon states which relate to the provision of humanitarian assistance. As such, Articles 55 and 56 of the UN Charter imply an obligation to UN Member States to ensure universal

²² Sections 3.4.2 Applicability of Human Rights in Armed Conflict and Occupation and 3.4.3 Hierarchy or Convergence of International Legal Norms?.

²³ See Section 5.3 A Human Right to Receive Humanitarian Assistance in International Law?.

²⁴ 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 § 243.

²⁵ Application of the International Convention on the Elimination of all Forms of Racial Discrimination (*Georgia v. Russian Federation*), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 353 § 149. It must be noted that this decision of the Court was taken by 8 votes to 7.

respect for human rights.²⁶ Specifically relating to the provision of humanitarian assistance, the rights to life, food, health and water have been discussed in Chapter 5 as part of this assurance. States have obligations that can be derived from these rights concerning the provision of humanitarian assistance and it has been noted that derogation from these four rights in times of a humanitarian crisis is not permitted.²⁷ In this regard, Article 2 of the ICESCR concerning the ‘progressive development’ of human rights as well as the ‘minimum core obligations’ has been considered in particular.²⁸

For the purpose of discussing duties on the ground in times of crisis, the first and foremost obligations relating to the fulfilment of these rights must be sought with the governments of State Parties to human rights treaties.²⁹ Yet, when translating treaty obligations into obligations in practice, it is relevant to note the status of obligations of human rights protection by non-state actors such as *de facto* regimes, as for example may be the case with the collapse of state authority.³⁰ Section 6.2.1 has concluded that, when adopting a pragmatic view, these obligations resting upon states as duty-bearers of international human rights can under current international law also be extended to non-state actors exercising a certain level of control over a territory, as for example in non-international armed conflicts.³¹ Furthermore, when considering the obligations towards citizens, it has become more and more accepted in international law that regimes exercising *de facto* control, or non-state actors, must abide by general international law, including human rights obligations.³² Therefore, whereas the following Section will address the obligations of states under international human rights law concerning humanitarian assistance, such obligations must also be considered equally for non-state actors that may be responsible for the provision of humanitarian assistance.

Regarding the right to life, the state has a clear duty to not arbitrarily deprive humans of their life.³³ Furthermore, the HRC has argued that the right to life within the ICCPR includes an obligation to take positive measures with regard to the reduction or elimination of malnutrition, epidemics and other such situations that

²⁶ Louis Henkin, *The Age of Rights* (Columbia University Press 1990) 3.

²⁷ Section 5.2.2 Derogability, Human Rights and the Provision of Humanitarian Assistance.

²⁸ Section 5.4.4 Humanitarian Assistance and the Right to Food.

²⁹ See in this regard also the ‘Vienna Declaration and Programme of Action’ UN Doc A/CONF.157/23 (12 July 1993) §1: “Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments”.

³⁰ Although the applicability of human rights standards to international organisations of naturally also of great relevance, it remains beyond the scope of this research and will therefore not be addressed.

³¹ Section 6.2.1.; ‘Legal Consequences for States of the Continued Presence of South Africa in Namibia’ ICJ Advisory Opinion (n 8) § 118; Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 229.

³² See amongst others Clapham, ‘Human rights obligations of non-state actors in conflict situations’ (n 9) 522; Tomuschat, ‘The Applicability of Human Rights Law to Insurgent Movements’ (n 9) 586; Steiner, Alston & Goodman, *International Human Rights in Context: Law, Politics, Morals* (n 9) 675, 1420.

³³ Article 3 UDHR, 6 ICCPR, Article 2 ECHR, Article 4 ACHR, Article 4 ACHPR. See for an in depth discussion Section 5.4.2.

might endanger the right to life.³⁴ In practice, this may entail the provision of medicine and food in the aftermath of a (natural) disaster or to those fleeing situations of conflict. This stance of the HRC has also been taken by the ECtHR in regard to the right to life.³⁵ Evidently, such an obligation (as envisaged by the HRC and ECtHR) remains relevant when considering a duty to provide humanitarian assistance. Indeed, it has been argued that this prohibition on the arbitrary deprivation of life as enshrined in the ICCPR must be seen as part of customary *jus cogens*, making the obligation that lies upon the state one of the highest within international law in general.³⁶ The provision of humanitarian assistance therefore functions as a means to ensure the fulfilment of the right to life. States and acting sovereigns thus have a duty under the right to life to prevent the ‘arbitrary’ loss of life by way of ensuring the provision of emergency aid.

Furthermore, the right to food must be considered. Article 11 of the ICESCR, and more particularly the General Comment on this by the CESCR, envisages an obligation for states to provide food as part of humanitarian assistance in the event of a humanitarian crisis; as part of the fulfilment of the right to food.³⁷ Indeed, according to the CESCR a State would have to demonstrate that it has made *every effort* using the resources at its disposal, to in fact fulfil these minimum core obligations.³⁸ As such, no retrogressive measures concerning *core* food provision may be taken, even in times of emergency, and Article 2 ICESCR provides that international cooperation and assistance should be sought in the fulfilment of the right to food, in the event a state’s own available resources should not suffice. Thus, a certain duty can be discerned for the affected state to seek international assistance in the fulfilment of its duties towards those under its jurisdiction based on Articles 11 and 2 ICESCR. Indeed, a distinct obligation lies with the state *to provide in the right to food*, in times of an emergency. In practice this would mean that state parties to the ICESCR have an obligation to seek international assistance in the delivery of emergency supplies of food to their population facing a humanitarian crisis, should they not be capable of fulfilling the right to food satisfactorily themselves. The duty to provide food aid therefore contains an international aspect under the ICESCR that states must abide by. The various other existing legal provisions pertaining to the obligation of states to provide for food, amongst others Article 24(2)(c) CRC, Article 12(2) CEDAW, Article 28 CRPD, Article 12 Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights and Article 15 Additional Protocol to the ACHPR on the Rights of Women in Africa, support the perspective of the

³⁴ CCPR General Comment 6: ‘The right to life (art. 6)’ (30 April 1982) § 2 and CCPR General Comment 14 ‘Nuclear weapons and the right to life (Art. 6)’ (9 November 1984) § 2.

³⁵ *Budayeva And Others v Russia* (App Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) ECHR 20 March 2008, Final 29 September 2008, § 128-129.

³⁶ ‘Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms’, Note by the Secretary-General UN Doc A/66/330 (30 August 2011) § 20.

³⁷ Section 5.4.4 and CESCR General Comment 12 (Article 11 ICESCR) UN Doc E/C.12/1999/5 ‘The right to adequate food’ (12 May 1999) § 28.

³⁸ *Ibid* § 17.

ICESCR. Furthermore, the latter two pertain to continents that are prone to natural disasters and conflicts, making their contribution of particular relevance to the provision of humanitarian assistance.

The right to health, enshrined in Article 25 UDHR and specifically in Article 12 ICESCR equally provides a (minimum core) obligation upon States Parties to ensure that persons within their jurisdiction have access to certain minimum essential levels of food, health facilities, basic shelter, water and sanitation. Non-compliance with this obligation according to the CESCR will result in a direct violation of Article 12 ICESCR.³⁹ In particular Article 12(2)(c) ICESCR, stating the duty of States Parties to take steps in ‘the prevention, treatment and control of epidemic, endemic, occupational and other diseases’, interpreted by the CESCR as to include the provision of humanitarian assistance in emergency situations, is of relevance with regard to the duty of the affected state to provide emergency relief.⁴⁰ This provision in practice would oblige the affected state to actively set up emergency ‘camps’ where those affected by crisis may find refuge, which includes sanitation facilities, in order to prevent such health epidemics. Therefore, the provision of humanitarian assistance by the duty-bearer fulfils the obligation of states under Article 12(2)(c) ICESCR to provide in the right to health through an obligation of conduct. Other treaty provisions supporting the state's obligation to provide in the right to health, although not referring so explicitly to humanitarian assistance, are Article 5(e)(iv) ICERD, Article 24 CRC, Article 11 European Social Charter, Article 10 of the Additional Protocol to the ACHR in the area of Economic, Social and Cultural Rights, Article 16 ACHPR, Article 14 of the African Charter on the Rights and Welfare of the Child and Article 14 of the Protocol to the ACHPR on the Rights of Women in Africa.⁴¹ In the above Articles, a consensus can be found concerning the obligation for states to prevent diseases and to prioritise vulnerable populations in the provision of medical aid.

Lastly, the right to water is relevant to the provision of humanitarian assistance. Although international treaty law does not consider the right to water independently, separate from the right to health, several more specialised treaties do contain provisions pertaining to the right to water, such as Article 24(1)(c) CRC, Article 14(2)(h) CEDAW, Article 28 CRPD, Article 15(a) Additional Protocol to the ACHPR on the Rights of Women in Africa, Article 14(2)(c) African Charter on the Rights and Welfare of the Child.⁴² From these provisions, an obligation can be distilled of a rather general nature, not focused on the provision of humanitarian assistance, resting upon states to provide access to safe drinking water. This obligation, however, is only found on the one hand in several specific treaties, connected to the rights of children, women or persons with disabilities, and on the other hand in regional conventions. As such, the right to water is not yet codified

³⁹ CESCR General Comment 14 (11 August 2000) UN Doc E/C.12/2000/4 ‘The right to the highest attainable standard of health’, § 43 and Section 5.4.6.

⁴⁰ *Ibid* § 16.

⁴¹ For a more detailed discussion of these articles, see Section 5.4.6.

⁴² Section 5.4.8.

properly or uniformly at an international level, and the most far-reaching obligations lying upon states can be found on the African continent. It must be noted that the CESCRC has interpreted a right to water to exist, as derived from Articles 11 and 12 ICESCR, but such an interpretation on its own does not hold legal standing.⁴³ Thus no practical duties can be discerned for sovereigns in the event of a humanitarian crisis under the ‘right to water’.

The rights to life, food and health in international law provide for distinct and specific obligations resting upon states. Not only is the right to life arguably part of the *jus cogens* body of law,⁴⁴ the rights to food and health also entail certain minimum core obligations for states to fulfil at all times. Moreover, Article 2 ICESCR addresses a duty of the affected state to search for *international* assistance and cooperation in the fulfilment of its obligations under the ICESCR and the rights to food and health enshrined therein. As such, the provision of humanitarian assistance in times of humanitarian crisis will be a *vehicle* or a *means* to fulfil a state's obligation under the right to life, food or health. Indeed, *not* providing emergency assistance may then be considered a violation of a state's duties under human rights law. Thus, the provision of humanitarian assistance in times of a humanitarian crisis is a translation, as made in the interpretative remarks of the HRC and CESCRC, from the basic obligations resting upon states concerning the rights to life, food, health (and water). In practice, this amounts to precisely the provision of supplies as defined to be ‘humanitarian assistance’.⁴⁵

Besides the rights to life, food, health and water which have been discussed in relation to the provision of humanitarian assistance, other provisions also exist in current human rights law, calling upon states to protect persons in situations such as a humanitarian crisis. As such, the Convention on the Rights of Persons with Disabilities declares:

“States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters”.⁴⁶

Thus, an obligation rests upon State Parties to the CRPD to provide for the fulfilment of human rights of such persons, in the event of a humanitarian crisis. Furthermore, the 1993 Vienna Declaration and Programme of Action, although a non-binding document, has emphasised the ‘importance of and the need for humanitarian

⁴³ Ibid.

⁴⁴ Which norms amount to *jus cogens* continues to be a discussion under international law. See amongst others: Rafael Nieto Navia, ‘International Peremptory Norms (Jus Cogens) And International Humanitarian Law’ in LC Vohrah, F Pocar et al, (eds) *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (Kluwer Law International 2003); Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006); and Malcolm Shaw, *International Law* (Cambridge University Press 2008) 303, 720-721.

⁴⁵ Section 2.2.2 Defining Humanitarian Assistance.

⁴⁶ Article 11 CRPD.

assistance to victims of all natural and man-made disasters' in the context of human rights.⁴⁷

Considering the above provisions in human rights law, specifically the provisions concerning the right to life, food and health as they relate to the delivery of emergency assistance in the event of a humanitarian crisis, the conclusions of Chapter 5 must therefore be reiterated. The provision of humanitarian assistance by states, and by non-state actors upon which human rights obligations rest under international law, functions as a *vehicle in the fulfilment of the obligations international human rights law places* upon the affected state concerning the rights to life, food, health (and water). This indeed also aligns with the findings as mentioned above by the ICJ in both the *Nicaragua*-case and the 'Application Of The International Convention On The Elimination Of All Forms Of Racial Discrimination (Georgia v. Russian Federation)'-case. Here, the Court observed that the provision of humanitarian assistance may indeed be a manner in which a state fulfils its obligations under human rights law.

6.3.2 *Rights of Persons to Receive Assistance under Human Rights Law*

The various human rights individuals may invoke to claim a right to the receipt of humanitarian assistance have been scrutinised above from the perspective of the affected state or non-state actor exercising control. Given the fact that no independent human right to receive humanitarian assistance currently exists in human rights law, individuals seeking to receive such assistance shall have to find recourse in the existing human rights to life, food, health (and water).⁴⁸ Within the receipt of humanitarian assistance lies the fulfilment of the basic necessities required in the fulfilment of the rights to life, food and health.

The right to life is distinctly formulated in Article 3 UDHR and Article 6 ICCPR, leaving no doubt as to the right of each individual to have his or her life protected.⁴⁹ Individuals may base themselves on Article 6 ICCPR, Article 2 ECHR, Article 4 ACHR or Article 4 ACHPR preventing the arbitrary or intentional deprivation of the right to life, when claiming a right to receive emergency aid from their sovereign authorities. Furthermore, the child in international human rights law may also revert to Article 6 CRC, claiming an inherent right to life which can be read in conjuncture with Article 22 CRC relating to the protection of children through the provision of humanitarian assistance. These international human rights treaties do not specifically refer to the provision of humanitarian assistance as related to the right to life, nor do the interpretive remarks of states parties in reservations to these treaties either.⁵⁰ As such, the State Parties have distinctly not chosen to *limit* the right to life in relation to the provision of humanitarian assistance, when they did have the opportunity to do so. This lack of restriction enables individuals to resort to invocation of this right in

⁴⁷ 'Vienna Declaration and Programme of Action' UN Doc A/CONF.157/23, (12 July 1993) § 23.

⁴⁸ 5.4 Humanitarian Assistance Within the Context of Existing Human Rights.

⁴⁹ Section 5.4.2.

⁵⁰ *Ibid.*

the event of a humanitarian emergency, with a view to the assertion that the HRC has interpreted the right to life to include such emergency relief, and following the suggestions thereto also by the ICJ, that has addressed the role humanitarian assistance plays in the fulfilment of human rights.

Subsequently, individuals may resort to the human right to (adequate) food in the event of a humanitarian emergency. As set out in Articles 25 UDHR and 11 ICESCR, each individual has a right to “adequate food” which according to the ICESCR includes the right to be free from hunger. As the CESCR has declared access to food to be of relevance to the fulfilment of the right to food,⁵¹ it unambiguously determines a link between the right to food and the receipt of humanitarian assistance. However, as has been established earlier, although Article 11 ICESCR is formulated as an inherent individual right, the emphasis of the provision lies with the obligation for State Parties to realise the right to adequate food, through its conduct.⁵² Article 24(2)(c) CRC and Article 28 CRPD envisage a right to adequate food (through the right to health), whereas the CEDAW follows the formulation as found in the ICESCR and bases the right to adequate food in Article 12(2) CEDAW largely on the obligation of the State Party to provide it. Similarly at the regional level, Article 12 of the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights and Article 15 of the Additional Protocol to the ACHPR on the Rights of Women in Africa formulate a right to food, and these Protocols also emphasise the role of the State Party in the obligation to fulfil the right to food. Whilst an individual’s right to food is thus codified broadly at the international level, the formulation of the right for the most part underlines the state’s obligations in the fulfilment of the right.⁵³ From a practical perspective, it is therefore more difficult to claim such an obligation of conduct, as no specificities with regard to the receipt of food in times of emergency are formulated from the perspective of the individual. Rather, the individual shall have to assert that the state is not fulfilling its duty to provide an adequate amount of emergency relief in times of crisis.

Equally the right to health, as codified in Article 25 UDHR and Article 12 ICESCR, accentuates the obligation of states to ensure access to certain minimum essential levels of food, health facilities, basic shelter, water and sanitation. In fact, the receipt of humanitarian assistance may fulfil such an obligation according to Article 12(2)(c) ICESCR. Thus, reversely formulated, as states have a duty under this Article to take steps in ‘the prevention, treatment and control of epidemic, endemic, occupational and other diseases’, individuals would be entitled through their human right to health to receive humanitarian assistance in the assurance that they do not succumb to certain epidemic diseases during, or in the aftermath of, a humanitarian emergency.⁵⁴ However, it is distinctly formulated within Article 12 ICESCR that State Parties to the ICESCR should ‘take steps’. Such a formulation does not appear to fall within the ‘minimum core obligations’ and it will be difficult for individuals

⁵¹ CESCR General Comment 12 (n 37) § 13.

⁵² Section 5.4.3 and 5.4.4.

⁵³ See Section 8.5.1 on the possibilities of individuals enforcing their rights.

⁵⁴ See in this regard also CESCR General Comment 14 (n 39) § 16.

to truly enforce this ‘step’ in the right to health in the circumstance of a humanitarian crisis. Yet, it remains apparent that the provision of humanitarian assistance *can* be a vehicle in the fulfilment of the right to health as formulated in the ICESCR. Both the interpretive comments of the CESCR and the formulation of Article 12 ICESCR itself allow this. The right to health is furthermore equally recognised in Article 5(e)(iv) ICERD, Article 24 CRC, Article 11 European Social Charter, Article 10 of the Additional Protocol to the ACHR in the area of Economic, Social and Cultural Rights, Article 16 ACHPR, Article 14 of the African Charter on the Rights and Welfare of the Child and Article 14 of the Protocol to the ACHPR on the Rights of Women in Africa. Problematic to the right to health however, as discussed in Chapter 5, is that each treaty holds different formulations to this specific right, thereby making a consensus difficult to find.⁵⁵ However, common ground can be found in the more narrow formulation concerning the prevention of diseases by states, which can be interpreted as part of the right to health for individuals. Such diseases, by their very nature, tend to spread more quickly in times of crisis and in circumstances of displacement of persons, leading to a distinct role of the affected state in the fulfilment of the right to health – through the prevention of diseases – in the circumstance of a humanitarian crisis. Individuals therefore have the right to request assistance in setting up proper health and sanitation facilities in the immediate aftermath of a disaster or when having fled their homes in times of conflict.

Lastly, regarding the right to water, it has indeed already been discussed that such a ‘right’ does not currently exist as a codified individual provision within major international human rights treaty law. Yet, the more specialised conventions do encompass a right to water, such as Article 24(1)(c) CRC, Article 14(2)(h) CEDAW, Article 28 CRPD, Article 15(a) Additional Protocol to the ACHPR on the Rights of Women in Africa, Article 14(2)(c) African Charter on the Rights and Welfare of the Child. As is the case with the right to food and the right to health, these conventions mostly formulate these provisions as obligations of the State Parties.⁵⁶ Furthermore, the incorporation is rather haphazard, as protection at the international level is somewhat limited to children and women, while at the regional level limited to the African and American continents. Indeed the CESCR has, through its interpretive remarks, attempted to ascertain that the right to water exists as derived from Articles 11 and 12 ICESCR, but in and of itself, this does not create an actual right in international law.⁵⁷ The further acceptance of such a right is currently in motion, through various initiatives in this regard within the resolutions of the UN General Assembly, leading to potential customary acceptance, although at this stage the law

⁵⁵ Section 5.4.3.

⁵⁶ Section 5.4.4.

⁵⁷ CESCR General Comment 15 (20 January 2003) UN Doc E/C.12/2002/11 ‘The Right to water (arts. 11 and 12 of the International Covenant on Economic Social and Cultural Rights)’ § 3. Earlier references by the CESCR on the right to water in relation to Article 11 can be found in its General Comment 6 (8 December 1995) UN Doc E/1996/22 ‘The economic, social and cultural rights of older persons’ § 5 and § 32, as well as General Comment 4 (13 December 1991) UN Doc E/1992/23 ‘The right to adequate housing’ § 8(b). The CESCR has furthermore referenced to the right to water in relation to Article 12 ICESCR in its General Comment No 14 (n 39) § 4, § 11-12, § 15, § 36, § 40, § 43 (c), § 51.

has not properly crystallised.⁵⁸ Yet, for the provision of humanitarian assistance, as well as its protection through human rights law, such individual codification is however not necessary. Given the possibilities for persons to claim provision of assistance in the fulfilment of their rights to life, food and health, which may include the provision of water, such an individual right is not necessary.

The existence of these rights creates a need and an obligation for their fulfilment. Humanitarian assistance can and must be seen as a vehicle through which these existing rights may be fulfilled. Such fulfilment must occur in respect of the principles of humanity, neutrality and impartiality, amongst others incorporated through Article 5 ICERD. Indeed, the receipt of assistance may be claimed by persons in times of a humanitarian emergency, in order to meet the *content* of the provisions relating to the rights to life, food and health. Such a claim could also be considered the meeting of a basic norm within this context. Whereas an independent right to receive assistance is indeed currently absent from human rights law today, the provision of assistance must be considered part of the human rights regime in a larger perspective. Not receiving assistance (i.e. food, water, medicine and shelter) when in need during a humanitarian crisis, could result in the violation of the human rights to life, food and water. Humanitarian assistance as a concept therefore clearly fits within the human rights framework and discourse. Persons in need of food, water, medicine and other facilities related to their immediate survival have the opportunity, under the existing rights to life, food and health, to request the receipt of humanitarian assistance. Framing the provision of humanitarian assistance within this human rights regime is not only legally sound, it furthermore enables persons in need of emergency aid to actively pursue such claims.

6.4 Duties and Rights under the UN Framework: the Security Council and General Assembly

The UN framework also provides a general and comprehensive perspective on the duties that may rest on the affected state in the provision of humanitarian assistance. The UN framework is, as this research's approach is doing, equally capable of approaching the provision of assistance from an overall perspective, addressing the provision of assistance at all times, as does human rights law. As such, the General Assembly is a representation of nearly all states in the world and therefore often reflects indications of *opinio juris* and state practice. Its scope furthermore is wide and covers all matters in international law. The Security Council on the other hand, whilst only encompassing a few member states, functions at the supranational level in international law, based upon the provisions in Article 25 of the UN Charter.⁵⁹ Given that it therefore has the power to adopt binding resolutions, its work influences the entire international legal world. Furthermore, whilst its scope of action may appear limited due to restrictions placed upon it in Article 39 UN Charter declaring

⁵⁸ Section 5.4.4.

⁵⁹ Article 25 UN Charter states: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

a need for a ‘threat to the peace’, such a limitation falls within the framework of this research. As argued in Section 3.3.3, the need for humanitarian assistance becomes immediate and relevant in the event of a ‘humanitarian crisis’. Such a crisis by definition encompasses a potential threat to the peace due to a variety of reasons, dependent on the specific circumstances. Non-international armed conflicts may incur spill-over effects into neighbouring countries, natural disasters may have cross-border effects and induce a large influx of IDPs and refugees and a variety of other possibilities that may result in a threat to the peace.

Thus, both Security Council and General Assembly resolutions, both for their own reasons, are relevant to analyse in relation to the rights and duties involved in the provision of assistance. Furthermore, several soft law instruments also adhere to such a comprehensive approach in the discussion of various duties related to the provision of emergency assistance. These soft law instruments, when in support of Security Council and General Assembly resolutions, are discussed therewith. They supplement the legal sources throughout this research as they often hold an overarching and encompassing approach in their consideration of rights and duties related to the receipt of humanitarian assistance, often taking the approach from the perspective of individuals entitled to receive aid. Considering the binding nature that Security Council resolutions can have regarding the member states of the UN, this category will be addressed first, followed by the General Assembly resolutions that in themselves do not have a binding force in international law.

6.4.1 Duties of the Affected State under Security Council Resolutions

The UN Security Council has expressed itself regarding the obligations of the affected state in the provision of humanitarian assistance on many occasions in recent years, but it got off to a slow start.⁶⁰ Whereas the UN General Assembly first addressed the matter of humanitarian assistance and thus the various responsibilities decades ago,⁶¹ the Security Council has for a long time avoided this topic. The more encompassing approach was furthermore not embraced from the outset. Given the Charter-based determination and division of tasks between the two UN organs, the Security Council did not deal with the General Assembly's addressing of humanitarian assistance, considering the latter's focus on natural disasters. Indeed, when adopting resolutions under Chapter VII of the Charter, these binding decisions affect the international legal realm and contribute to the further development of norms. A turning point came a few decades ago, when the Council embraced humanitarian assistance within its scope of work, and within the boundaries of a ‘threat to the peace’ as codified in Article 39 UN Charter. The Council then commenced addressing the matter of humanitarian assistance thematically in independent resolutions, which will be concentrated on further in this Section.

⁶⁰ The provision of humanitarian assistance as provided by peacekeeping operations, including their particular mandate, as frequently addressed by the Security Council, shall remain outside the scope of this research.

⁶¹ UNGA Res 2034 (XX) (7 December 1965) ‘Assistance in cases of natural disaster’ and Section 2.2.1.1.

However, the UN Security Council initially dealt with humanitarian assistance on a more *ad hoc* basis. The Council addressed humanitarian assistance increasingly in several of its resolutions pertaining to certain country situations that arose in the early 1990s, most notably amongst others the prolonged conflicts in the Sudan, Somalia, the Former Yugoslavia and the situation in Iraq.⁶² To provide a more thorough view of the Security Council's approach, these situations will be addressed and analysed, for the purpose of establishing the potential thread in the work of the Council.

Several primary references to the provision of humanitarian assistance may be found in the Security Council resolutions concerning the situation in Iraq in the early 1990s. However, in these resolutions the Council fails to address Iraq's *own* sovereign responsibility in adhering to this.⁶³ Yet, considering the situation, the Security Council for the first time directly links the on-going repression of civilians to a threat to the international peace.⁶⁴ Indeed, this approach where the responsibilities of the affected state are not addressed can also be seen in subsequent resolutions pertaining to Somalia that requested the international community to assist in the delivery of assistance.⁶⁵ The Security Council foregoes Somalia's responsibilities in the provision of assistance, focusing on the facilitation of international assistance (to be addressed in the subsequent Chapter).⁶⁶ Only in passing does the Council note that the Somali *people* have the 'ultimate responsibility for national reconciliation and the reconstruction of their own country'.⁶⁷ Similarly, and occurring roughly simultaneously, the Security Council focuses on the *external provision* of assistance in the conflict in the Former Yugoslavia,⁶⁸ having received calls for assistance in the delivery of aid by amongst others the Bosnian President.⁶⁹ At a later stage, still concerning the Former Yugoslavia, but related to the conflict in Kosovo, the Security Council does demand:

⁶² It remains beyond the scope of this research to provide in depth analyses of all country situations in which the UN Security Council addressed the matter of humanitarian assistance, and only several key examples will be used, to illustrate the legal relevance.

⁶³ UNSC Res 661 (6 August 1990) UN Doc S/RES/661 § 3(c) and 4; UNSC Res 687 (8 April 1991) UN Doc S/RES/687; UNSC Res 688 (5 April 1991) UN Doc S/RES/688 § 3, 5-6 and UNSC Res 706 (15 August 1991) UN Doc S/RES/706 preamble §8 and §2.

⁶⁴ *Ibid* S/RES/688 § 1.

⁶⁵ See amongst others UNSC Res 794 (3 December 1992) UN Doc S/RES/794 preamble § 7.

⁶⁶ UNSC Res 733 (23 January 1992) UN Doc S/RES/733 § 2, 8-9; UNSC Res 746 (17 March 1992) UN Doc S/RES/746 § 3,5,8; UNSC Res 751 (24 April 1992) UN Doc S/RES/751 § 12 & 14; UNSC Res 767 (27 July 1992) UN Doc S/RES/767 § 3-4, 6; UNSC Res 775 (28 August 1992) UN Doc S/RES/775 § 7&9; UNSC Res 794 (3 December 1992) UN Doc S/RES/794 § 2-3.

⁶⁷ *Ibid* S/RES/794 preamble § 15.

⁶⁸ UNSC Res 752 (15 May 1992) UN Doc S/RES/752 § 7&8; UNSC Res 757 (30 May 1992) UN Doc S/RES/757 § 17; UNSC Res 770 (13 August 1992) UN Doc S/RES/770 § 2-3, 6; UNSC Res 776 (14 September 1992) UN Doc S/RES/776; UNSC Res 781 (9 October 1992) UN Doc S/RES/781 preamble & § 1; UNSC Res 786 (10 November 1992) UN Doc S/RES/786; UNSC Res 787 (16 November 1992) UN Doc S/RES/787 § 17-18; UNSC Res 819 (16 April 1993) UN Doc S/RES/819 preamble § 8 and § 8; UNSC Res 824 (6 May 1993) UN Doc S/RES/824 preamble §4 & § 4(b), 7; UNSC Res 836 (4 June 1993) UN Doc S/RES 836 preamble §15 & § 5.

⁶⁹ *Ibid* S/RES/752 preamble § 7.

“that the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership take immediate steps to improve the humanitarian situation and to avert the impending humanitarian catastrophe”.⁷⁰

Thus, prior to addressing the *thematic* issue of the protection of civilians in armed conflict, the Security Council did not *systematically* address the potential responsibilities of the *affected* states in the provision of humanitarian assistance. It must however be noted that in these resolutions pertaining to specific country situations, the Security Council often *responded to calls from the affected state* to assist in the provision of international assistance, which indicates a willingness from the state-party to acknowledge a need for international support and in theory also implies an acknowledgment of that state that it cannot handle the situation independently. Such international assistance is then subsequently addressed by the Council. Indeed, where the situation in Kosovo was concerned, the Security Council called to parties, *demanding* even, that they improve the humanitarian situation, although the Council still fell short in addressing such matters as the ‘responsibility’ of the affected state.

The country-specific circumstances opened the door to the more thematic deliberation of the topic within the work of the Council, and by 1999 the Security Council for the first time issued a thematic, non-country specific resolution. In this resolution concerning the protection of civilians in armed conflict the Council urged all parties involved to:

”comply strictly with their obligations under international humanitarian, human rights and refugee law, in particular those contained in the Hague Conventions of 1899 and 1907 and in the Geneva Conventions of 1949 and their Additional Protocols of 1977, as well as with the decisions of the Security Council”.⁷¹

Specifically regarding refugees and IDPs, the Security Council noted that the primary responsibility to protect these vulnerable groups lies with states, but fails to mention a primary responsibility in the protection of *all* civilians or the provision of humanitarian assistance.⁷² Despite this lacuna, the Security Council took an important step in the greater protection of civilians with this resolution, urging those involved in armed conflict to adhere to the relevant rules of international law, which include those concerning the provision of humanitarian assistance. The Council has on occasion elaborated such matters with a view to specific groups, by stressing

⁷⁰ UNSC Res 1199 (23 September 1998) UN Doc S/RES/1199 § 2.

⁷¹ UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 [Protection of Civilians in Armed Conflict] § 4. The thematic resolution followed a Secretary General Report on the matter: UN Doc S/1999/957 (8 September 1999). Since 1999, the Secretary General has systematically reported on the matter of the protection of civilians. See in this regard: UN Doc S/2001/331 (30 March 2001); UN Doc S/2002/1300 (26 November 2002); UN Doc S/2004/431 (28 May 2004); UN Doc S/2005/740 (28 November 2005); UN Doc S/2007/643 (28 October 2007); UN Doc S/2009/277 (29 May 2009); UN Doc S/2010/579 (11 November 2010); and UN Doc S/2012/376 (22 May 2012).

⁷² UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 preamble.

amongst others the importance of children's access to basic services such as health care during 'conflict and post-conflict periods'.⁷³

Following this thematic resolution, the Security Council has over the past years specifically addressed the matter of civilians in armed conflict more in depth. In subsequent resolutions, the Security Council reiterated its position concerning the adherence to the rule of law, but again did not declare a direct responsibility *in the protection of persons or the provision of humanitarian assistance* for the affected state.⁷⁴ However, with time, the Security Council has altered its take on the provision of humanitarian assistance, to not only view this notion from an external position. Indeed the Council has begun to address it rather from the perspective that a *primary* responsibility lies with the affected state. As such, the Council declared in 2006 in the third thematic resolution on the protection of civilians in armed conflict that it:

"Urges the international community to provide support and assistance to enable States to fulfil their responsibilities regarding the protection of refugees and other persons protected under international humanitarian law".⁷⁵

Thus, whereas the Council urges the international community to take action, it does acknowledge that it is the primary responsibility of states to not only protect refugees and other protected persons in times of conflict, but to protect *civilians in general*.⁷⁶ With time, and with the simultaneous incorporation of the concept of the Responsibility to Protect within the UN framework as of 2005,⁷⁷ the Security Council has also taken a stronger position in the declaration that the primary responsibility in the protection of civilians lies with the affected state. Such a protection concerns the basic needs of a population and must therefore include the provision of humanitarian assistance.

Subsequently in 2009 in its fourth thematic resolution, the Security Council recalled this position.⁷⁸ Intermittently, the Security Council also addressed matters concerning humanitarian assistance in other themed resolutions, where it reaffirmed the position taken in the resolutions concerning the protection of civilians in times of armed conflict.⁷⁹ Equally, the Council continued to reaffirm its position in country

⁷³ UNSC Res 1314 (11 August 2000) UN Doc S/RES/1314 § 14.

⁷⁴ See amongst others UNSC Res 1296 (19 April 2000) UN Doc S/RES/1296 Protection of Civilians in Armed Conflict preamble & § 19.

⁷⁵ UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 § 13.

⁷⁶ Ibid preamble stating: "that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of affected civilians".

⁷⁷ Section 4.2.3.1 UN Endorsement of the Responsibility to Protect.

⁷⁸ UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894 preamble "*Recognizing* that States bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law, *Reaffirming* that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians" and § 15: "Expresses its intention to: (a) Call on parties to armed conflict to comply with the obligations applicable to them under international humanitarian law to take all required steps to protect civilians (...)".

⁷⁹ See amongst others UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325 on Women and Peace and Security.

resolutions, calling upon governments to fulfil their ‘primary responsibility in the protection of civilians’.⁸⁰ In fact, on occasion the Security Council also called upon ‘all parties’ to a specific conflict to fulfil their responsibilities in such protection, such as concerning Somalia.⁸¹ In doing so, the Security Council reaffirms that it recognises a responsibility of armed groups to protect civilians and adhere to their responsibilities under international law when playing a role in an international or non-international armed conflict.

Rather than being confined to armed conflict and humanitarian law, as was declared in the previously discussed thematic resolutions, the Security Council’s perspective today regarding the provision of humanitarian assistance holds a somewhat broader perspective, through the incorporation of the notion of RtoP in the UN framework.⁸² Although the ‘protection of civilians’ as a thematic issue should arguably not be confused with the notion of RtoP,⁸³ the two concepts share a common denominator in their ideology of protecting populations in need. Indeed, considering the ‘Arab Spring’ in 2011, the Security Council called upon the Libyan authorities in its resolution ‘Peace and security in Africa’ with a primary reference to RtoP *in practice* to ‘protect its population’.⁸⁴ The Council reiterated that stance in its subsequent resolution declaring that such a duty to ‘protect and ensure’ that the primary needs of the population were met, was the *responsibility of the state*.⁸⁵ As discussed more in depth in Chapter 4 above, the Security Council reaffirmed this position concerning the responsibility of the state in successive resolutions concerning Libya:

“underscores the Libyan authorities’ responsibility for the protection of its population, including foreign nationals and African migrants”.⁸⁶

The Council has reiterated such wording as well concerning Cote d’Ivoire, Sudan, the Democratic Republic of the Congo and Yemen; ‘stressing’, ‘reaffirming’, ‘recalling’ or ‘underscoring’ the responsibility of these states in the protection of their populations.⁸⁷ In doing so regarding the Libyan situation, the Security Council

⁸⁰ See amongst others UNSC Res 1430 (14 August 2002) UN Doc S/RES/1430 on the Situation between Eritrea and Ethiopia; UNSC Res 1861 (14 January 2009) UN Doc S/RES/1861 preamble on the situation in Chad and the Central African Republic; and UNSC Res 1906 (23 December 2009) UN Doc S/RES/1906 preamble on the situation in the Democratic Republic of the Congo.

⁸¹ See for example UNSC Res 1863 (9 July 2009) UN Doc S/RES/1863 § 19.

⁸² UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 § 13 and UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894.

⁸³ ‘Report of the Secretary-General on the protection of civilians in armed conflict’ (22 May 2012) UN Doc S/2012/376 § 21 / p5-6.

⁸⁴ UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 ‘Peace and security in Africa’ preamble.

⁸⁵ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 ‘The situation in Libya’ preamble § 3. For a more in depth discussion of these resolutions see Section 4.2.3.2.

⁸⁶ UNSC Res 2016 (27 October 2011) UN Doc S/RES/2016 ‘The situation in Libya’ § 3. See similarly UNSC Res 2040 (12 March 2012) UN Doc S/RES/2040 ‘The situation in Libya’ § 4.

⁸⁷ UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975 preamble; UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996 § 3(b)(iv); UNSC Res 1991 (28 June 2011) UN Doc S/RES/1991 preamble; UNSC Res 2014 (21 October 2011) UN Doc S/RES/2014 preamble.

distinctly referred to the state's *obligations under international law*, including humanitarian law, human rights law and refugee law, as it had done in earlier resolutions pertaining to the protection of civilians in armed conflict.⁸⁸ In both instances therefore the Council addressed the states' obligations under international law. Such statements and declarations by the Security Council reaffirm the assertion that it is indeed the affected state that holds the *primary responsibility as a sovereign* to provide humanitarian assistance when (parts of) its population are in need of this due to a humanitarian crisis.

While it is apparent that the embracement of the notion of RtoP has widened the scope of the Security Council's resolutions concerning the responsibility of states to protect their civilians and populations, the Security Council is somewhat ambiguous in its formulations. On the one hand, it calls upon states to protect 'civilians in time of armed conflict', referring to general international law while including particular obligations under humanitarian law, human rights law and refugee law. On the other hand, in situations falling short of a determination of an armed conflict it calls merely for the 'protection of a population' based on the states' 'responsibility', without addressing the specific bodies of law upon which this responsibility is based.⁸⁹ As such, the absence of the determination of an armed conflict alters the wording of the Security Council. The 'responsibility' called upon would then lie within general international law, but if interpreted narrowly within the UN's concept of Responsibility to Protect, would consequently only exist in relation to the four core crimes of genocide, war crimes, crimes against humanity and ethnic cleansing. As argued previously by the UN Secretary General, this distinction between the 'protection of civilians in armed conflict' and RtoP should be upheld, as the 'protection of civilians' finds a greater legal basis than the political concept of RtoP.⁹⁰ Yet, a parallel discourse may be counterproductive, as the political concept of RtoP certainly adheres to the protection of civilians in a broader sense. And what of the situations such as Sudan, Yemen and Cote d'Ivoire, where the Security Council referred to the legal notion of 'protecting civilians' rather than the political concept of RtoP, while simultaneously also using terminology such as 'protecting its population'?⁹¹ For instance concerning Syria, the Council:

⁸⁸ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 'The situation in Libya' § 3; UNSC Res 2016 (27 October 2011) UN Doc S/RES/2016; UNSC Res 2040 (12 March 2012) UN Doc S/RES/2040 § 3, as well as UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 § 5; UNSC Res 1296 (19 April 2000) UN Doc S/RES/1296 § 8.

⁸⁹ See all resolutions discussed in this Section – a.o. UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975 'The situation in Côte d'Ivoire'; UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996; UNSC Res 2014 (21 October 2011) UN Doc S/RES/2014; UNSC Res 2016 (27 October 2011) UN Doc S/RES/2016; UNSC Res 2040 (12 March 2012) UN Doc S/RES/2040.

⁹⁰ UN Doc S/2012/376 (n 83) § 21.

⁹¹ UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975 'The situation in Côte d'Ivoire'; UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996; UNSC Res 2014 (21 October 2011) UN Doc S/RES/2014; UNSC Res 2016 (27 October 2011) UN Doc S/RES/2016; UNSC Res 2040 (12 March 2012) UN Doc S/RES/2040.

“Also demands that all parties take all appropriate steps to protect civilians, including members of ethnic, religious and confessional communities, and stresses that, in this regard, the primary responsibility to protect its population lies with the Syrian authorities”.⁹²

Indeed, in practice, situations will arise in which one the four core crimes warranting action under the scope of RtoP is perhaps occurring, whilst the situation does not meet the threshold of an armed conflict. Consider in this regard in particular the concept of a crime against humanity, where no connection to an armed conflict is needed.⁹³ While the primary responsibility of the Security Council is the maintenance of international peace and security, the Council will address matters that are often not defined as an ‘armed conflict’, but may in fact amount to a ‘humanitarian crisis’, once a ‘threat to the peace’ under Article 39 UN Charter is established.

It appears that the Security Council is not adhering to a strict distinction between the two notions of ‘protection’, and opts for a rather broad approach to the protection of persons in need of assistance. Indeed, it is more all-encompassing, similar to the approach of this research, rather than the more abstract divisions. This path of the Security Council may provide a more practical approach to the circumstances it faces. In fact, the Security Council at times refers to ‘civilians’ and at times refers to ‘populations’; a less legal term. However, despite the variety of formulations, the Council does not *specifically* assert what is needed in many circumstances, rather remaining more abstract.

A common denominator in the resolutions of the Security Council relating to the provision of humanitarian assistance can be found in its referral to *general* international law, while including humanitarian law, human rights law and refugee law. Indeed, this approach also aligns with the UN’s embracement of the notion of RtoP, and the more contemporary concept of state sovereignty as including a responsibility of the state to ensure the protection of those within its territory and control.⁹⁴ Such an approach is for example also seen in the Council’s phrasing of the responsibilities of those involved in the conflict in Syria. Whilst the Council has been severely criticised for its indecisiveness and lack of action regarding Syria as compared to Libya, in 2014 it commenced to address in more detail the provision of humanitarian assistance in Syria, asserting that the ‘primary responsibility to protect its population lies with the Syrian authorities’.⁹⁵ Subsequently in the summer of 2014 the Council reiterated this position:

“Reaffirming the primary responsibility of the Syrian authorities to protect the population in Syria and reiterating that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians, and recalling in this regard its demand that all parties to armed conflict comply fully with the obligations applicable to

⁹² UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139 § 9.

⁹³ See Section 8.6.2.2.

⁹⁴ See Sections 4.2.3.1 and 4.2.3.2.

⁹⁵ UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139 § 9.

them under international law related to the protection of civilians in armed conflict, including journalists, media professionals and associated personnel”.⁹⁶

It can and must therefore be concluded that the Security Council envisages such a primary responsibility for states and parties exercising control under general international law, while referring to more specific fields of law also as sources of such responsibility, but not adhering to a strict distinction as proposed by the Secretary General and rather taking an all-encompassing view to states’ obligations in this regard.

Indeed, this conclusion is also supported by several of the ‘Aide Memoires’ provided by the President of the Security Council; stating on behalf of the Council that the Council reaffirms that primary responsibility is borne by parties to an armed conflict to protect the ‘affected civilians’.⁹⁷ In the most recent Aide Memoire pertaining to the theme of ‘protection of civilians’ the Council has in fact incorporated the scope and lingo of RtoP as it stated:

“The Security Council recalls that States bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law and reaffirms the responsibility of each individual State to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity”.⁹⁸

Furthermore, the Aide Memoires have requested that the Security Council continues to stress the responsibility of parties to an armed conflict to ‘respect, protect and meet the basic needs of civilian populations within their effective control’.⁹⁹ Clearly, meeting the ‘basic needs’ of a population involves the provision of food, water and emergency shelter, which can only lead to the conclusion that the Security Council perceives the primary responsibility in the provision of humanitarian assistance to lie with the sovereign state, or other parties involved in a particular conflict acting with a certain degree of control.

⁹⁶ UNSC 2165 (14 July 2014) UN Doc S/RES/2165 preamble.

⁹⁷ For example ‘Aide Memoire Protection of Civilians in Armed Conflict’ UN Doc S/PRST/2010/25 (22 November 2010) preamble, and ‘Aide Memoire Protection of Civilians in Armed Conflict’ UN Doc S/PRST/2014/3 (12 February 2014) 2. These Aide Memoire’s follow the previous one UN Doc S/PRST/2002/6 (15 March 2002); as well as the thematic resolutions UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265, UNSC Res 1296 (19 April 2000) UN Doc S/RES/1296, UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674, UNSC Res 1738 (23 December 2006) UN Doc S/RES/1738; and UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894 relating to the protection of civilians in armed conflict.

⁹⁸ Ibid UN Doc S/PRST/2014/3, 2.

⁹⁹ ‘Aide Memoire Protection of Civilians in Armed Conflict’ UN Doc S/PRST/2010/25 (22 November 2010) 2; ‘Aide Memoire Protection of Civilians in Armed Conflict’ UN Doc S/PRST/2014/3 (12 February 2014) 1. This has been furthermore reiterated in ‘Aide Memoire Protection of Civilians in Armed Conflict’ UN Doc S/PRST/2013/2 (12 February 2013) 1 and 3.

Thus, as Presidential Statements are considered (non-binding) decisions of the Council under Article 27 of the UN Charter,¹⁰⁰ the Security Council continues to restate its commitment to emphasising the primary responsibility of states regarding the protection of individuals within their jurisdiction, through a comprehensive approach, in support of its earlier resolutions in this regard. Indeed, the continued reiteration that the Security Council ‘recognises that States bear the primary responsibility to protect civilians’ as well as reaffirming that parties to an armed conflict bear the primary responsibility to take ‘all feasible steps to ensure the protection of civilians’ and urging that they meet civilians’ basic needs while at the same time reaffirming the ‘responsibility to protect populations’ in light of the World Summit Outcome Document, reaffirms the Security Council’s comprehensive approach to the provision of assistance, in search of broad protection for those in need. This protection appears to be sought both through the original thematic ‘protection of civilians’ as well as through the more recent concept of RtoP. Furthermore, such a primary responsibility for states is asserted under international law, including humanitarian law, human rights law and refugee law, to protect their civilians and populations in circumstances of armed conflict and other situations that may provide a threat to the peace.

A primary role can therefore be discerned for the sovereign or other party exercising control within the territory where the humanitarian crisis is taking place in the view of the Security Council in the provision of assistance in circumstances threatening the peace. Finally however, it must be noted that although the Security Council appears to be taking an all-encompassing approach to the discussion of the protection of persons, it does not address such protection in situations not amounting to some form of international threat to the peace. In this regard, the General Assembly’s resolutions must be considered, to further develop a view of the current UN framework concerning the obligations of the affected state in the provision of humanitarian assistance. Nonetheless, the decisions of the Council do set forth an increasingly consistent line of reasoning regarding the responsibilities of the affected state, which can be considered to reinforce existing international norms.

6.4.2 Rights of Persons to Receive Assistance under Security Council Resolutions

Prior to discussing the approach of the General Assembly, the Security Council’s approach to the duty of the affected state to provide assistance must be set off against its approach to the potential *right to receive* such assistance. Whereas the Security Council considered the duties of the affected state rather thoroughly as discussed in the above Section, its take on the rights of individuals in the receipt of such assistance cannot be said to be anything more than meagre.

The approach of the Security Council is quite clearly developed from the perspective of the obligation of the affected state and, as will be seen in the subsequent Chapter, also from the perspective of the potential right to the delivery of

¹⁰⁰ S Talmon, ‘The Statements of the President of the Security Council’, (2003) 2 *Chinese Journal of International Law*, 447-448, 450.

assistance by third parties, which relates to a state's potential duty to allow access therefore.¹⁰¹ In fact, in analysing the Security Council resolutions pertaining to humanitarian assistance and related topics such as the protection of civilians in armed conflict, it becomes apparent that the Security Council does *not* in so many words address the rights of individuals receiving assistance. The Council rather approaches the topic from the viewpoint of the responsibilities of the state. Although this approach from the perspective of state's duties is somewhat disappointing given the opportunities the Council has to exercise influence on strengthening the 'right to receive assistance', it can to a certain degree be clarified and understood. Given the fact that the Security Council resolutions in fact bind *states*, it is logical that they are indeed therefore formulated in a manner to indeed address the responsibilities of states. Nonetheless, the opportunity remains for the Security Council to in fact also address the related right of individuals to receive aid as fulfilment of the states' duties to provide such assistance.

6.4.3 Duties of the Affected State under General Assembly Resolutions

Whilst the General Assembly resolutions do not hold binding legal consequences for states, they do contribute to the determination of the position of state practice, given the large number of states represented within the body, in particular when such resolutions are adopted by consensus. Should a distinct thread or line in the work of the Assembly be discerned, this would then contribute to the argument of potential (developing) customary legal norms in this regard.

The pivotal position of the General Assembly in the development of the role of the UN *as an organisation* in the provision of humanitarian assistance has been previously discussed in Section 2.2.1.1. This Section considers the position of the General Assembly concerning the affected state's duties. From the 1960s onwards, the General Assembly has noted the relevance of the provision of humanitarian assistance.¹⁰² A clear stance regarding the affected state's responsibility remained lacking during the early decades, as the General Assembly focused on external offers regarding the provision of assistance from the international community.¹⁰³ Yet, as early as 1981 the General Assembly noted the primacy of the role of the affected countries 'in caring for the victims of natural disasters and other disaster situations', while also stating that the primary responsibility for administration and relief operations, as well as the majority of the provision of actual material assistance lies

¹⁰¹ Section 7.4.2.

¹⁰² The General Assembly also notes the importance of disaster preparedness, mitigation and prevention in many of its resolutions. A discussion of these matters however remains outside the scope of this research.

¹⁰³ Amongst others UNGA Res 2034 (XX) 'Assistance in cases of natural disaster' (7 December 1965); UNGA Res 2435 (XXIII) (19 December 1968) § 5; UNGA Res 2717 (XXV) 'Assistance in cases of natural disaster' (15 December 1970) § 1; UNGA Res 2816 (XXVI) 'Assistance in cases of natural disaster and other disaster situations' (14 December 1971). International assistance is addressed in Chapter 7.

with these affected states.¹⁰⁴ The General Assembly reaffirmed its stance in subsequent resolutions throughout the 1980s.¹⁰⁵ Furthermore, gearing up towards its ‘International Decade for Natural Disaster Reduction’,¹⁰⁶ the General Assembly noted in 1988 and in 1990 that ‘it is up to each state first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory’ and asserted the affected state’s primary role in this regard.¹⁰⁷ The Assembly thus unequivocally asserts the responsibility of the affected state. Reiterating this position at an early stage during the ‘International Decade for Natural Disaster Reduction’, the General Assembly determined in its well-known Resolution 46/182 that:

“Each state has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory”.¹⁰⁸

Thus, almost a decade before the Security Council asserted a primary role for states in the ‘the protection of civilians in time of armed conflict’, the General Assembly claimed such a *responsibility* to lie with the affected state in times of ‘natural disaster and other emergencies’. As has already been argued, such an ‘other emergency’ may indeed include a wide variety of situations, originating from multiple origins.¹⁰⁹ It is apparent that the wording of the General Assembly resolutions, although non-binding in character, is much clearer and more direct than the Security Council in the declaration that the provision of humanitarian assistance falls within the scope of responsibilities attributable to the affected state. Where the Security Council considers phrases such as the ‘protection of civilians’ and meeting their ‘basic needs’, the General Assembly is straightforward in the assessment of the need for humanitarian assistance in the aftermath of a natural disaster and that such a need should be met through the responsibilities of the affected state. Naturally, a state’s *responsibility* for the *occurrence* of such a disaster is far more likely to be absent than is often the case in responsibility for instances of armed conflict, with which the Security Council is concerned. Such a determination by the General Assembly is therefore also more likely to be feasible in the political arena of the UN, with less political and legal consequences. Furthermore, although the General Assembly claims a responsibility for the affected state, it does not specify the exact legal basis for such a responsibility, nor do its resolutions have binding legal value.

¹⁰⁴ UNGA Res 36/225 (17 December 1981) UN Doc A/RES/36/225 preamble and § 2.

¹⁰⁵ See amongst others UNGA Res 38/202 (20 December 1983) UN Doc A/RES/38/202 preamble and § 4. See also UNGA Res 41/201 (8 December 1986) UN Doc A/RES/41/201 § 2.

¹⁰⁶ Section 2.2.1 Historical Development.

¹⁰⁷ UNGA Res 43/131 (8 December 1988) UN Doc A/RES/43/131 preamble & § 2; UNGA Res 45/100 (14 December 1990) UN Doc A/RES/45/100 preamble and § 2.

¹⁰⁸ UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182, General Assembly Resolution ‘Strengthening the coordination of humanitarian emergency assistance of the United Nations’, Annex Guiding Principles § 4.

¹⁰⁹ Section 3.2.5 Defining a (Natural) Disaster and Section 3.3.3. Defining a Humanitarian Crisis.

The abovementioned Resolution 46/182 is considered to be the cardinal resolution concerning the establishment of the UN framework on the provision and coordination of humanitarian assistance, and the Assembly has referred back to it consistently in subsequent resolutions, generally adopted without a vote, by consensus. In such subsequent resolutions, the Assembly reiterates the *Guiding Principles* annexed to Resolution 46/182, and stresses the need for humanitarian assistance to be provided according to these *Principles*.¹¹⁰ In doing so, the General Assembly has continued to repeat its original approach and wording, asserting the primary responsibility of the affected state. However, the Assembly has progressed and developed its perspective, as in subsequent years the Assembly has also addressed the responsibility of the affected state in circumstances *other* than related to natural disaster, noting:

“the obligation of all States and parties to an armed conflict to protect civilians in armed conflicts in accordance with international humanitarian law, and invites States to promote

¹¹⁰ See amongst others UN Res 47/168 (22 December 1992) UN Doc A/RES/47/168; UNGA Res 48/57 (14 December 1993) UN Doc A/RES/48/57; UNGA Res 48/188 (9 March 1994) UN Doc A/RES/48/188; UNGA Res 49/139 (20 December 1994) UN Doc A/RES/49/139; UNGA Res 51/194 (10 February 1997) UN Doc A/RES/51/194; UNGA Res 52/167 (18 February 1998) UN Doc A/RES/52/167; UNGA Res 52/168 (18 February 1998) UN Doc A/RES/52/168; UNGA Res 53/87 (27 January 1999) UN Doc A/RES/53/87; UNGA Res 53/88 (29 January 1999) UN Doc A/RES/53/88; UNGA Res 54/95 (28 January 2000) UN Doc A/RES/54/95; UNGA Res 54/192 (21 February 2000) UN Doc A/RES/54/192; UNGA Res 54/233 (25 February 2000) UN Doc A/RES/54/233; UNGA Res 55/163 (7 February 2001) UN Doc A/RES/55/163; UNGA Res 55/164 (7 February 2001) UN Doc A/RES/55/164; UNGA Res 55/175 (7 March 2001) UN Doc A/RES/55/175; UNGA Res 56/99 (31 January 2002) UN Doc A/RES/56/99; UNGA Res 56/103 (5 February 2002) UN Doc A/RES/56/103; UNGA Res 56/107 (7 February 2002) UN Doc A/RES/56/107; UNGA Res 56/217 (19 February 2002) UN Doc A/RES/56/217; UNGA Res 57/150 (27 February 2003) UN Doc A/RES/57/150; UNGA Res 57/152 (3 March 2003) UN Doc A/RES/57/152; UNGA Res 57/153 (3 March 2003) UN Doc A/RES/57/153; UNGA Res 58/25 (29 January 2004) UN Doc A/RES/58/25; UNGA Res 58/114 (5 February 2004) UN Doc A/RES/58/114; UNGA Res 59/141 (25 February 2005) UN Doc A/RES/59/141; UNGA Res 59/212 (3 March 2005) UN Doc A/RES/59/212; UNGA Res 60/123 (24 March 2006) UN Doc A/RES/60/123; UNGA Res 60/124 (8 March 2006) UN Doc A/RES/60/124; UNGA Res 60/125 (15 March 2006) UN Doc A/RES/60/125; UNGA Res 61/131 (22 February 2007) UN Doc A/RES/61/131; UNGA Res 61/133 (1 March 2007) UN Doc A/RES/61/133; UNGA Res 61/134 (1 March 2007) UN Doc A/RES/61/134; UNGA Res 62/92 (1 February 2008) UN Doc A/RES/62/92; UNGA Res 62/94 (25 January 2008) UN Doc A/RES/62/94; UNGA Res 62/95 (29 January 2008) UN Doc A/RES/62/95; UNGA Res 63/138 (5 March 2009) UN Doc A/RES/63/138; UNGA Res 63/139 (5 March 2009) UN Doc A/RES/63/139; UNGA Res 63/141 (10 March 2009) UN Doc A/RES/63/141; UNGA Res 64/76 (2 February 2010) UN Doc A/RES/64/76; UNGA Res 64/77 (8 February 2010) UN Doc A/RES/64/77; UNGA Res 64/251 (30 April 2010) UN Doc A/RES/64/251; UNGA Res 65/132 (1 March 2011) UN Doc A/RES/65/132; UNGA Res 65/133 (3 March 2011) UN Doc A/RES/65/133; UNGA Res 65/264 (21 June 2011) UN Doc A/RES/65/264; UNGA Res 65/307 (25 August 2011) UN Doc A/RES/65/307; UNGA Res 66/117 (1 March 2012) UN Doc A/RES/66/117; UNGA Res 66/119 (7 March 2012) UN Doc A/RES/66/119; UNGA Res 66/227 (15 March 2012) UN Doc A/RES/66/227; UNGA Res 67/85 (21 March 2013) UN Doc A/RES/67/85; UNGA Res 67/87 (26 March 2013) UN Doc A/RES/67/87; UNGA Res 67/231 (9 April 2013) UN Doc A/RES/67/231; UNGA Res 68/101 (18 February 2014) UN Doc A/RES/68/101; UNGA Res 68/102 (12 February 2014) UN Doc A/RES/68/102; UNGA Res 68/103 (19 February 2014) UN Doc A/RES/68/103. The General Assembly has also recalled this cardinal resolution in subsequent resolutions relating to specific situations such as for example in the Indian Ocean Tsunami UNGA Res 63/137 (11 December 2008) UN Doc A/RES/63/137; and UNGA Res 64/250 (30 April 2010) UN Doc A/RES/64/250 concerning the earthquake in Haiti.

a culture of protection, taking into account the particular needs of women, children, older persons and persons with disabilities".¹¹¹

Thus, aligning itself with the position of the Security Council, the General Assembly also affirms the duty of states and other parties to armed conflict to protect civilians, in particular the most vulnerable. This stance has then also been reiterated by the General Assembly in subsequent resolutions pertaining to the provision of humanitarian assistance.¹¹² More recently, the General Assembly has begun to call upon states to 'comply fully with their obligations under international humanitarian law' regarding the respect for and protection of civilians within their jurisdiction.¹¹³

When considering the General Assembly's perspective on the responsibility of states in the provision of humanitarian assistance, it becomes apparent that the original focus concerned a responsibility regarding the provision of humanitarian assistance in relation to natural disasters. Yet, in more recent years, the General Assembly has begun to complement the Security Council in both its topic and wording, as it has begun to include the responsibility of states to provide assistance *in times of conflict*, as well as mentioning the duties of states in the 'protection of civilians'. Thus, although it may be too soon to state that the two central UN organs are perhaps aligning themselves towards one singular perspective, the General Assembly does indeed appear to be embracing the perspective taken by the Security Council with regard to a more all-encompassing and overarching approach concerning the responsibilities of the affected state, without so much distinction as to the specific circumstance leading up to the need for emergency aid.

What remains however, is some lack in clarity with regard to the *specific* obligations that states may have within the 'general responsibility' to provide assistance. With the exception of the recent referrals to humanitarian law, the General Assembly does not declare whether these responsibilities that it recognises may be a duty to provide assistance under a particular body of law, thereby leaving no other source than general international law. Yet, the General Assembly does insist that such obligations exist in international law, and considers potential enforcement mechanisms should a state not provide for humanitarian assistance.¹¹⁴ Thus, while the UN body itself does not have the means to adopt legally binding resolutions, the resolutions in general are adopted by consensus and indicative of a particular trend within the body of UN member states. As such, it can be concluded that the UN General Assembly resolutions support the stance taken by the Security Council in the

¹¹¹ UNGA Res 58/114 (5 February 2004) UN Doc A/RES/58/114 § 12.

¹¹² UNGA Res 59/141 (25 February 2005) UN Doc A/RES/59/141 § 15; UNGA Res 60/124 (8 March 2006) UN Doc A/RES/60/124 § 3; UNGA Res 62/94 (25 January 2008) UN Doc A/RES/62/94 § 19; UNGA Res 63/139 (5 March 2009) UN Doc A/RES/63/139 § 21; UNGA Res 64/76 (2 February 2010) UN Doc A/RES/64/76 § 22; UNGA Res 65/133 (3 March 2011) UN Doc A/RES/65/133 § 23; UNGA Res 66/119 (7 March 2012) UN Doc A/RES/66/119 § 29; UNGA Res 67/87 (26 March 2013) UN Doc A/RES/67/87 § 33; UNGA Res 68/102 (12 February 2014) UN Doc A/RES/68/102 § 36.

¹¹³ See amongst others UNGA Res 65/132 (1 March 2011) UN Doc A/RES/65/132 § 12 and UNGA Res 68/101 (18 February 2014) UN Doc A/RES/68/101 § 13.

¹¹⁴ Chapter 8.

sense that here too an assertion is made regarding an overall primary responsibility for the affected state to protect civilians within its jurisdiction under international law, through the provision of humanitarian assistance in the event of a broad range of emergencies. Unlike the Security Council, which includes non-state actors such as armed groups in its deliberations, the General Assembly however focuses on the responsibilities of the affected state.

6.4.4 Rights of Persons to Receive Assistance under General Assembly Resolutions

Similar to the Security Council, the General Assembly approaches the provision of humanitarian assistance from the perspective of the state, rather than from the perspective of the recipient of such assistance. Indeed, the UN's outlook focuses on the duties that may lie with the affected state (or third states in Chapter 7), rather than possible rights of the persons in need of assistance. At an early stage, the General Assembly merely formulated rather broadly that:

“The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights”.¹¹⁵

As such, although noting the human rights context within which humanitarian assistance should take place, the General Assembly does not address specific rights-holders. This formulation that the provision of humanitarian assistance is ‘in conformity with’ the UDHR and other human rights instruments however does align with the assessment in Chapter 5 that the provision of such aid is a vehicle in the fulfilment of existing human rights.¹¹⁶

Also, the General Assembly has considered that the abandonment of victims of natural disasters ‘constitutes a threat to human life and an offence to human dignity’, although the Assembly has refrained from noting a specific obligation or duty resting upon a certain duty-bearer.¹¹⁷ Similarly avoiding a distinct responsible actor, the General Assembly has declared to be ‘deeply concerned with the victims’ of emergency situations and reaffirming the ‘cardinal importance of humanitarian assistance’ for such victims.¹¹⁸ The milestone Resolution 46/182 reiterates this perspective in its Guiding Principles.¹¹⁹ Indeed, subsequent resolutions do not evolve much, only on occasion adding words of sympathy and solidarity with those affected by disasters, but not framing such sentiments in legal rights:

¹¹⁵ UNGA Res 2675 (XXV) (9 December 1970) ‘Basic principles for the protection of civilian populations in armed conflict’ § 8.

¹¹⁶ Section 5.5.1.

¹¹⁷ UNGA Res 45/100 (14 December 1990) UN Doc A/RES/45/100 preamble § 6.

¹¹⁸ *Ibid* § 1.

¹¹⁹ UNGA Res 46/182 (19 December 1991) UN Doc. A/RES/46/182 Annex Guiding Principles 1.

“Expressing its solidarity with the people and countries that suffer as a result of natural disasters and expressing also the deepest sympathy to all victims of the natural disasters that have struck in various parts of the globe”.¹²⁰

The General Assembly herewith foregoes the opportunity to provide those finding themselves in humanitarian crises with stronger tools to assert themselves, as it avoids the formulation of both a potential right to receive aid, as well as a stronger embedding of humanitarian assistance within the current legal framework of (human) rights. Thus, it must be concluded that the General Assembly, although affirming strongly the responsibility of states to provide assistance, does not perceive this obligation to be translated into a right formulated for persons in need of assistance.

6.5 Duties and Rights in Specific Circumstances under International Law

Humanitarian assistance is not provided in a legal vacuum: it must be considered in the context of the realities on the ground. When facing a humanitarian crisis, the affected state cannot be expected to ensure that ‘life continues as normal’ prior to this crisis. Yet, humanitarian assistance in essence ensures that the basic necessities are provided to those in need. As such, given that the general international legal regulations have been discussed, the more specific regimes applicable in times of crisis need to be addressed. Therefore, this Section addresses the provision of humanitarian assistance from the various legally qualifiable circumstances of conflict, occupation and (natural) disaster. In these circumstances, specific *corpora juris* are applicable, jointly with the application of more general international law and human rights law and their provisions must therefore be addressed accordingly. Furthermore, refugee law is discussed as a separate body of law, as humanitarian assistance may be of relevance to circumstances in which a refugee population exists.

The obligations of states must continuously be considered within the context of the relationship with state sovereignty. As discussed, the current concept of state sovereignty accepts both the right of the sovereign to be free from external interference; based on the principles of consent, non-interference and domestic jurisdiction, and the duty to provide for those within its jurisdiction. In this Chapter, the provision of assistance from external sources is not specifically addressed, as the focus lies on the duty of the affected state (or non-state actor) to provide humanitarian assistance from the perspective of its sovereign duties. As such, this Chapter looks into the specific circumstances in which the latter aspect of sovereignty plays a role.

Relevant to the discussion of the current legal framework regarding the provision of humanitarian assistance, is the differentiation between the various circumstances in which assistance may be necessary. Only having clearly established which duties and rights exist in the various legal circumstances can a common denominator and shared common ground be sought and found. The determination of such a ‘minimum standard’ will allow for the better protection of *all* persons facing humanitarian crises, rather than accepting the fact that a person facing food shortages in Syria is

¹²⁰ UNGA Res 51/185 (11 February 1997) UN Doc A/RES/51/185 preamble § 2.

hypothetically not as well protected as someone needing food in the aftermath of the Sudanese drought. As such, the rights of persons to receive assistance from their sovereign in certain circumstances, namely armed conflict, occupation, natural disaster and other qualifiable circumstances are addressed according to the duties of these states.

6.5.1 Duties of the Affected State and Non-State Actor in Times of Conflict

Whilst the circumstance warranting the need for humanitarian assistance itself results in the application of a specific regime, within humanitarian law a differentiation must be made between international and non-international armed conflicts. Such a differentiation also exists pertaining to the provisions within humanitarian law, relating to the delivery of humanitarian assistance. States and non-state actors, as parties to a conflict, have obligations under international humanitarian law both in international armed conflicts and in non-international armed conflicts.¹²¹ These two factual circumstances result in the application of different legal provisions and the obligations resting upon the parties to a conflict are discussed accordingly.

Particularly poignant to the circumstance of armed conflict is the fact that the provision of humanitarian assistance not only contributes food, water and medicine to those in need, but also substantially adds to the safety on the ground of persons caught up in a conflict. Through the provision of neutral, impartial and humanitarian assistance, these persons are often reassured in their protection from violence and in their security of person. Although humanitarian assistance itself does not indeed prescribe this in its most literal definition,¹²² the provision of such assistance and the presence of such neutral, impartial and humanitarian providers contributes greatly in this regard. Within the context of humanitarian law, the Geneva Conventions and their Protocols supply a variety of legal considerations in the provision of humanitarian assistance, assessed in the following Sections.

6.5.1.1 Duties of the Affected State in Times of an International Armed Conflict

For the regulation of the obligations resting upon parties to an international armed conflict, recourse must be had in first instance to the 1949 Geneva Conventions, forming the basis of international humanitarian law today.¹²³ The Geneva Conventions differentiate between various categories of persons and duties related thereto, and as the provision of humanitarian assistance concerns a civilian population, the relevant provisions must be determined.¹²⁴ Many provisions concern relief schemes, but very few specifically address the duties of parties to an international armed conflict to provide humanitarian assistance *themselves* as the

¹²¹ See amongst others Common Article 3 to the 4 Geneva Conventions and Article 1 AP II.

¹²² Section 2.2.2 Defining Humanitarian Assistance.

¹²³ Section 3.2.2 Armed Conflicts and the Provision of Humanitarian Assistance.

¹²⁴ Section 2.3.1 Recipients of Humanitarian Assistance for a discussion on the various categories of persons.

‘affected state’ to a civilian population in need. This may well be explained by the time period in which the Geneva Conventions were drafted. As argued in the official Commentary, the Conventions uphold the principle to ‘not interfere in a State’s relations with its own nationals’ which was recognised in international law rather more unlimited at the time of drafting the Conventions in 1949 than it is today.¹²⁵ Thus, the four original Geneva Conventions of 1949 do not hold provisions specifically obliging a party to an international armed conflict to provide humanitarian assistance to (their own) civilian populations in need of such aid. Indeed, neither does their predecessor, the Convention (IV) respecting the Laws and Customs of War on Land; containing only brief provisions relating to relief for prisoners of war.¹²⁶ In fact, when considering an international armed conflict, parties are in general considered to be inclined to provide for their own civilian populations facing conflict-related hardships.

Yet, with the changing nature of the international legal domain, the 1977 Additional Protocol I *does* address the responsibility of parties to an international armed conflict to provide for its own population, by declaring a prohibition of starvation in Article 54 AP I, which includes a prohibition of parties to destroy objects that are ‘indispensable to the survival of the civilian population’:

“1. Starvation of civilians as a method of warfare is prohibited. 2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive [...] 5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity”.¹²⁷

States and other parties to an international armed conflict are therefore obliged to refrain from those activities that are incompatible with the general principle of protecting the civilian population.¹²⁸ As noted in Article 54 AP 1 and explained in the *Commentary*, certain acts (such as for example the creation of a blockade) are not necessarily prohibited, but rather the object and purpose of the act, i.e. military

¹²⁵ Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949 Volumes I-IV* (International Committee of the Red Cross 1952-1959), Volume IV Commentary GC IV Article 4, 46.

¹²⁶ Articles 15 and 16 of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907.

¹²⁷ See also Yoram Dinstein, ‘The Right to Humanitarian Assistance’ (2000) LIII *Naval War College Review* 4, 81.

¹²⁸ Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Protocol I and II* (International Committee of the Red Cross 1987) Protocol I Article 54, 653 & 657-659.

necessity as opposed to deliberately cutting off the civilian population, must be taken into consideration.¹²⁹

As the concept of state sovereignty presupposes both a right of non-interference and a duty of the state to take care of its civilian population, it is arguable to suggest that specific provisions thereto may be redundant, but practice has taught otherwise. It remains however rather unfortunate that humanitarian law does not address the specific duty of the actual parties to an international armed conflict to actively provide assistance to their own civilian population. Other than the provision of Article 54 AP I, international humanitarian law does *not* assert such duties from the affected state or other parties to an international armed conflict. And indeed, it is quite clear that the duty to refrain from causing starvation as reflected in Article 54 AP I is not as strong as a positive obligation to *provide* assistance would have been.

However, international humanitarian law is not the only body of law applicable to states involved in an international armed conflict. Indeed, human rights law and more general principles of international law remain applicable also, and are particularly relevant in the absence of specific clauses in humanitarian law. As discussed, with regard to the *lex specialis*-doctrine and the provision of humanitarian assistance, the most specific and most protective clause in a given circumstance must be considered, to provide the utmost protection – on humanitarian grounds, in the spirit of the law – to persons needing assistance.¹³⁰

As such, seen within the context of international human rights law, the obligation under Article 54 AP I does align with the obligations of states and other actors concerning the right to life, food, health (and water) under international human rights law.¹³¹ Indeed, it has been argued with regard to the right to life, that the specific prohibition of starvation as enshrined in Article 54 AP I is a reflection of the influence of human rights law on humanitarian law, as prior to the implementation of amongst others this specific provision, the deprivation of the right to life would only be arbitrary if a person died in violation of the rules of war.¹³² Also, the CESCR has asserted that part of this obligation under Article 54 to protect objects that are indispensable for the survival of a civilian population includes:

"drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water".¹³³

¹²⁹ Ibid 657-659; see also Eyal Benvenisti, 'International Protection of the Right to Water', (October 2010) *Max Planck Encyclopedia of Public International Law* § 20.

¹³⁰ Section 3.4.3 Hierarchy or Convergence of International Legal Norms?.

¹³¹ Section 6.3.1 Duties of the Affected State and Non-State Actor under Human Rights Law.

¹³² Fausto Pocar, 'Human Rights Under The International Covenant On Civil And Political Rights And Armed Conflicts', in LC Vohrah, F Pocar et al, (eds) *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (Kluwer Law International 2003) 733-735.

¹³³ CESCR General Comment 15 (20 January 2003) UN Doc E/C.12/2002/11 'The Right to water (arts. 11 and 12 of the International Covenant on Economic Social and Cultural Rights' § 22.

Thus, the CESCR directly links its perspectives on the right to water to obligations under international humanitarian law.¹³⁴ Similarly, the right to adequate food can be directly connected to these circumstances in humanitarian law, as the provision prohibiting starvation as a method of warfare can be considered a manner of protecting the right to food, although this right encompasses further positive obligations. In a similar manner, the Special Rapporteur on the right to health has asserted the duty of states to provide humanitarian assistance in conflict situations.¹³⁵ Equally, the Security Council has affirmed these duties as discussed above, although not going into great detail; stating the duties of all parties to fulfil their obligations under human rights law in times of conflict.¹³⁶ With regard to the rights as enshrined in the ICESCR, a duty of the affected state to seek international cooperation and assistance to fulfil its obligations regarding the rights to food and health is included under Articles 11 and of the Covenant. In this manner, these provisions in human rights law reach a different and higher level of protection for persons caught in conflict than the prohibition to avoid starvation as enshrined in Article 54 AP I. In particular in international armed conflict, where *states* are parties to the conflict, there is little doubt as to whom the addressees of the duties are, and both human rights obligations and duties under humanitarian law are simultaneously applicable. As such, it has been argued that the provisions in the ICESCR indeed create a more substantive protection for the receipt of humanitarian assistance.¹³⁷

Thus, the prohibition of starvation as provided for in Article 54 AP I enshrines an obligation for parties to an international armed conflict to provide emergency assistance in the event of a *threat of starvation*. Furthermore, the duties under human rights law of states party to a conflict do not cease to exist, including the obligation to *seek international assistance in the provision of the 'minimum core obligations'*. As such, not providing such assistance would not only violate Article 54 AP I itself, but also related human rights law provisions as the right to food, health and life. In fact, those latter provisions are more concrete with regard to the positive obligations of states party to an international armed conflict to provide humanitarian assistance.

6.5.1.2 Duties of the Affected State and Non-State Actors in Times of a Non-International Armed Conflict

When considering humanitarian law pertaining to non-international armed conflicts, a differentiation must be made regarding the types of non-international armed

¹³⁴ See in this regard also Benvenisti, 'International Protection of the Right to Water' (n 129) § 7: armies must respect civilians' right to water ; no direct attacks on water installations or other such items that supply water is allowed.

¹³⁵ 'Right of everyone to the enjoyment of the highest attainable standard of physical and mental health' Report of the Special Rapporteur on the Right to Health UN Doc A/68/297 (9 August 2013) § 52.

¹³⁶ Amongst others UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 § 4; UNSC Res 1863 (9 July 2009) UN Doc S/RES/1863 § 19 and UNSC Res 2036 (22 February 2012) UN Doc S/RES/2036 § 16; and Section 6.3.1 Duties of the Affected State and Non-State Actor under Human Rights Law.

¹³⁷ Rebecca Barber, 'Facilitating humanitarian assistance in international humanitarian and human rights law', (2009) 91 International Review of the Red Cross 874, 395.

conflicts and the applicable law. As discussed in Section 3.2.1, a differentiation can be made between those non-international armed conflicts where Common Article 3 is applicable, conflicts meeting the threshold of Article 1 AP II (and where parties to the conflict are also party to the Additional Protocol) and those circumstances that may arguably not meet the threshold of the applicability of humanitarian law but remain classified as ‘internal strife’ or a similar consideration.¹³⁸ A topical situation to consider in that regard is the current situation in the Ukraine, where difficulties exist in the classification of the conflict.

Commencing with the four Geneva Conventions, it becomes immediately apparent that these, similar to the case in an international armed conflict, do not contain a provision placing a duty upon states or other parties to the conflict to provide assistance to their population. In the circumstance of a non-international armed conflict, common Article 3 is applicable, and although Article 3 does not stipulate an obligation to provide assistance, it does consider that persons with no active role in the hostilities must be treated ‘humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria’. This principle as explained by the ICTY’s Trial Chamber in fact entails the obligation to not intentionally, through an act or omission cause ‘serious mental or physical suffering or injury or constitute [...] a serious attack on human dignity’.¹³⁹ Such assistance would ensure the humane treatment of those civilians finding themselves in a non-international armed conflict, and would furthermore have to be based upon the principle of non-discrimination. Indeed, although considered to reflect ‘elementary considerations of humanity’, the rules laid out in common Article 3 of the Conventions do not assist in the determination of the duties resting upon parties to a non-international armed conflict when it comes to the provision of humanitarian assistance.¹⁴⁰ Thus, it may be argued that a duty exists for parties to provide a minimum of assistance based upon common Article 3.

Similar to circumstances of international armed conflict, here too the Additional Protocol presents more considerations. With regard to the duties of the parties to a conflict, Article 1 AP II distinctly asserts that the Protocol’s applicability extends to those circumstances between a ‘State Party’ and non-state actors that can be classified as ‘dissident armed forces or other organized armed groups’ under responsible command.¹⁴¹ Article 14 of AP II relating to non-international armed conflicts is drafted in a very similar fashion to Article 54 of AP I, declaring:

“Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production

¹³⁸ Section 3.2.1.

¹³⁹ *Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka “Pavo”), Hazim Delic and Esad Landžo (aka “Zenga”) (Celebici - Case)* (Trial Chamber) IT-96-21-T (16 November 1998) § 543.

¹⁴⁰ *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 § 218.

¹⁴¹ Article 1(1) AP II.

of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works”.

The Article elaborates on common Article 3 of the four Conventions which merely refers to humane treatment and is thereby as a specific Article quite relevant for the protection of civilians caught in non-international armed conflicts, as AP II does not otherwise specifically protect civilian objects useful to the survival of civilians.¹⁴² Article 14 must furthermore be read in conjunction with Article 18 AP II, which will be discussed further in Chapter 7, as it concerns the provision of relief through *external* sources. Together, these two provisions do not allow for parties to a non-international armed conflict to use the argument of ‘military necessity’ as failure to provide for the civilian population, when such a civilian population is at risk of starvation.¹⁴³ Indeed, whilst the argument that an airstrip or harbour is not immediately available due to operations being carried out may be a valid point, such an argument will not hold over a prolonged period of time. Furthermore, according to the official Commentary, an *omission* to provide for the civilian population, resulting in starvation, may also result in a violation of parties’ obligations under Article 14.¹⁴⁴ Indeed, the Commentary distinctly argues that a party’s decision to deliberately not take ‘measures to supply the population with objects indispensable for its survival in a way would become a method of combat by default, and would be prohibited’ under Article 14 AP II.¹⁴⁵ Whereas Article 54 of AP I arguably leaves some leeway to a State with regard to its right to destroy parts of its own territory to halt the progress of enemy troops, Article 14 of AP II obliges parties to respect such civilian objects that are indispensable to the survival of the population throughout the entire territory regardless of under whose control a certain part may be.¹⁴⁶ As such, according to the Commentary, the scope of Article 14 AP II is far-reaching: obliging parties to the conflict to prevent the starvation of civilians through active measures, as omissions and ‘deliberate decisions’ to not supply indispensable relief provisions can both lead to violations of Article 14 AP II.

Similar to the circumstance of international armed conflicts, human rights law continues to be applicable in situations of non-international armed conflict and to armed groups as parties involved in such conflicts, as also assessed by the Security Council.¹⁴⁷ Indeed, as was established above, human rights obligations also rest upon non-state actors, which often play a large role in non-international armed conflicts.¹⁴⁸ As with an international armed conflict, the relevant provisions remain those related

¹⁴² Sandoz, Swinarski & Zimmermann *Commentary to the Additional Protocols* (n 128) Protocol II Article 14, 1456.

¹⁴³ *Ibid.*, 1457.

¹⁴⁴ *Ibid.*, 1458.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, 1459.

¹⁴⁷ Amongst others in UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 § 4; UNSC Res 1863 (9 July 2009) UN Doc S/RES/1863 § 19 and UNSC Res 2036 (22 February 2012) UN Doc S/RES/2036 § 16. See also Sections 3.4.2 and 6.3.1.

¹⁴⁸ Section 6.3.1.

to the right to life, food, health (and water). Such has also been reaffirmed for example by the CESCR, declaring in its General Comment pertaining to Article 11 ICESCR that:

“Violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States. These include: (...) prevention of access to humanitarian food aid in internal conflicts or other emergency situations”.¹⁴⁹

Thus, the CESCR argues that parties to a non-international armed conflict are obliged to fulfil the right to food through the provision of humanitarian assistance. Indeed, the prevention of access to humanitarian assistance results in a direct violation of Article 11 ICESCR according to the CESCR. The duties of the state and non-state actors in the realisation of the right to health have been asserted also by the Special Rapporteur on the right to health, arguing a ‘primary responsibility’ for such parties in times of conflict, which can be fulfilled through the provision of humanitarian aid and making ‘resources available’.¹⁵⁰ As such, attacks on health care facilities could be considered a violation of the right to health, with a view to the obligation of conduct enshrined in the ICESCR to provide health care. Thus, although the obligations formulated in AP II are somewhat similar to those of AP I when considering the protection of persons in need of humanitarian assistance, the scope of AP II remains restricted to non-international armed conflicts involving armed groups that hold a certain *degree of control and organisation*. The provisions of Article 14 AP II require the prevention of starvation from parties involved in the conflict, which has been explained to include the prevention of deliberate obstruction of humanitarian aid. A positive obligation cannot therefore be construed within the Protocol. Thus, the content of the Protocol is not very far-reaching in the protection of persons. Furthermore, the scope of the Protocol results in many circumstances of non-international armed conflict remaining outside its protection. This situation results in uncertainty as to the obligations concerning the provision of humanitarian assistance to those in need that happen to be in circumstances falling short of a non-international armed conflict falling within the scope of AP II. Yet, human rights law norms remain relevant and applicable. Indeed, as has been seen concerning international armed conflicts, the duties of the parties to a conflict are more protective under the rights to life, food and health. These rights envisage a *positive* obligation resting upon states, especially those of the ICESCR, to provide minimum levels of food and health care.

6.5.2 Rights of Persons to Receive Assistance in times of Conflict

Regarding the rights to *receive* humanitarian assistance in times of conflict, a similar approach as with the obligations to *provide* such assistance in times of conflict must be held. As such not only does a differentiation need to be made between the

¹⁴⁹ CESCR General Comment 12 (n 37) § 19.

¹⁵⁰ UN Doc A/68/297 (n 135) § 51- 52

circumstance of an international armed conflict and a non-international armed conflict, but also a consideration of the various applicable fields of law is relevant.

6.5.2.1 Rights of Persons to Receive Assistance in Times of an International Armed Conflict

When regarding the Geneva Conventions and AP I, neither contain specific formulations providing persons in need of humanitarian assistance with legal rights to claim such assistance from their sovereign under humanitarian law. This indeed once again reflects the timeframe of the Conventions, as can be seen for example through the incorporation of Articles 30 and 38 GC IV. Both Articles consider a right for ‘protected persons’ to apply for relief or allowing relief to be sent to them, rather than a right for civilians in general, and this right is furthermore not related to the affected state. Article 30 GC IV notes the opportunity for protected persons:

“for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them”.

As such, a right to claim assistance from the affected state is absent. Furthermore, Article 38 also does not reflect duties of the affected state to provide assistance to its own population, rather noting certain rights of protected persons such as to be:

“[...] enabled to receive the individual or collective relief that may be sent to them. (2) They shall, if their state of health so requires, receive medical attention and hospital treatment to the same extent as the nationals of the State concerned. (3) They shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith. (4) If they reside in an area particularly exposed to the dangers of war, they shall be authorized to move from that area to the same extent as the nationals of the State concerned. (5) Children under fifteen years, pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned”.

Here too the official Commentary is unambiguous, clearly stating that the intention has been to restrict these possibilities to those persons in specific circumstances (such as detention) granting them the status of ‘protected persons’.¹⁵¹ Thus, civilians finding themselves in an international armed conflict do not have the possibility to resort to specific provisions in international *humanitarian* law granting them the right to receive humanitarian assistance from their sovereign state. However, arguably an implicit right to receive such assistance does exist, as can be read in other provisions. As such, certain provisions refer to a right of third parties to *offer* assistance or relief actions which ‘shall be undertaken’ (to be discussed further in Chapter 7) if and when

¹⁵¹ Pictet, *Commentary on the Geneva Conventions of 12 August 1949* (n 125) Article 30, 213-214 and Article 38, 244.

a civilian population ‘is in need’.¹⁵² Such formulations can be construed as an entitlement of the civilian population to be supplied with emergency aid in situations of need.¹⁵³

This changing approach seen in the formulation of the provisions of AP I towards a right to receive assistance, albeit not from the state sovereign, has been supported by the practice of the ICRC and its perspective as laid down in its ‘Customary IHL Study’.¹⁵⁴ The ICRC itself has also repeatedly stated it recognises a right of a civilian population to receive humanitarian assistance in circumstances where it should be in need.¹⁵⁵ Furthermore, such a right to seek and receive relief has been explicitly incorporated by several states in their military manuals, evidencing the belief that civilian populations should be entitled to demand assistance.¹⁵⁶ Yet, as these states are few and far between, as well as the fact that the ICRC’s perspective is not *explicitly* formulated in AP II, it remains difficult to assert an actual right of the civilian population to receive assistance from their state under existing humanitarian law.

Alternatively, as seen in Section 6.3.2, such a right can be found in existing human rights law, more specifically the rights to life, food and health. These rights, considering their continued applicability in times of conflict, ensure at a more concrete level the receipt of assistance for persons in need of emergency aid. Indeed, in requesting assistance, persons in need of aid have more direct protection under human rights law, than through the inferred protection of international humanitarian law, when considering rights to receive assistance from the state sovereign.

6.5.2.2 *Rights of Persons to Receive Assistance in Times of a Non-International Armed Conflict*

Whilst civilians finding themselves in a non-international armed conflict are subject to a different legal regime, granting them other options, than those caught in an international armed conflict, it remains difficult to find clear-cut *rights* enshrined in humanitarian law for them also. As such, in circumstances falling within the scope of a non-international armed conflict as envisaged by AP II, civilians, similar to the lack of provisions in AP I, do not find distinct rights formulated within this Protocol. Articles 14 and 18 AP II do not provide for a right of civilians to demand assistance from the sovereign or other party involved in the conflict, nor do other provisions of the Protocol.

¹⁵² Article 70 AP I and to a lesser extent Articles 10 and 23 of GC IV.

¹⁵³ Jean-Marie Henckaerts & Louise Doswald-Beck (eds), *Customary International Humanitarian Law (ICRC Study)* (Cambridge University Press 2006) Rule 55.

¹⁵⁴ Henckaerts & Doswald-Beck, ICRC Customary International Humanitarian Law Study.

¹⁵⁵ ‘Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief’, Annex VI to the resolutions of the 26th International Conference of the Red Cross and Red Crescent, Geneva, 1995 Prepared jointly by the International Federation of Red Cross and Red Crescent Societies and the ICRC, Res II, § A(h).

¹⁵⁶ Henckaerts & Doswald-Beck, ICRC Customary International Humanitarian Law Study (n153) Rule 55 for the Military manuals of Germany, the Netherlands, Nicaragua and Switzerland.

Yet, the ICRC's perspective does not alter from its stance concerning international armed conflicts, and can remain true also for those civilians who are in need of assistance in times of a non-international armed conflict. As such, the ICRC argues a right to receive humanitarian assistance for *all civilians* finding themselves in a conflict situation.¹⁵⁷ However, for the exercise of these rights of civilians in such conflicts, resort will mostly have to be had to other provisions in general international law and human rights law, which remain applicable at all times. Such resort also leads to a greater protection for those caught in conflicts falling outside the scope of AP II due to a lack of organisation or control of the armed group party to the conflict. Whilst in these circumstances it may be more difficult to claim responsibility of such groups in the provision of assistance, such responsibilities will nonetheless continue to remain for the state sovereign. As seen in Section 6.3.2, the rights to life, food and health provide for such protection at a more concrete level. In fact, given the lack of protection provided to civilians under humanitarian law in particular for non-international armed conflicts falling outside the scope of AP I, the right to receive humanitarian assistance from the sovereign is more protectively and substantially enshrined in the rights to life, food and health under human rights law. As such, this law may well function as *lex specialis*, given its more specific and protective nature regarding the provision and receipt of humanitarian assistance. The provision of such assistance in fact, as concluded in Chapter 5, functions as the vehicle for the state's fulfilment of those human rights.

6.5.3 Duties of the Affected State (Occupying Power) in Times of Occupation

It remains essential to note that, while a state of war no longer needs to be declared by parties for humanitarian law to be applicable, such a conflict must be factually determined and equally a situation of occupation must be determined to assess an authority as 'occupying power'.¹⁵⁸ Only if and when an occupation is determined, shall the law of occupation enter into force. As such, the law of occupation is only applicable in a circumstance where a sovereign state is involved as an actor, *exercising a degree of control* as discussed in Section 3.2.1. The possibility of application of the law of occupation to circumstances 'other than a state of war or armed conflict between or among High Contracting parties' has also been suggested by some,¹⁵⁹ allowing for the application of the law to armed groups that may control territory without a sovereign's consent, but such a suggestion is not generally accepted.¹⁶⁰

Similar to the distinction between *jus ad bellum* and *jus in bello*, the law of occupation applies independently of whether or not the occupation was established

¹⁵⁷ 'Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief' (n 155), Res II, § A(h).

¹⁵⁸ Section 3.2.3 Defining Occupation.

¹⁵⁹ Robert B Oakley, Michael J Dziedzic, Eliot M Goldberg (eds), *Policing The New World Disorder: Peace Operations And Public Security* (National Defense University Press 1998) 405.

¹⁶⁰ Barber, 'Facilitating humanitarian assistance in international humanitarian and human rights law', (n 137) 384-385.

lawfully, as long as its factual establishment can be determined.¹⁶¹ As such, the ICJ concluded in 2005 in the *Armed Activities in the Democratic Republic of Congo* case that:

“Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party. The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda’s responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account. The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation”.¹⁶²

Thus, establishing *who* the occupying power is in a certain situation is the primary step to determining that the law of occupation is applicable, triggering (some of) the duties of the occupier to provide in humanitarian assistance for the civilian population should it be in need. Indeed this caveat of ‘need’ is of more relevance to the law of occupation, as opposed to the law of armed conflict, given that circumstances of conflict are more likely to result in situations of humanitarian crisis. Occupation on the other hand may not lead to the establishment of a humanitarian crisis, but rather on the contrary serve to prevent or solve such situations, such as for example the role of the United States and United Kingdom in Iraq following the armed conflict in 2003.¹⁶³

Contrary to the law concerning armed conflict, the law of occupation historically contains many provisions prescribing an occupying power to provide in humanitarian assistance to an occupied population. Explanations for this difference with the law of armed conflict can particularly be found in the circumstances of World War II and the German occupation of large parts of Europe, leading up to the creation of the Geneva Conventions. Article 43 of the Regulations Concerning the Law and Customs of War on Land, as the predecessor to the Geneva Conventions dealing with occupation, does not distinctly mention such a duty of the occupier to provide, but

¹⁶¹ Section 3.2.3 Defining Occupation; see also Eyal Benvenisti, *The International Law of Occupation* (Oxford University Press 2012) 5.

¹⁶² *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168, § 178-180.

¹⁶³ See in this regard the role of the Coalition Provisional Authority, UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483.

succinctly declares that such a power must ensure ‘public order and safety’.¹⁶⁴ However, the 1949 Geneva Conventions and their Protocols, following the events of World War II, clearly and more elaborately set forth the duties of the occupying power, starting with Article 55 GC IV which declares:

“To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate. The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. [...] The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements”.

Clearly this is a differentiation from the law applying to parties to an armed conflict in which no occupation exists, as the obligations in the Geneva Conventions and their Protocols do not contain such provisions for parties to a conflict in general. Indeed, the developments in the law of occupation cannot be viewed as separate from the Nazi-occupation of large parts of Europe, in the aftermath of which these provisions were developed. Article 55 GC IV thereby extends the duties of the occupier, as it now has to ‘ensure to the fullest extent of the means available’ that the population is provided with food and medical supplies. As such, Article 55 GC IV remains aware of the difficulties an occupier may face while doing so at the time of a conflict.¹⁶⁵ The occupying power may furthermore not be relieved from its duties in the event assistance is provided through other, external, sources (to be discussed further in Chapter 7), as Article 60 GC IV stipulates that the responsibility to provide relief remains with the occupying power.¹⁶⁶

In relation to the provision of relief and duty to ensure that an occupied population receives medical supplies, Article 56 GC IV obliges the occupier furthermore to ensure and maintain hospitals and public health, particularly taking measures concerning the prevention of epidemics.¹⁶⁷ However, this responsibility does not rest solely with the occupying power, as Article 56 provides that such measures should be taken ‘with the co-operation of national and local authorities’.¹⁶⁸ While the

¹⁶⁴ Article 43 Regulations Concerning the Law and Customs of War on Land – annex to Convention Respecting the Laws and Customs of War on Land. See also Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009), who argues that the 1907 Hague Regulations provide insufficient protection to civilians.

¹⁶⁵ Pictet, *Commentary on the Geneva Conventions of 12 August 1949* (n 125) Article 55, 309-310.

¹⁶⁶ Article 60 GV IV and also Pictet, *Commentary on the Geneva Conventions of 12 August 1949* (n 125) Article 60, 323.

¹⁶⁷ The relevant passage of Article 56 GC IV declares: “To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics”.

¹⁶⁸ Pictet, *Commentary on the Geneva Conventions of 12 August 1949* (n 125) Article 56, 313.

provisions relating to the duties of an occupier in GC IV already greatly surpass the duties resting upon parties to conflicts in general under the Geneva Conventions, Additional Protocol I has added to these duties as GC IV relates mostly to a responsibility of the occupying power to provide necessary food and medical supplies. Article 69 AP I supplements this obligation by stipulating that the occupier must, again ‘to the fullest extent of the means available to it’, also ensure clothing, shelter and *other* supplies that may be ‘essential to the survival of the civilian population’. AP I thereby creates a non-limitative list through which the occupier is obliged to supply those items that may be necessary specific to a certain situation.¹⁶⁹ However, the text of the Article does recognise that an occupying power may be limited (beyond its control) in its possibilities, as the Protocol stipulates that the occupier shall be limited by the ‘extent of the means available to it’.¹⁷⁰ Such limitations indeed reflect the fact that a circumstance of occupation can immediately follow that of conflict, resulting in a situation in which the fulfilment of these duties are more difficult. Whereas certain duties apply immediately upon establishment of occupation, other duties, amongst which those stipulated in Articles 55, 56 and 59-62 and related to the provision of assistance through relief such as food and medical supplies, may arise only at a later stage.¹⁷¹ Thus, interestingly the particular provisions under GC IV *pertaining to the delivery of humanitarian assistance* necessary at the time of a humanitarian crisis only arise upon the *longer* establishment of occupation, whereas such a crisis may then not, or no longer, exist.

However, as established also with regard to times of armed conflict, the law of war, or in this case, the law of occupation is not necessarily the only body of law applicable. As seen above, it is accepted by the ICJ that human rights find continued application in times of occupation.¹⁷² Such application in relation to the duties of the ‘affected state’ is distinct from its application in times of armed conflict, as in the latter case such application relates to the sovereign’s duties regarding its own citizens whilst in times of occupation such obligations would rest upon the occupying force regarding the occupied population. However, for all the obligations of the occupier to enter into force, including relevant human rights obligations, a level of ‘effective’ control or authority must be established.¹⁷³ Therefore it is necessary to establish the exact level of ‘control’ of the occupying force in order for human rights law to be a source of obligations in the provision of humanitarian assistance for the occupier in a certain circumstance. As noted in more detail in Section 3.4.2.2 however, international law today does not definitively determine the level of ‘effective’ control

¹⁶⁹ Sandoz, Swinarski & Zimmermann *Commentary to the Additional Protocols* (n 128) Protocol I Article 69, 812.

¹⁷⁰ Dinstein, *The International Law of Belligerent Occupation* (n 164) 150.

¹⁷¹ See in particular Section 3.2.4 Occupation and the Provision of Humanitarian Assistance regarding the timeframe and level of control necessary for the application of several of the provisions. See also Pictet, *Commentary on the Geneva Conventions of 12 August 1949* (n 125) Article 6, 60.

¹⁷² ICJ *Armed Activities on the Territory of the Congo* (n 162) § 216.

¹⁷³ See amongst others for example with regard to the right to water Benvenisti, ‘International Protection of the Right to Water’ (n 129) § 7 and 20.

or authority needed for the extraterritorial application of human rights.¹⁷⁴ Thus, this leaves the practical application of human rights obligations in times of occupation somewhat uncertain.

Furthermore, the 'progressive development' aspect of the rights incorporated in the ICESCR, such as the right to food and health, as relevant to the provision of humanitarian assistance, may be problematic for an occupying force establishing new control over a certain territory and not necessarily intending to *remain* the occupying force for an extended period of time, and must therefore be taken into account.¹⁷⁵ The 'minimum core obligations' of the ICESCR resting upon states regarding the rights to food and health, which must be fulfilled, however do complement the duties of an occupier under the law of occupation, as this framework can be seen as 'emergency law'.¹⁷⁶ Indeed, these minimum core obligations must then be seen in the context of the establishment of control by the occupying power.

Both for the applicability of human rights obligations and for the applicability of the specific provisions in the Geneva Convention relating to the provision of humanitarian assistance, a certain duration and degree of control are therefore necessary to incur responsibilities for the occupying power. Given the fact that humanitarian assistance is of relevance in the immediate existence of a humanitarian crisis such may well not be the case in the establishment of situations of occupation today, as compared to the origins of the elaborations in the Geneva Conventions following World War II. In that regard, it has also been noted by Higgins that whilst the protection of civilians is an 'intransgressible obligation of humanitarian law', such an obligation not only rests upon the occupier, but 'equally for those seeking to liberate themselves from occupation'.¹⁷⁷ Indeed, in such circumstances a humanitarian crisis may once again arise.

6.5.4 *Rights of Persons to Receive Assistance in Times of Occupation*

Similar to the provisions lacking in humanitarian law concerning an international and a non-international armed conflict, the law of occupation does not provide for a distinct right of individuals to claim humanitarian assistance *from the occupier*. Whereas Articles 59 and 60 GC IV and 69 AP I contain obligations for the occupying power to provide in relief, they do not equally entail a right for individuals during occupation that may be enforced towards the occupier. The obligations resting upon the occupier in fact cannot be 'reversed' into an enforceable right of individuals. Indeed, such a lack in distinct rights for individuals may follow from the related circumstance that a level of control needs to be established prior to which the duties relating to the provision of humanitarian assistance are applicable to the occupying

¹⁷⁴ Section 3.4.2 Applicability of Human Rights in Armed Conflict and Occupation.

¹⁷⁵ Sylvain Vité, 'The interrelation of the law of occupation and economic, social and cultural rights', (2008) 90 *International Review of the Red Cross* 871, 632.

¹⁷⁶ *Ibid* 636.

¹⁷⁷ Separate opinion Judge Higgins § 19 in the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136.

power. In fact, given the need for a certain amount of time to pass in this transitional stage, international humanitarian law in a larger sense may continue to be applicable with the therein-incorporated rights and duties relating to conflict.

Thus, in situations of occupation, individuals wanting to request humanitarian assistance from the occupying power must resort to the above mentioned regulations as enshrined in human rights law, or more general international law regulations. With regard to such possibilities, it must equally be noted that the applicability of human rights law, although acknowledged, has not crystallised yet to the extent of unambiguously determining at what point during an occupation a level of control has been established granting individuals the right to request humanitarian assistance from the occupying force, based on human rights law.

6.5.5 Duties of the Affected State in Times of (Natural) Disaster

A third circumstance, following armed conflict and occupation, is that of a (natural) disaster. The legal regime applicable to disasters of both man-made and natural origins is not as specific as the legal regime applicable in times of conflict or occupation. Humanitarian law is not applicable, unless the disaster takes place on a territory where an armed conflict is also occurring simultaneously. The general principle of humanity however finds continued application. The ICJ stated as early as the 1949 Corfu Channel-case that indeed

“certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war”¹⁷⁸

exist that are applicable to an even greater detail in times of peace. The principle of humanity has been discussed at length in Section 2.2.3.1. Of course in circumstances of disaster, general international law such as the law of state responsibility and more specifically human rights law are applicable, and in the above Section 6.3.3 in particular the role of the General Assembly in asserting the responsibilities of the affected state has become apparent. The UN body has been concerned with victims of natural disaster for decades, expressing amongst other concerns that:

“the abandonment of the victims of natural disasters and similar emergency situations without humanitarian assistance constitutes a threat to human life and offence to human dignity”.¹⁷⁹

Given the fact that a particular regime for natural disaster law is absent, efforts have been made to assert the applicability of certain general aspects of international law in the circumstance of a natural or man-made disaster, and the ensuing need for humanitarian assistance when a humanitarian crisis unfolds. As such, the General Assembly has claimed that the primary responsibility in the provision of

¹⁷⁸ Corfu Channel Case (UK v Albania) (Merits) 9 April 1949 I.C.J. Reports 4, 22.

¹⁷⁹ UNGA Res 43/131 (8 December 1988) (n 3) preamble.

humanitarian assistance *in the aftermath of a disaster* lies with the affected state, while simultaneously affirming the affected state's sovereignty.¹⁸⁰ This perspective has indeed been reaffirmed by various other organs within the UN framework.¹⁸¹ Furthermore, such organs have asserted the importance of states' responsibilities under human rights law in the discourse on the provision of humanitarian assistance, as the provision thereof is a vehicle in, or recognition of, the fulfilment of several essential human rights.¹⁸² Whereas circumstances of disaster may frequently lead to the state asserting a 'state of emergency' which may result in the invocation of certain derogation clauses under international human rights treaties, this does not affect the duty of the affected state in its responsibilities to provide humanitarian assistance. Indeed, as discussed in Section 5.2.2, the relevant rights regarding the provision of humanitarian assistance, i.e. the rights to life, food and health, do not allow for derogation (from minimum core obligations) in times of emergency. As such, the duties of the affected state with regard to the provision of assistance under human rights law continue to be applicable in the aftermath of disasters, and as such Section 6.4.1 has addressed these responsibilities in detail. This Section focuses on the more specific regulations geared towards natural or man-made disasters, *besides* existing obligations in human rights law.

Currently, only a few international (regional) conventions exist concerning the facilitation of humanitarian assistance in the event of a natural disaster. Previously, failed attempts include the 1927 'Convention establishing an International Relief Union'; the first international convention on peacetime disaster relief, and the 1984 'Draft Convention on expediting the delivery of emergency assistance'.¹⁸³ Although both initiatives were many years apart, the international community was still unable to positively create legal obligations for the provision of humanitarian assistance in the aftermath of a natural disaster through an international convention.¹⁸⁴ The current binding legal regime as laid down in treaty law is therefore limited and regional. An example includes the 'Inter-American Convention To Facilitate Disaster Assistance'

¹⁸⁰ For a comprehensive list of GA resolutions see (n 110) and *infra* Annex. One of the primary affirmations has been in UNGA Res 36/225 (17 December 1981) UN Doc A/RES/36/225 § 2, and a more recent example can be found in UNGA Res 64/251 (30 April 2010) UN Doc A/RES/64/251 preamble.

¹⁸¹ 'Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development Human Rights And International Solidarity' Note By The United Nations High Commissioner For Human Rights UN Doc A/HRC/12/27 (22 July 2009) § 36; 'Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development' Report Of The Representative Of The Secretary-General On The Human Rights Of Internally Displaced Persons UN Doc A/HRC/10/13/Add.1 (5 March 2009) § 38; 'Operational Guidelines on Human Rights and Natural Disasters' by the Representative on human rights of internally displaced persons UN Doc A/HRC/4/38/Add.1 (26 January 2006) General Principle II.

¹⁸² See amongst others 'Report of the independent expert on human rights and international solidarity (Mr. Rudi Muhammad Rizki)' UN Doc A/HRC/4/8 (7 February 2007) § 23; UN Doc A/HRC/10/13/Add.1 (n 181) § 10, 20 and 67; Report of the Special Rapporteur on the Right to Health UN Doc A/HRC/7/11/Add.2 (5 March 2008) § 133.

¹⁸³ Convention establishing an International Relief Union Geneva (12 July 1927); UNGA Res 39/367 (18 June 1984) UN Doc A/39/367/Add.2 and E/1984/96/Add.2 'Draft Convention on Expediting the Delivery of Emergency Relief'.

¹⁸⁴ See Section 2.2.1 on the reasons behind the failure of this convention.

of 1991.¹⁸⁵ Although only very few states have ratified this regional treaty, similar to the stance of the General Assembly, the Convention places the responsibility of the coordination of humanitarian assistance upon the affected state.¹⁸⁶ In 2005, the ASEAN Agreement on Disaster Management and Emergency Response settled with regard to the Asian region that ‘each affected Party shall have the primary responsibility to respond to disasters occurring within its territory’.¹⁸⁷ The ASEAN Agreement bases this assertion on the concept of state sovereignty. More specifically geared towards nuclear accidents, the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency also places the primary responsibility for ‘the overall direction, control, co-ordination and supervision of the assistance’ with the affected state.¹⁸⁸

It becomes apparent that besides rather topic-specific regulations and small regional initiatives, international binding regulation concerning the responsibilities for the provision of humanitarian assistance in the aftermath of a disaster are lacking. Indeed, general international law and human rights law provide a solid basis, upon which responsibility can be asserted for the affected state to provide such assistance. Despite such existing obligations, certain specific soft law regulations as well as regulations currently under development, can be applied to the circumstance of a natural disaster, although they do not (currently) have legally binding force. Despite their non-binding nature, they are of practical value to the provision of assistance, as well as contributing to further development of the current legal framework.

6.5.5.1 The Potential Application of the ILC Study: Protection of persons in the event of disaster

In developing its study on the ‘Protection of persons in the event of disaster’, the ILC has formulated Draft Articles pertaining to the rights and obligations in the provision of assistance. Although these Articles do not currently have binding legal stature, and it remains uncertain whether they will obtain such standing, the ILC's work is relevant to the development of the law pertaining to humanitarian assistance and international law.¹⁸⁹ Indeed, the Articles themselves are currently very much in the developmental stage, and it remains unclear precisely which form they will obtain if and when adopted. Draft Article 21 clearly defines the scope, stating that the Articles will not be applicable to circumstances in which international humanitarian law is

¹⁸⁵ ‘Inter-American Convention To Facilitate Disaster Assistance’ (7 June 1991, entry into force 16 October 1996). To date, 6 states have ratified the treaty, namely Colombia, Dominican Republic, Nicaragua, Panama, Peru and Uruguay

¹⁸⁶ Article IV(a) Inter-American Convention To Facilitate Disaster Assistance.

¹⁸⁷ Article 3, Principle 1 ASEAN Agreement on Disaster Management and Emergency Response 2005. Currently 10 states are party, equal to the number of member states of ASEAN, namely Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

¹⁸⁸ Article 3(a) of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (18 November 1986). To date the Convention has 112 state parties.

¹⁸⁹ See Section 2.2.2 on the work of the ILC.

applicable.¹⁹⁰ The ILC Study thereby takes the approach that international humanitarian law as a body of law is the *lex specialis* in times of conflict, and a different regime applies entirely in times of disaster.¹⁹¹ Although this follows on from the approach taken by many of the UN organs in the provision of humanitarian assistance during the past decades, the opportunity was missed to approach disaster relief from a more all-encompassing perspective, including all applicable fields of law through one study, namely human rights law, humanitarian law and refugee law; an approach that has been adhered to increasingly in the past years.¹⁹² Indeed such a perspective is held by the ILC Special Rapporteur who has argued for a more simultaneous applicability and complementarity of the various fields of law relevant to disaster situations, including humanitarian law.¹⁹³ It is therefore regrettable that the ILC as a whole in drafting these Articles is apparently creating another niche and separate body of law applicable to non-conflict disaster situations, as opposed to embracing a more all-encompassing view.

Addressing more specifically the obligations set out in these Draft Articles, it becomes apparent that a *primary responsibility* is envisaged for the affected state. Draft Article 12 sets out that:

“1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. 2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance”.¹⁹⁴

Thus, Draft Article 12 clearly expresses the primary duty of the affected state to provide assistance to the population affected by disaster. The term ‘protection’ reflects the overall theme of study of the ILC.¹⁹⁵ The notion of ‘protection of persons’ is therefore of a broader view than the more narrow ‘protection of civilians’ as a concept within international humanitarian law and as also used by the Security Council, although discussion on this topic also exists.¹⁹⁶ The Special Rapporteur has elaborated that the Draft Articles intend to respect state sovereignty within their

¹⁹⁰ ILC ‘Protection of persons in the event of disasters’ Draft Articles UN Doc. A/CN.4/L.831 (15 May 2014) Draft Article 21. In subsequent reports, states have addressed the option that the Articles apply in situations where existing international law provisions do not: ‘Fourth report on the protection of persons in the event of disasters’ by Eduardo Valencia-Ospina, Special Rapporteur (11 May 2011) UN Doc A/CN.4/643 § 10.

¹⁹¹ ‘Preliminary report on the protection of persons in the event of disasters’ (5 May 2008) International Law Commission, UN Doc A/CN.4/598 § 49.

¹⁹² See Section 3.4 on the relationship between human rights and humanitarian law.

¹⁹³ ILC ‘Preliminary report on the protection of persons in the event of disasters’ UN Doc A/CN.4/598 (n 191) § 51.

¹⁹⁴ ILC ‘Protection of persons in the event of disasters’ Draft Articles UN Doc. A/CN.4/L.831 (n 190).

¹⁹⁵ ‘Third report on the protection of persons in the event of disasters’, ILC Special Rapporteur Eduardo Valencia-Ospina, UN Doc A/CN.4/629 (31 March 2010) § 97.

¹⁹⁶ Amra Lee, ‘The Case for Strengthening Protection Frameworks in ‘Other Situations of Violence’ (2014) *The Journal of Humanitarian Assistance* <<http://sites.tufts.edu/jha/archives/2091>> accessed 1 March 2015.

framework.¹⁹⁷ Interestingly, Draft Article 13 includes another duty of the affected state, namely a *duty to seek assistance* should the disaster not be manageable through its own resources:

“To the extent that a disaster exceeds its national response capacity, the affected State has the duty to seek assistance from among other States, the United Nations, other competent intergovernmental organizations and relevant non-governmental organizations, as appropriate”.¹⁹⁸

The Draft Articles therefore see an active duty from the perspective of the affected state to not only provide humanitarian assistance individually but to also take up the responsibility to seek such assistance from other states. This duty aligns with the obligations reflected in the ICESCR. When indeed reasoned from a human rights perspective, such a duty would in fact be arguable in line with the obligations resting upon a state under Article 2 ICESCR, in combination with the relevant rights to food, health (and water).¹⁹⁹ Indeed, the ILC Special Rapporteur has also followed this reasoning, elaborating that while this duty to seek assistance by no means diminishes the obligations of the affected state to provide assistance itself, this notion of ‘internal sovereignty’ also encompasses a duty to seek assistance from other, external, sources in a state’s fulfilment of its human rights obligations.²⁰⁰ Given the fact that the Draft Articles are currently in a state of development, it remains to be seen what the final outcome shall become, and what their influence may be on the law pertaining to the provision of humanitarian assistance in times of natural disaster. Furthermore, given the fact that the Draft Articles distinctly do *not* incorporate circumstances in which humanitarian law is applicable, it is at least commendable that they follow the line of existing human rights law. With a view to the continuous protection of persons in need of assistance, the creation of *another* separate body of law, applicable in specific circumstances, may only add to the fragmentation of the law, as opposed to assisting in the creation of greater protection.

6.5.5.2 *The Potential Application of the IDRL Guidelines and Model Act*

As a second initiative, the ‘Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance’ (IDRL Guidelines), may be considered. The IDRL Guidelines were developed by the International Federation of the Red Cross and were unanimously adopted by all state parties to the 1949 Geneva Conventions in 2007.²⁰¹ The IDRL Guidelines aim to aid governments in preparedness at a domestic level with regard to overcoming legal obstacles in the

¹⁹⁷ UN Doc A/CN.4/629 (n 195) § 67 and further.

¹⁹⁸ ILC ‘Protection of persons in the event of disasters’ Draft Articles UN Doc. A/CN.4/L.831 (n 190).

¹⁹⁹ Sections 5.2.2.1 and 5.4 and further.

²⁰⁰ UN Doc A/CN.4/643 (n 190) § 32-40.

²⁰¹ ICRC Resolution 30IC/07/R4 ‘Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance’, 30th International Conference of the Red Cross and Red Crescent (30 November 2007).

provision of assistance in the aftermath of disaster, but are distinctly *not binding* in their nature. More relevantly, nor are they *intended* to be binding as they merely provide suggestions to adopt, and in this way distinctly differ from for example the General Assembly resolutions which are also non-binding in nature but hold a different standing as they are more reflective of state practice and contribute to customary developments.²⁰² The IDRL Guidelines follow the IDRL Programme which was developed in 2001 (as of 2012 called the 'Disaster Law Programme') following a resolution for this purpose by the Red Cross and Red Crescent Council of Delegates, and aimed at a:

“compilation and publication of existing international laws and regulations, and the evaluation of their actual effectiveness in humanitarian operations”.²⁰³

Therefore initially appearing to have a more international legal approach, the Guidelines themselves however operate as more domestic tools for states. In their creation and methodology, the IFRC did build on domestic examples as well as various existing (soft) law tools.²⁰⁴ As the Guidelines aim to be a practical tool for governments in their national responses, they will not be discussed in depth as part of the international legal framework concerning humanitarian assistance.²⁰⁵ Indeed, following their adoption in 2007, only 12 states have reported to have ‘drawn language or inspiration’ from the Guidelines in their domestic legislation.²⁰⁶ Even if the intention of the Guidelines therefore had been more legislative they cannot be considered reflective of state practice. For the purpose of this Chapter it is however relevant to note that these IDRL Guidelines also identify the affected state as the primary responsible actor in the provision of assistance in the event of a disaster.²⁰⁷

However, the more recently developed ‘Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance’, as supplement to the IDRL Guidelines, does indeed attempt to provide more legal regulation, although also operating at a domestic level. This ‘Model Act’; which is a model and example for domestic lawmakers, was adopted in March 2013 as an initiative of the IFRC ‘intended to assist states to strengthen their legal preparedness

²⁰² IFRC ‘Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance’ (IDRL Guidelines) (30 November 2007), adopted at the 30th International Conference of the Movement, § 1: “These Guidelines are non-binding. While it is hoped that States will make use of them to strengthen their laws, policies and/or procedures related to international disaster response, as appropriate, the Guidelines do not have a direct effect on any existing rights or obligations under domestic law”.

²⁰³ Council of Delegates of the International Red Cross and Red Crescent Movement, (Geneva, Switzerland 11 - 14 November 2001) ‘Resolution 5: International Disaster Response Law’ §1.

²⁰⁴ ‘International Disaster Response Laws (IDRL) Project Report 2002-2003’, 28th International Conference of the Red Cross and Red Crescent (2-6 December 2003), IFRC and Red Crescent Societies Doc 03/IC/11.

²⁰⁵ IFRC IDRL Guidelines (2007) (n 202) § 3.

²⁰⁶ <<http://www.ifrc.org/en/what-we-do/idrl/idrl-guidelines/new-legislation-adopted-on-idrl/>> accessed 8 February 2015.

²⁰⁷ IFRC IDRL Guidelines (2007) (n 202) Article 3.

for international disaster cooperation' in a manner that would be 'appropriate to their national circumstances'.²⁰⁸ Similar to the IDRL Guidelines, the Model Act suggests in its Article 2 that the affected state bears primary responsibility for the provision of humanitarian assistance.²⁰⁹ Given the novel status of this Model Act, it has yet to be embraced by states and subsequently incorporated into their domestic regulatory framework.

Thus, contrary to the circumstance of conflict and occupation, *one* particular legal regime pertaining to humanitarian assistance in times of (natural) disaster is missing. As such, no concrete, specific legal provisions relate to the obligations resting upon the affected state to provide in assistance for the population within its territory or control, following such a disaster. However, general international law and most notably human rights law provide the continuous legal basis for such obligations and assertions in times of disaster. Such more general provisions are occasionally supplemented with regional conventions such as on the South American continent and the ASEAN Management Agreement. Although the developments of the ILC and IFRC recognise the responsibility of the affected state, in a similar matter to existing international law, it remains to be seen what their contributions to the existing legal framework will be. On the one hand, the IDRL Guidelines and Model Act operate more at the domestic level, while the ILC initiatives into the protection of persons in the event of a disaster have yet to concretely materialise with more binding status. The latter also problematically limits itself to circumstances distinctly outside the realm of the applicability of international humanitarian law.

6.5.6 Rights of Persons to Receive Assistance in Times of (Natural) Disaster

As a result of the above lacking framework on the specific obligations for the affected state in times of disaster, similarly no particular framework is in place concerning the *rights* of persons to *request* such (international) assistance from their sovereign.²¹⁰ General human rights law of course continues to find applicability and individuals shall therefore be able to have recourse to such provisions in the aftermath of disaster. The UN IASC has also asserted this perspective, developing 'Operational Guidelines on Human Rights and Natural Disaster' through which victims of natural disaster 'should enjoy the same rights and freedoms under human rights law as others in their country'.²¹¹ Important as such Guidelines may be for those involved in the practice of humanitarian assistance, from a *legal* perspective additional specific guarantees in the form of specific rights to request humanitarian aid are absent for victims of natural

²⁰⁸ <<http://www.ifrc.org/en/what-we-do/idrl/model-act-on-idrl/>> accessed 19 October 2014.

²⁰⁹ Article 2(a) of the Model Act.

²¹⁰ The Directory of National emergency Response offices, Disaster Emergency Plans and Legislation, and Regional and Sub-Regional Agreements for Disaster Assistance, UNDRO 1992 however states to have documentation on legislation for 64 countries; that apparently entail a right to receive assistance.

²¹¹ 'Operational Guidelines on Human Rights and Natural Disasters' by the Representative on human rights of internally displaced persons UN Doc A/HRC/4/38/Add.1 (26 January 2006) General Principle I. See also in this regard the follow-up thereto, developed in cooperation with the Brookings-Bern Project, 2011.

disasters in these Guidelines. However, the work of the ILC in developing its Draft Articles on the Protection of persons in the event of disasters may bring renewed possibilities to the victims of natural disasters that find themselves in need of humanitarian assistance, strengthening their position. Formulating specific legal rights enhances the position of those finding themselves in the aftermath of disaster, to claim aid from those exercising sovereign duties.

6.5.6.1 The Potential Application of the ILC Study: Protection of persons in the event of disaster

The ILC study, which is currently still in progress, has to date foregone the opportunity to create a Draft Article tailored specifically to the needs of those requesting assistance in the aftermath of a disaster.²¹² Until now, the ILC study has merely incorporated a Draft Article 6 stating that ‘persons affected by disasters are entitled to respect for their human rights’.²¹³ As the focus lies on the protection of those in the aftermath of a disaster, it appears that the ILC, like many other initiatives and legal provisions, has taken the approach of the obligation of the *state*, rather than the right of the *individual* to request specific assistance from its sovereign. In doing so, the ILC has opted to focus in its study on those obligations that may rest upon states or rights that may exist for other providers of assistance, rather than attempting to formulate a right to receive assistance for victims of (natural) disasters. Indeed, the ILC study does not break new ground, or depart from the existing degree of protection envisaged under general human rights law. Whilst it is commendable to ensure the protection that may be derived from existing human rights provisions; and these existing human rights do ensure a sufficient level of protection for those in a humanitarian crisis without warranting the development of an individual human right, it remains somewhat disappointing that the ILC study has not asserted a more specific formulation. Indeed, as the Draft Articles appear to attempt to develop a new legal framework specifically tailored for circumstances of disaster, one would expect a more elaborate development of rights of persons finding themselves in such crises. From the perspective of this research however, which takes a more encompassing view of the legal framework of humanitarian assistance, the reliance of the ILC study on the existing legal body of human rights law in fact confirms the assertion made in this research that such a framework adequately represents the rights of persons in need of emergency aid.

6.5.6.2 The Potential Application of the IDRL Guidelines and Model Act

An entirely different stance has been taken by the IFRC/ICRC, in relation to the IDRL Guidelines. Indeed, while the IDRL Guidelines do not hold binding legal status nor formulate a specific right to receive assistance, the ICRC in 2007 recognised that

²¹² Spring 2015.

²¹³ ILC ‘Protection of persons in the event of disasters’ Draft Articles UN Doc. A/CN.4/L.831 (n 190).

the Movement considers persons to have a fundamental right ‘both to offer and receive humanitarian assistance’, whilst adopting these Guidelines.²¹⁴ Moreover, this stance was a reaffirmation of the ‘Principles and Rules of the Red Cross and Red Crescent in Disaster Relief’.²¹⁵ Clearly such expressions are not legally binding, but may be seen as the perspective of the ICRC/IFRC on the manner in which humanitarian assistance and its legal framework should be approached. Subsequently, although the ‘Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance’ was created to supplement the IDRL Guidelines, it too does not formulate a right of persons to receive assistance. Therefore, whilst such a perspective may be the stance of the ICRC/IFRC as an organisation, it is not reflected in their legislative attempts for the domestic regulation of disaster response.

In times of conflict and occupation many of the legal provisions concern the duties of the state as opposed to the rights of the individuals, resulting in the absence of an individual’s right to claim assistance from the sovereign. In times of natural disaster, the end result is indeed similar, whereas the result is reached through a general lack of an existing legal framework, and a lack of implementation of the perspective into the existing initiatives.

6.5.7 Duties of the Affected State under Refugee Law

Although being a ‘refugee’ or an ‘Internally Displaced Person’ is not a situational circumstance as for example conflict and natural disaster, being defined as a ‘refugee’ or as an ‘IDP’ does warrant the applicability of a specific set of rules, as in certain instances those persons in need of humanitarian assistance may be categorised as refugees or IDPs, independently from other groups of civilians facing for example a conflict or disaster.²¹⁶

The application of refugee law and obligations in this regard concerning the provision of humanitarian assistance is dependent on the qualification of a person as ‘refugee’ under the 1951 Refugee Convention.²¹⁷ As noted above in Section 2.3.1, the provision of humanitarian assistance is aimed at all those in need of emergency aid in the aftermath of a crisis, while refugees mark a distinct category of such persons, and their legal qualification often occurs during a timeframe that may *exceed* the situation of a ‘humanitarian crisis’ in which humanitarian assistance is necessary. Furthermore, for the purposes of the provision of humanitarian assistance upon which this research is focused, the determination of a ‘refugee-status’ involves a cross-border movement to the extent that a person no longer is able to turn to the government of its original nationality for assistance.²¹⁸ Refugee law therefore has a

²¹⁴ ICRC Resolution 30IC/07/R4 (n 201).

²¹⁵ ‘Principles and Rules of the Red Cross and Red Crescent in Disaster Relief’ as amended by the 26th International Conference of the Red Cross and Red Crescent, 1995.

²¹⁶ Section 2.3.1 Recipients of Humanitarian Assistance.

²¹⁷ See Section 2.3.1 on the definition of a refugee, as according to the 1951 Refugee Convention.

²¹⁸ Article 1 Refugee Convention.

specific focus on ‘protection’ which is distinct from emergency assistance with which the legal framework of humanitarian assistance is concerned. With regard to the framework of humanitarian assistance, such simultaneous occurrence will most likely be at the time of a non-international armed conflict where civilians are fleeing the country, or a (natural) disaster with cross-border effects. As such, refugees form a distinct category of persons in the discussion of obligations under international law resting upon states in the provision of humanitarian assistance. Determining that a person is a ‘refugee’ almost unequivocally results in the conclusion that the state of origin is (sometimes wilfully) not fulfilling certain duties in accordance with international law.²¹⁹ Thus, when discussing the obligations pertaining to the provision of assistance, in refugee law such obligations automatically pertain to *third* states, as these states become the ‘affected’ state: namely the state with a received refugee population. As such, Article 23 of the 1951 Refugee Convention declares that:

“The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals”.

Although the provision itself does not specify what is meant with ‘public relief’, according to its *Commentary* it was meant to be interpreted widely and includes hospital treatment and emergency relief.²²⁰ Consequently, the state *receiving* refugees shall be under the obligation to provide refugees with the same assistance as they are obliged to provide their own nationals.²²¹ In the event of a humanitarian crisis that results in the creation of a refugee population, the ‘affected’ state shall therefore be obliged to apply those rules of humanitarian law and human rights law that may be relevant in the specific circumstance, acting towards the refugees with the same responsibilities it would towards its own civilians. Both the UN Security Council and the General Assembly have indeed also taken the stance that the civilian population, as recipient of humanitarian assistance, includes refugees and IDPs.²²²

²¹⁹ It remains beyond the scope of this research to address the full range of refugee law in depth. This research will concern itself strictly with those provisions of refugee law that are relevant to the legal regime concerning the provision of humanitarian assistance.

²²⁰ Paul Weis, *The Refugee Convention 1951: The Travaux Préparatoires Analysed With A Commentary* (UNHCR 1995) 125.

²²¹ It must be noted that several states have placed reservations to Article 23 of the Convention, mainly concerning the fact that this Article shall be interpreted as a recommendation rather than as legally binding. States that have placed reservations are: Austria, Canada, Egypt, Estonia, Iran, Malta, Monaco, Timor Leste, Zimbabwe: Convention Relating To The Status Of Refugees Geneva, 28 July 1951, Entry into Force: 22 April 1954, Signatories: 19. Parties: 144, UNTS, vol. 189, p. 137.

²²² See in this regard amongst others: UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 § 7; UNGA Res 52/167 (18 February 1998) UN Doc A/RES/52/167 ‘Safety and security of humanitarian personnel’ § 3; UNGA Res 53/87 (27 January 1999) UN Doc A/RES/53/87 ‘ Safety and security of humanitarian personnel and protection of United Nations personnel’ § 11; UNGA Res 60/124 (8 March 2006) UN Doc A/RES/60/124 ‘Strengthening the coordination of humanitarian emergency assistance of the United Nations’ § 2; UNGA Res 61/133 (1 March 2007) UN Doc A/RES/61/133 ‘Safety and security of humanitarian personnel and protection of United Nations personnel’ § 4; UNGA Res 62/94 (25 January 2008) UN Doc A/RES/62/94 ‘Strengthening of the coordination of emergency humanitarian assistance

The UN accordingly acknowledges the need that may incur in certain instances to provide humanitarian assistance to refugees and IDPs. However, as refugees are considered civilians, and as the ‘affected’ state is a third state that has an obligation to provide equal assistance to lawful refugees as to its own nationals, the duties resting upon a state to provide humanitarian assistance must therefore be sought within general international law, human rights law and, on occasion, humanitarian law. Refugee law itself does not offer much support aside from the abovementioned Article 23 of the Refugee Convention with regard to specific obligations resting upon states in the provision of humanitarian assistance. As such, an in-depth look into this body of law is not necessary for the purpose of this research into the legal framework on the provision of humanitarian assistance. Recourse must be had to those provisions the third (recipient) state is obliged to fulfil at all times concerning its own civilian population, which would in essence result in the application of general principles of international law and human rights law.

6.5.8 Rights of Persons to Receive Assistance under Refugee Law

As the 1951 Refugee Convention is almost silent in its consideration of humanitarian assistance, only briefly referring to the duties of states to treat refugees as nationals in their provision of ‘public relief’ in Article 23, the Convention also does not specifically address a right of refugees to receive or claim humanitarian assistance from the ‘affected’ state. This affected state continues to be the ‘third’ state to which they have travelled. The Refugee Convention merely provides in Article 5 that:

“Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention”.

Thus, the Convention declares that refugees remain entitled to all those rights which the State Parties bestow upon them. This must be read in light of the rights and duties existing in international law with regards to human rights, as discussed in the above Section 6.3.2. Two provisions in particular are relevant to the discussion of the human rights of refugees to receive assistance, as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child stipulate in Article 22 and Article 23 respectively that a *refugee child* is entitled to receive humanitarian assistance within the context of the enjoyment of the rights of the Conventions.²²³ Thus, when it comes to the right to receive humanitarian assistance, recourse must be had to other substantial bodies of law, as refugee law in itself does not make provisions in this. Refugees are of course free to claim such assistance from their original authorities based upon existing human rights law. Refugee children,

of the United Nations’ § 24; UNGA Res 63/139 (5 March 2009) UN Doc A/RES/63/139 ‘Strengthening of the coordination of humanitarian and disaster relief assistance of the United Nations, including special economic assistance: strengthening of the coordination of emergency humanitarian assistance of the United Nations’ § 25.

²²³ See Section 5.4 and further on the full discussion of these rights.

particularly within the African continent, have extra means at their disposal through the particular clauses in the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. More relevantly, once refugees are lawfully within the jurisdiction of another state, they may claim assistance based on human rights provisions that are applicable to them within the jurisdiction of this *third* state. These provisions are applicable to such refugees through the very scope of human rights law itself, as discussed above in Chapter 4.

6.5.9 Duties of the Affected State under the (Potential) IDP Framework

Like refugees, internally displaced persons are a category of persons recognised in the receipt of humanitarian assistance by the UN.²²⁴ Furthermore, like refugees, they are indeed civilians although they are distinctly categorised in international law.²²⁵ However, unlike the case for refugees, no international binding legal framework exists with regard to the duties resting upon states concerning the treatment of IDPs.

Regionally in Africa, however, the Kampala Convention for the ‘Protection And Assistance Of Internally Displaced Persons In Africa’ declares far-reaching obligations resting upon states regarding the provision of humanitarian assistance to IDPs. Article 3 pertaining to ‘general obligations’ stipulates in particular relating to the provision of assistance that:

“1. States Parties undertake to respect and ensure respect for the present Convention. In particular, States Parties shall: (...) j. Ensure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access by humanitarian organizations and personnel; k. Promote self-reliance and sustainable livelihoods amongst internally displaced persons, provided that such measures shall not be used as a basis for neglecting the protection of and assistance to internally displaced persons, without prejudice to other means of assistance; (...).”

Clearly, the African Union has wished to place a distinct obligation upon the State Parties to the Kampala Convention to provide assistance to IDPs by meeting their

²²⁴ UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 § 7; UNGA Res 52/167 (18 February 1998) UN Doc A/RES/52/167 ‘Safety and security of humanitarian personnel’ § 3; UNGA Res 53/87 (27 January 1999) UN Doc A/RES/53/87 ‘ Safety and security of humanitarian personnel and protection of United Nations personnel’ § 11; UNGA Res 60/124 (8 March 2006) UN Doc A/RES/60/124 § 2; UNGA Res 61/133 (1 March 2007) UN Doc A/RES/61/133 ‘Safety and security of humanitarian personnel and protection of United Nations personnel’ § 4; UNGA Res 62/94 (25 January 2008) UN Doc A/RES/62/94 ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations’ § 24; UNGA Res 63/139 (5 March 2009) UN Doc A/RES/63/139 ‘Strengthening of the coordination of humanitarian and disaster relief assistance of the United Nations, including special economic assistance: strengthening of the coordination of emergency humanitarian assistance of the United Nations’ § 25.

²²⁵ See Section 2.3.1 on their inclusion as recipients of humanitarian assistance. See furthermore ‘Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39’, Addendum ‘Guiding Principles on Internal Displacement’ (Guiding Principles on IDPs) (11 February 1998) UN Doc E/CN.4/1998/53/Add.2 preamble § 2 and the African Union Kampala Convention Article 1(k).

basic needs and respecting their rights, as stated in particular in Article 3(1)(j). The Kampala Convention takes the obligations of States Parties one step further than the general obligations of international law, stating in Article 4 that such States Parties have an obligation to prevent conditions that *may lead to* arbitrary displacement and, ‘where necessary, provide immediate protection and assistance to internally displaced persons’. Following this obligation, Article 5 asserts that States Parties shall have the *primary* obligation and responsibility in the provision of humanitarian assistance to all IDPs within their territory or jurisdiction, specifying a duty to ‘take necessary steps to effectively organize, relief action that is humanitarian, and impartial in character’. Article 5 explicates that such a duty exists regardless of the origin of the disaster which causes displacement; be it manmade or natural, whilst at the same time recognising respect for the existing principles of sovereignty and territorial integrity under international law.²²⁶ Article 9 of the Kampala Convention reiterates this obligation to protect the rights of IDPs regardless of the cause of the displacement, and sets forth that states, in doing so, must refrain amongst others from ‘genocide, crimes against humanity, war crimes and other violations of international humanitarian law’ as well as from starvation, which has already been discussed more in detail above, in Section 6.5.1.²²⁷ More specifically concerning humanitarian assistance, Article 9 also sets forth that *during* internal displacement:

“2. States Parties shall: (...) b. Provide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services, and where appropriate, extend such assistance to local and host communities; c. Provide special protection for and assistance to internally displaced persons with special needs, including separated and unaccompanied children, female heads of households, expectant mothers, mothers with young children, the elderly, and persons with disabilities or with communicable diseases; (...) g. Respect and maintain the civilian and humanitarian character of the places where internally displaced persons are sheltered and safeguard such locations against infiltration by armed groups or elements and disarm and separate such groups or elements from internally displaced persons”.

As such, the Kampala Convention has created specific provisions for the various timeframes that may be of relevance, namely assistance in the protection *from* displacement, assistance *during* displacement, as well as in the aftermath thereof. Tailoring to many possible situations and with many specific provisions, the Kampala Convention has also asserted particularly in relation to armed groups participating in conflict that obligations pertaining to the provision of humanitarian assistance rest upon *them* also and not merely upon the State Parties to the Convention. As such, Article 7 states that:

²²⁶ Article 5(4) and 5(12) African Union Kampala Convention.

²²⁷ See in further detail Section 8.6.2 for the consequences of such assertions.

“5. Members of armed groups shall be prohibited from: (...) b. Hampering the provision of protection and assistance to internally displaced persons under any circumstances; c. Denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; and separating members of the same family; (...) g. Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons h. Attacking or otherwise harming humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons and shall not destroy, confiscate or divert such materials; and i. Violating the civilian and humanitarian character of the places where internally displaced persons are sheltered and shall not infiltrate such violations”.

Although this provision does not contain a positive obligation towards armed groups to provide humanitarian assistance, the Kampala Convention does envisage a *prohibition* for armed groups to *interfere* with the provision of such assistance. The inclusion of this provision adds to the protection of IDPs on the African continent, where complex emergencies often occur, and natural disasters take place in regions afflicted by (often non-international) armed conflict. Given the gaps in protection offered by humanitarian law in times of non-international armed conflict, the enhanced protection provided by the efforts of the Kampala Convention add to the legal framework for IDPs. Clearly, it must be noted that the Kampala Convention is limited as the treaty's scope concerns the African continent, and has only recently entered into force.²²⁸

It is therefore relevant to note furthermore that, in circumstances of non-international armed conflict, Additional Protocol II to the Geneva Convention holds in Article 17 that displacement of civilians, aside from two exceptional circumstances, is prohibited and that should displacements indeed have to be carried out, all possible measures must be taken to ensure that the IDPs are ‘received under satisfactory conditions of shelter, hygiene, health, safety and nutrition’. This provision also includes the conditions *during* displacement itself and not only upon the arrival of IDPs in a new area, and it follows Article 49 of GC IV, as the original 1949 Conventions are silent on the matter of internal displacement and treatment of such IDPs.²²⁹ Thus, in circumstances of non-international armed conflict as covered by the level of control indicated in AP II, a minimum level of protection for IDPs exists, as states have a duty to ensure that no displacement occurs, and in the exceptional circumstance that such displacement does occur, assistance must be provided to the IDPs.

At a more general level, the Guiding Principles on Internal Displacement, developed within and largely embraced by the UN framework, are the current existing *soft law* framework with regard to the rights and duties concerning IDPs.²³⁰ Although non-binding in nature, they will be discussed in this Section pertaining to

²²⁸ Currently 22 states are party to the Convention.

²²⁹ Sandoz, Swinarski & Zimmermann *Commentary to the Additional Protocols* (n 128) Protocol II Article 17, 1472 .

²³⁰ See Section 2.3.1 with regard to the development and legal value of these Guiding Principles and (n 231).

the legal framework as they have been widely embraced by actors in the field.²³¹ Similar to the Kampala Convention, the Guiding Principles distinguish between provisions concerning protection *from* displacement, *during* displacement *and* thereafter. Specifically concerning the obligation resting upon states in the provision of humanitarian assistance during the prevention of displacement, Guiding Principle 3 stipulates that ‘national authorities have the primary duty and responsibility’ in this regard.²³² Similar to the provision of Article 17 AP II, Guiding Principle 7 declares that should displacement be inevitable, ‘satisfactory conditions of safety, nutrition, health and hygiene’ must be met.²³³ In the event displacement has occurred, the Guiding Principles prohibit, as do the Geneva and Kampala Conventions, ‘starvation as a method of combat’.²³⁴ In fact, according to Guiding Principle 18(2) authorities shall have the obligation to at least provide IDPs with access to:

“(a) Essential food and potable water; (b) Basic shelter and housing; (c) Appropriate clothing; and (d) Essential medical services and sanitation”.

The subsequent Principle explicates what such essential medical services entail, with a specific view to the prevention of contagious diseases.²³⁵ From the above it follows that the Guiding Principles have attempted to be as explicit and detailed as possible in their assertion of the duties of states. As such, reiterating Principle 3 (that dealt more particularly with the prevention of displacement), Guiding Principle 25 declares unambiguously that the ‘primary duty and responsibility for providing humanitarian

²³¹ Ibid and more specifically also ‘Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39’, Addendum ‘Guiding Principles on Internal Displacement’ (Guiding Principles on IDPs) (11 February 1998) UN Doc E/CN.4/1998/53/Add.2, Principle 3. The Guiding Principles are supported by the United Nations offices UNHCR and OHCHR, and furthermore the UN General Assembly declared in § 7 of UNGA Res 58/177 (12 March 2004) UN Doc A/RES/58/177 ‘Protection of and assistance to internally displaced persons’ that it: “Expresses its appreciation of the Guiding Principles on Internal Displacement as an important tool for dealing with situations of internal displacement, welcomes the fact that an increasing number of States, United Nations agencies and regional and non-governmental organizations are applying them as a standard, and encourages all relevant actors to make use of the Guiding Principles when dealing with situations of internal displacement”. See also former UN Special Rapporteur on the Human Rights of Internally Displaced Persons Walter Kälin has furthermore declared in his final ‘Report of the Representative of the Secretary-General on the human rights of internally displaced persons’, UN Doc A/HRC/13/21 (5 January 2010) § 10. Furthermore the General Assembly has continued to embrace the Guiding Principles, amongst others in UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 ‘World Summit Outcome Document’ § 132 where the General Assembly recognises the Principles as an “important international framework for the protection of internally displaced persons”, a phrasing that is echoed by UNGA Res 60/124 (8 March 2006) UN Doc. A/RES/60/124 § 6; UNGA Res 60/168 (7 March 2006) A/RES/60/168 ‘Protection of and assistance to internally displaced persons’ § 8; and UNGA Res 62/153 (6 March 2008) UN Doc. A/RES/62/153, ‘Protection of and assistance to internally displaced persons’ § 10; as well as UN HRC Res 6/32 (14 December 2007) A/HRC/6/32 § 5.

²³² Guiding Principle 3(1).

²³³ Guiding Principle 7(2).

²³⁴ Guiding Principle 10(b).

²³⁵ Principle 19(3).

assistance' to IDPs lies with national authorities.²³⁶ The creation of the Guiding Principles was primarily to 'fill the gap' in protection for IDPs under existing human rights, refugee and humanitarian law, as many provisions were not tailored to the specific needs of such IDPs.²³⁷ Prior to their development, Francis Deng addressed a problem that unfortunately still exists today, as the Principles are non-binding:

“Clear gaps in international protection arise in certain areas where no explicit norms exist to address identifiable needs of the internally displaced (...) A norm may exist in human rights law but be lacking in humanitarian law, or vice versa (...) The second category of insufficient coverage results where a general norm exists but a corollary, more specific right has not been articulated that would ensure implementation of the general norm in areas of particular need to internally displaced persons (...) While it may be possible to infer specific legal rights from general norms, the protection of the internally displaced would be strengthened by spelling out the particular corollary of the norm relevant to their needs. There are also inherent shortcomings in the law”.²³⁸

Although these Guiding Principles have been embraced by the UN General Assembly and other organs, they are indeed non-binding and as such do not add to the existing legal framework on the protection of persons in need of humanitarian assistance.²³⁹ Indeed as addressed by Deng himself, the Guidelines build forth on existing law to provide 'gap-filling' for the grey areas in the law concerning IDPs. In their support several organs of the UN themselves have also in recent years called upon the primary responsibility of states to provide in assistance towards IDPs.²⁴⁰ Not only have UN organs supported the embracement of the Guiding Principles, their content too has been specifically supported, as several organs have expressed that IDPs at least should enjoy (amongst others) access to essential food and water, shelter and medical

²³⁶ Guiding Principle 25(1). Paragraphs 2 and 3 of Principle 25 shall be dealt with more in depth in Chapter 7.

²³⁷ 'Further Promotion And Encouragement Of Human Rights And Fundamental Freedoms, Including The Question Of The Programme And Methods Of Work Of The Commission Human Rights, Mass Exoduses And Displaced Persons Internally displaced persons' Report of the Representative of the Secretary General UN Doc E/CN.4/1997/43 (4 February 1997) § 2-5.

²³⁸ *Ibid* § 3-5.

²³⁹ See (n 230 and 231).

²⁴⁰ See amongst others regarding the General Assembly's support of this position: UNGA Res 49/169 (23 December 1994) UN Doc A/RES/49/169 § 11; UNGA Res 58/177 (12 March 2004) UN Doc A/RES/58/177 preamble; See also the Report of the Representative of the Secretary-General, Mr. Francis Deng, UN Doc E/CN.4/1994/44 (n 74) § 21; 'Further Promotion And Encouragement Of Human Rights And Fundamental Freedoms, Including The Question Of The Programme And Methods Of Work Of The Commission Human Rights, Mass Exoduses And Displaced Persons Internally displaced persons', Report of the Representative of the Secretary-General (22 February 1996) UN Doc E/CN.4/1996/52 § 71; Report of the Representative of the Secretary-General on the human rights of internally displaced persons UN Doc A/HRC/4/38/Add.2 (18 October 2006) § 5; 'Specific Groups And Individuals: Mass Exoduses And Displaced Persons' Report of the Representative of the Secretary-General UN Doc E/CN.4/2002/95/Add.3 (10 December 2001) § 13; and more recently ILC 'Preliminary report on the protection of persons in the event of disasters' UN Doc. A/CN.4/598 (n 191) § 45; as well as UN Doc A/HRC/13/21 (n 231) § 56.

services.²⁴¹ Such assertions are most relevant, as they can be construed as potential indications of *opinio juris* with regard to legal developments. In fact, with the changing nature of humanitarian crises, focusing more on natural disasters and non-international armed conflicts, the need for clear regulations regarding IDPs is increasing. Such a need is also of a more general level, rather than focusing perhaps more specifically on the receipt of humanitarian aid. Indeed, where persons are displaced as the result of a natural disaster or potential (non-) international armed conflict, the more general applicable law in such circumstances remains appropriate and valid, such as human rights law and humanitarian law.²⁴² When considering however the *binding* and *specific* legal framework placing obligations upon states to provide humanitarian assistance to IDPs, it must be concluded that such a framework only exists regionally for states that fall within the scope of the Kampala Convention, and rather limited for those circumstances regulated by AP II of the Geneva Conventions, as Article 17 AP II does not allow for much (explicit) protection. In a more general sense therefore, circumstances in which IDP populations arise, such as non-international armed conflicts falling outside the scope of AP II, or outside of the African continent, recourse must be had to the more general protection of the existing human rights to life, food and health, similar to other civilians.

6.5.10 Rights of Persons to Receive Assistance under the (Potential) IDP Framework

Similar to refugees, several specific legally binding provisions detail the rights of IDPs to request humanitarian assistance. In particular, within a human rights context, the African Charter on the Rights and Welfare of the Child stipulates in Article 23 that the rights applicable to the refugee child are equally applicable to the IDP child, entitling it to receive humanitarian assistance within the context of the enjoyment of the rights of that Charter.²⁴³ Also within the African continent, but more elaborately and unambiguously, the Kampala Convention declares in Article 5(9):

“States Parties shall respect the right of internally displaced persons to peacefully request or seek protection and assistance, in accordance with relevant national and international laws, a right for which they shall not be persecuted, prosecuted or punished”.

²⁴¹ Report of the Representative of the Secretary-General on the human rights of internally displaced persons, ‘Addendum Framework on Durable Solutions for Internally Displaced Persons’ UN Doc A/HRC/13/21/Add.4 (9 February 2010) § 65. See also HRC Res 6/32 (14 December 2007) UN Doc A/RES/6/32 § 3 in which the Human Rights Council expresses concern for IDPs not having access to such materials; Commission on Human Rights resolution 2002/561 (25 April 2002) § 10; Report of the Representative of the Secretary-General on the human rights of internally displaced persons (23 December 2005) UN Doc E/CN.4/2006/71/Add.1 § 10.

²⁴² This perspective has amongst others also been supported by the ILA in its ILA Declaration of International Law Principles on Internally Displaced Persons (29 July 2000) Article 2. See the Commentary to the Declaration for a further discussion on the ILA’s perspective that the state is the primary responsible for the provision of assistance to IDPs (Article 10). As this declaration is also non-binding, this research will not discuss it within this section on the legal framework.

²⁴³ See supra Section 4.3.I.A Humanitarian Assistance as a Potential Human Right in International Treaty Law on the full discussion of this right.

Thus, the Kampala Convention very clearly addresses the distinct right to request aid, pertaining to IDPs. Also, the Kampala Convention acknowledges in Article 9(2)(k) that IDPs must be consulted, and more particularly, that they are allowed to participate in the process of receiving assistance.

Furthermore, it has been asserted that IDPs have a right to request assistance based on the existing human rights framework, similar to other civilians in general.²⁴⁴ The close relationship and complementarity between IDPs' need for humanitarian assistance and the protection offered by general human rights law has indeed frequently been addressed, and an independently existing right to request assistance for IDPs has been asserted by the UN Special Rapporteur.²⁴⁵ This perspective is also voiced in the Guiding Principles on IDPs, as Principle 3(2) states that IDPs not only have a right to *request* assistance, but that they also have the right to *receive* such assistance. The Guiding Principles therefore hold a dual right for IDPs in relation to their authorities, similar to the Kampala Convention. In circumstances of displacement, Guiding Principle 18 is more elaborate and explicates that:

“1. All internally displaced persons have the right to an adequate standard of living. 2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to: (a) Essential food and potable water; (b) Basic shelter and housing; (c) Appropriate clothing; and (d) Essential medical services and sanitation. 3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies”.

Thus, the Guiding Principles envisage a right for IDPs to receive and request humanitarian assistance in the fullest possible manner. This viewpoint is echoed by the ILA's Declaration of International Law Principles on Internally Displaced Persons, creating a strong perspective in soft law with regard to the rights of IDPs in relation to humanitarian assistance.²⁴⁶ Existing binding legal provisions however remain those provisions in general international law and human rights law. Specifically within human rights law, next to the existing rights to life, food and health, tailored provisions exist such as Article 23 African Charter on the Rights and Welfare of the Child and particularly supplemented by the Kampala Convention.

²⁴⁴ Section 5.4 Humanitarian Assistance Within the Context of Existing Human Rights.

²⁴⁵ See in this regard amongst others Commission on Human Rights resolution 2003/52 (24 April 2003) preamble § 9; Report of the Representative of the Secretary-General, Mr. Francis Deng, UN Doc E/CN.4/1994/44 (n 74) § 20; 'Further Promotion And Encouragement Of Human Rights And Fundamental Freedoms, Including The Question Of The Programme And Methods Of Work Of The Commission Alternative Approaches And Ways And Means Within The United Nations System For Improving The Effective Enjoyment Of Human Rights And Fundamental Freedoms' Note by the Secretary-General UN Doc E/CN.4/1993/35 (21 January 1993) § 59. For the perspective of the Special Rapporteur: UN Doc A/HRC/4/38/Add.2 (n 240) § 5.

²⁴⁶ Article 3(2) Declaration of International Law Principles on Internally Displaced Persons, which confers the right to seek and receive assistance upon IDPs.

6.6 Ascertaining the Existing Legal Framework in a Humanitarian Crisis

From the above overview of the applicable legal framework, it must be distinctly ascertained in which circumstances the provision of humanitarian assistance is developed most fully, and which circumstance may be lacking proper legal provisions. The relationship of various *corpora juris* is furthermore relevant, to determine the exact level of protection for persons needing emergency aid in a humanitarian crisis, depending on the specific kind of crisis at hand.

The perspective is taken in this research that persons in need of assistance should be able to receive such assistance, regardless of the origin of the humanitarian crisis. The determination of such a crisis in itself warrants the provision of assistance. Yet, various legal regimes are currently applicable in different circumstances, providing for different levels of protection. It has therefore been established that the *lex specialis* principle entails that the more detailed *provision* (as opposed to a whole body of law) is considered the applicable law, while the *lex generalis* remains present in the background.²⁴⁷ With a more harmonious approach, focus would lay on gap-filling methods and the application of specific provisions, rather than entire bodies of law having prevalence over another body of law.²⁴⁸ This approach would enhance the level of protection at all times, as provisions can be utilised from various bodies of law, to ensure a greater level of protection for the provision of assistance.

Only upon analysing the interaction of the various applicable rights and duties that have been ascertained above, can it be ascertained precisely which duties the affected state has, and which rights persons in need can claim, in circumstances amounting to a humanitarian crisis. When ascertaining the applicable law, it is relevant to take all provisions of the above *corpora juris* into account.

6.6.1 The Applicable *Lex Specialis* in Armed Conflict

In times of armed conflict, multiple fields of law are of relevance in the determination of the current legal framework pertaining to the provision of humanitarian assistance. Indeed, armed conflict in particular is a circumstance in which the circumstantial field of humanitarian law and the topical fields of refugee law and IDP law are applicable next to the generally applicable bodies of law such as human rights law and the duties under state sovereignty or those derived from the UN Security Council resolutions ascertaining a general primary duty for affected states to provide in humanitarian assistance.

With regard to the relation between human rights law and humanitarian law, a conflict does not necessarily exist concerning the provisions pertaining to the delivery of emergency aid. Indeed, whilst the provisions in the Additional Protocols are quite specific, they are duties to refrain from certain actions, and do not conflict with the duties under human rights law, in particular the rights to food and health,

²⁴⁷ Section 3.4.3 Hierarchy or Convergence of International Legal Norms?.

²⁴⁸ *Ibid.*

that incorporate obligations of conduct, where the affected state is responsible for meeting the minimum core obligations. Both fields of law are specific, and tailored to the topic of humanitarian assistance. Both fields of law address distinct duties in circumstances of armed conflict that are not necessarily in conflict, in particular given the fact that humanitarian law differentiates between the type of armed conflict and thus does not have a broad scope of protection for those persons in need of assistance, to receive such aid from the affected state.

Sections 6.5.1 and 6.5.2 have addressed that humanitarian law recognises obligations resting upon parties to a conflict to prevent certain circumstances. Besides the existing duty of ‘humane treatment’ in Common Article 3, Article 54 AP I stipulates an obligation resting upon parties to an international armed conflict to prevent the destruction of objects that are indispensable to the civilian population, whereas Article 14 AP II states a duty for parties to a non-international armed conflict to prevent starvation of civilians: both duties are obligations of result. However, human rights law also provides for various positive obligations of states: obligations of conduct. These duties exist regardless of the typology of the conflict, and include the duty to provide adequate food for the civilian population, which the CESCR has interpretatively ascertained to entail the freedom from hunger, as part of the minimum core obligations under Article 11 ICESCR. The right to health, in particular Article 12(2)(c) ICESCR with regard to the prevention of diseases provides for a right of the population in times of conflict to request assistance from the affected state. Such assistance is then related to the prevention epidemics, common to emergency situations. Furthermore, the right to life in armed conflict continues to encompass the right to not be ‘arbitrarily deprived’ of one’s life.

Should an armed conflict be international and include the development of a refugee population, the refugee child shall also be protected through Article 22 of the CRC. Furthermore, if such conflicts occur within the African continent, Article 23 of the African Charter on the Rights and Welfare of the Child holds specific provisions in this regard. Moreover, in the case of a non-international armed conflict, the protection is increased on the African continent through the provisions of the Kampala Convention. Articles 3(1)(j), 4, 5, 7(5)(b) and (c), 9(1), 9(2)(b) and (c), and 9(2)(k) place detailed obligations upon State Parties with regard to the provision of humanitarian assistance.

Thus, the above shows that international humanitarian law is not in itself *by definition* the *lex specialis* with regard to the provision of humanitarian assistance in times of conflict. Rather, various *corpora juris* contain specific provisions pertaining (mostly) to the obligations resting upon the affected state in the provision of assistance; a positive obligation that is distinctly absent in humanitarian law. All such obligations must be read together, facilitating a harmonious approach through which the affected population shall be able to receive the greatest protection in international law, and the best legal protection for the provision of assistance. Indeed, it will be necessary to apply the various obligations side-by-side, as their simultaneous application does not cause conflict of the law. Furthermore, it remains the essence of

both human rights law and humanitarian law to enhance the protection of persons, and as such both bodies work towards the same goal.

6.6.2 *The Applicable Lex Specialis in Occupation*

A similar converging approach must be had to the law applicable in times of occupation that amounts to a humanitarian crisis. As is the case in times of armed conflict, the constant factor of state sovereignty and the UN framework provide for a primary responsibility that lies with the occupier in the provision of assistance, should it be needed in times of occupation.

As seen in Sections 6.5.3 and 6.5.4, the Fourth Geneva Convention stipulates in Articles 55, 56 and 60 that the occupier has a duty to provide food and medical supplies to its available means, whereas Article 69 AP I elaborates on this to include shelter and other supplies that may be essential to the survival of the occupied population. Although the provisions of GC IV and AP I are rather detailed, they do include the phrasing ‘to the fullest extent of the means available’, which provides the occupier with the possibility to claim it is not in a position to grant the population such materials. Furthermore, it must be noted that these provisions only become relevant upon the passing of a certain amount of *time* and establishment of a certain amount of *control* by the occupying force, when often a humanitarian crisis may not (or no longer) exist.

The level of control of the occupier is furthermore relevant to the application of human rights law. Whereas the continued application of such law is accepted in times of conflict, its continued application in times of occupation is subject to the discussion of the level of ‘effective’ control or authority, in extraterritorial situations.²⁴⁹ Whilst the relevant provisions of human rights law include the obligation of states to respect the right to life of civilians, provide adequate food, and safeguard health (in particular with regard to the prevention of epidemics and diseases), their continued application is not crystal clear. Should a crisis exist, most logically the rather detailed provisions of the Geneva Conventions would be resorted to.

As the provisions in times of occupation allow for a rather far-reaching level of obligations upon states, it has been argued that such duties resemble the duties upon states in peacetime situations to quite a large extent.²⁵⁰ Indeed, in contrast to a situation of conflict, occupation may be prolonged over time, and the urgency to supply goods may subside or may indeed already have subsided when occupation is established. As such, it would then need to be re-evaluated whether or not a humanitarian crisis exists, to re-evaluate the application of legal provisions

²⁴⁹ Sections 3.4.2 Applicability of Human Rights in Armed Conflict and Occupation and 3.4.2.2 The Potential Extraterritorial Scope of Application of Human Rights Treaties.

²⁵⁰ Benvenisti, *The International Law of Occupation* (n 161) 87; Flavia Zorzi Giustiniani, ‘The Works of the International Law Commission on ‘Protection of Persons in the Event of Disasters. A Critical Appraisal’ in A de Guttery, M Gestri, G Venturini (eds), *International Disaster Response Law* (TMC Asser Press / Springer 2012) 65-84.

concerning humanitarian assistance. Today, the need for humanitarian assistance is more often found in other circumstances, such as (natural) disasters.

6.6.3 *The Applicable Lex Specialis in Times of (Natural) Disaster*

As has been addressed in Sections 6.5.5 and 6.5.6, a particular encompassing and tailored legal framework is absent in times of disaster not resulting from armed conflict. State sovereignty and the duties expressed through organs in the UN framework such as the General Assembly, however, continue to note the general legal responsibility of the affected state to provide in the delivery of humanitarian assistance to an affected group of persons in the aftermath of such disasters.

Furthermore, human rights law is applicable as only *lex specialis* to provide persons in need of assistance with actual legal rights to claim the receipt such aid from the affected state. Human rights law does so through provisions pertaining to the right to life, food, health (and water). Thus, as in times of conflict, states are obliged to not arbitrarily deprive persons of their life, and fulfil the positive obligations relating to the right to adequate food and health as stipulated in Articles 11 and 12 of the ICESCR as well as in all other specialised treaties discussed above. Furthermore, the topical bodies of refugee and IDP law can be applied. Should children become refugees, Article 22 of the CRC will provide State Parties with specific obligations in light of other obligations they may have under the Convention. The African continent in particular – prone to natural disasters – has developed far-reaching human rights protection for IDPs, as Articles 3(1)(j), 4, 5, 7(5)(b) and (c), 9(1), 9(2)(b) and (c), and 9(2)(k) oblige the affected state to provide in humanitarian assistance for IDPs. Also, Article 23 of the African Charter on the Rights and Welfare of the Child holds specific provisions to this end that are comparable to Article 22 CRC. As seen in the above settings also, the African continent regionally holds the most specific obligations for affected states and specific rights for those in need of humanitarian assistance. This region is furthermore prone to ‘complex emergencies’ in which a natural disaster may occur in times of armed conflict.

Indeed as addressed in Section 6.6.1, in essence the provisions of the various fields of law that can be applicable in disaster do not conflict with each other. As such, no discussion arises on the applicability of fields of law, and the applicable fields complement each other.

6.6.4 *Determining the Problems and Gaps in the Provision of Humanitarian Assistance*

In addressing the rights of the affected population to request assistance from its sovereign or other authority exercising sovereign control, such as certain armed groups in times of conflict, and addressing the duties of the authorities to provide in this regard, this Chapter has also uncovered the problems and gaps in the current legal framework. Indeed, whereas greatly detailed provisions exist for example with regard to the provision of assistance to children on the African continent falling

within the scope of the Kampala Convention, some areas are still very much lacking specific legal protection by the affected state for persons in a humanitarian crisis.

In particular, several situations spring to mind. For example, one might consider situations of non-international armed conflict, outside the realm of the Kampala Convention on the African continent, where one does not look specifically to the IDP population. Both natural disasters and non-international armed conflicts are the types of humanitarian crises most commonly found today. In cases of non-international armed conflict, the civilian population is protected under humanitarian law solely through Additional Protocol II's stipulation that states are obliged to prevent starvation. Such protection is however solely granted to those civilians finding themselves within the scope of AP II's *threshold of 'control'* needed for a non-state party, and furthermore is confined to those states that are party to the Protocol in the first place. Yet, what protection is offered in situations in which a state is not party to the Additional Protocol, or such a threshold is not met?

For all other protection, such civilians must resort to human rights law and the provisions therein that are not necessarily drafted for tailoring to circumstances of conflict. This is equally the law which is applicable in times of natural disaster, as no other detailed provisions exist for the receipt of assistance. Although human rights law offers great protection through the rights to life, food and health, the provisions are not as detailed concerning the delivery of emergency assistance specifically. Despite their lack of detail, the provisions of the ICESCR, in particular due to the notion of 'minimum core obligations' do cast a 'wide net' of protection through their continued applicability and are by some considered to provide greater protection than international humanitarian law.²⁵¹ Indeed, human rights law contains positive obligations for the affected state that are lacking in humanitarian law. Whilst it is therefore positive that human rights law provides this protection, it remains regrettable that such duties for the sovereign actor are absent under humanitarian law. Such gaps in the law are particularly poignant in the recent rise in non-international armed conflicts, where populations in need are caught in conflict between state armed forces and non-state actors or armed groups.

Furthermore, complex emergencies are relevant in the determination of gaps in the law, such as those emergencies where a natural disaster takes place in a conflict area. Whilst human rights law remains applicable, consideration must be given to areas where the national authorities may claim not to have sovereignty or control within their state territory due to an on-going conflict. It might be unclear who the sovereign is in a certain area, and therefore upon whom the obligation lies to provide assistance should a sudden natural disaster take place that overwhelms the local authority. The state sovereign may then be unwilling or unable to provide the assistance it is required to provide under existing human rights obligations.

Indeed, the above Chapter has shown that within the current framework, not only do *gaps* exist, but furthermore a lack of *harmony* exists between various *corpora juris*. The implementation of the more detailed provisions tailored specifically to the

²⁵¹ Barber, 'Facilitating humanitarian assistance in international humanitarian and human rights law', (n 137) 395.

delivery of assistance has been dispersed: indeed the African continent has the greatest level of protection, in particular for IDPs.²⁵² Yet even for IDPs not finding themselves within the protection of the new Kampala Convention, a lack of protection from humanitarian law and even human rights law can be argued, as such persons often find themselves displaced due to both natural disasters and non-international armed conflict.²⁵³ To ensure the equal protection of all persons, not merely children on the African continent that happen to fall within the particular scope of the Kampala Convention, the possibilities of ensuring the *external* provision of assistance and potential state duties to *allow access* from abroad must be considered. Enhancing harmonisation of the protection of persons in need will allow for more certainty of that protection, regardless of the particular circumstance in which the humanitarian crisis is taking place.

6.7 Conclusion

The above Chapter has established the current existing legal framework with regard to the specific obligations resting upon affected states and the specific rights for the affected persons to claim such assistance from their national authorities or sovereign. As has become apparent, no ‘single’ overall duty or right can be discerned. Clarity in the law does not exist concerning the provision of humanitarian assistance. Such lack of clarity is not necessarily only the result of gaps, as it is moreover the result of ‘grey areas’ in the law and in some circumstances even the result of overlap between multiple human rights as well as humanitarian law provisions. Human rights law acknowledges the right to life, food, health (and water), with the simultaneous acknowledgement of obligations resting upon state parties to human rights treaties to positively provide in the protection of such rights. Several distinct human rights treaties furthermore cater to the rights of children and IDPs within the scope of the Kampala Convention.

At a general level, the Security Council and General Assembly have asserted the primary responsibility of the affected state in the provision of humanitarian assistance, both in times of conflict and in times of (natural) disaster. Such assertions made by both the Security Council and General Assembly however lack detailed obligations or rights that are *specifically* tailored to the situation of a humanitarian crisis, as the respective resolutions often refer to the affected state’s obligations under ‘international law’, ‘human rights law’ or ‘humanitarian law’.²⁵⁴ Thus, whilst these resolutions assert general obligations upon states or provide rights for individuals to assistance, they lack specific clarity within their texts. Such grey areas or gaps enhance the difficulties persons may experience in their attempt to receive assistance when in a humanitarian crisis. These assertions must therefore be explicated by

²⁵² ICRC Resolution 30IC/07/R4 (n 201) § preamble. See also ‘Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law’, Report of the Study Group of the International Law Commission (13 April 2006) UN Doc A/CN.4/L.682.

²⁵³ UN Doc E/CN.4/1993/35 (n 245) § 61 & 74.

²⁵⁴ Section 6.4 Duties and Rights under the UN Framework: the Security Council and General Assembly.

human rights law and humanitarian law. Indeed, international humanitarian law contains a variety of very precise and detailed provisions, but lacks the incorporation of more general duties for the affected state and completely foregoes a right of individuals to request assistance from their sovereign or other authorities exercising control. Indeed, no specific duty to provide emergency assistance exists for the affected state.

Such a general obligation is also missing from human rights law, as this body of law was originally of course not specifically designed to protect persons solely in a humanitarian crisis, but more generally at all times. From this general purpose however of the rights to life, food and health, the duty of the affected state to ensure these rights *also in times of crisis* for persons finding themselves in a humanitarian emergency *can* be derived. This particular protection is *essential*, as human rights law finds continued applicability in particular circumstances where protection through other bodies of law is lacking, such as (natural) disasters and non-international armed conflicts.

Furthermore, the African continent has recently expanded its legal framework through the Kampala Convention, allowing for a surge in protection of IDPs in this area of the world. Such enhanced protection must of course be applauded, but it also painfully lays bare the lack of protection for IDPs in other regions of the world. Given the influx of IDPs over the past decades,²⁵⁵ due to the surge in natural disasters and non-international armed conflicts, this *relative* lack of protection of IDPs (compared to IDPs happening to fall within the scope of the Kampala Convention) exemplifies the need for a more comprehensive, all-encompassing approach to the legal framework protecting those in a humanitarian crisis, rather than haphazard incorporation or geographical protection.

Another related, and problematic, aspect of the legal framework concerning humanitarian assistance is the fact that the existing detailed provisions are often confined to very specific circumstances, such as IDPs in Africa, or refugee children. Thus, the legal protection provided to persons in need of assistance becomes rather 'sectoral', with different legal obligations resting upon various states and different rights existing for persons depending on the particular category of crisis one finds oneself in, or the particular location on the globe. Such haphazard and disparate protection is rather problematic, as it results in unequal *protection* under the law for persons in need of humanitarian assistance, as well as unequal *obligations* for affected states, depending on their particular region. A person in need of food, water and shelter due to the existence of a humanitarian emergency should have to be able to request and receive such bare necessities and retain human dignity, regardless of country of origin, typology of crisis or age. For this precise purpose, this research takes an overall and encompassing view of the protection of persons in need of humanitarian assistance.

²⁵⁵ For some statistics in this regard: <<http://www.unhcr.org/pages/49c3646c23.html>> accessed 20 October 2014, where UNHCR states that in 2012 nearly 29 million IDPs existed worldwide, compared to 17 million in 1997.

Many soft law documents have sought to solve such problematic situations by developing guidelines and principles with regard to the provision of humanitarian assistance which are applicable to all circumstances. As such, the 1991 Guidelines for Humanitarian Assistance, the 1993 San Remo Principles, the Mohonk Criteria and the well-known Bruges Resolution of 2003 proffer suggestions. These soft law instruments invariably recognise the primary duty of the affected state to provide aid, regardless of the nature or origin of the crisis, and the Mohonk Criteria and Bruges Resolution even explicitly recognise such a duty for other authorities exercising a certain amount of control.²⁵⁶ Moreover, and quite distinct from the existing law, these instruments almost all acknowledge a right of persons affected by a humanitarian crisis to *request and receive* assistance from their national authorities or sovereign.²⁵⁷ Clearly, such instruments express a development initiative in the international legal framework regarding humanitarian assistance, as they can be considered to contribute to expressions of *opinio juris*.²⁵⁸ However, such an all-encompassing approach to the provision of humanitarian assistance is currently lacking in existing law; in particular the recognition of a 'right to request' assistance.

In essence, such an individual right is however not necessary for the protection of persons through human rights law, as argued in Chapter 5, given the sufficient level of protection offered by the existing human rights to life, food and health. Whereas the development of more tailored provisions might theoretically enhance protection, such development is of greater necessity from the perspective of the duties of the affected state; in particular in circumstances of loss of control of the affected state over areas of its territory, such as in times of non-international armed conflict and complex emergencies.

From the above discussion of the existing legal framework, as well as from the efforts of soft law instruments, a conclusion can be drawn. The international legal framework regarding the provision of humanitarian assistance, although hesitant to affirmatively acknowledge a right of individuals to claim assistance and receive such assistance from their sovereign, *does* view a primary positive, but general, obligation to rest upon the affected state in the provision of humanitarian assistance. Such a duty is furthermore made more concrete through the duties derived from the human rights to life, food and health as well as by the notion of sovereignty as 'responsibility'. Consequently, if an affected state or acting sovereign does not provide in such a duty, the legal framework regarding humanitarian assistance must enlarge its scope, and look to encompass potential rights of *third* parties, such as states and international organisations, in the provision of assistance to persons in need. The subsequent

²⁵⁶ See in this regard the 1991 Guidelines for Humanitarian Assistance Guideline 6 (6); 'Guiding Principles on the Right to Humanitarian Assistance' (April 1993) The International Institute of Humanitarian Law in San Remo, Principle 4; 'The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies', (1995) reprinted in 17 *Human Rights Quarterly* 1, Principle II; Resolution 'Humanitarian Assistance' (2 September 2003) Institute of International Law, Sixteenth Commission, Bruges Session, Principle III.

²⁵⁷ Ibid 'Guiding Principles on the Right to Humanitarian Assistance' Principles 1 and 2; *ibid* 'The Mohonk Criteria'; and *ibid* the Bruges Resolution § II.2.

²⁵⁸ See Section 1.4.1 on the components of customary international law.

Chapter VI

Chapter shall therefore address a potential external right to provide assistance, as well as a potential related right to access for these third parties.

The Duty of the Affected State to Provide, and the Right of Persons
to Receive Humanitarian Assistance

	Duty of Affected State	Right of Affected Population	Source
State Sovereignty	<ul style="list-style-type: none"> • Primary duty of affected state to provide assistance based on concept of sovereignty within this research (as responsibility) 	<ul style="list-style-type: none"> • Right to request assistance from affected state based on a reciprocal relationship between the sovereign and society as acknowledged within this research 	<ul style="list-style-type: none"> • 2(1) UN Charter; UNGA Res 38/202 (20 December 1983) UN Doc A/RES/38/202 § 4, UNGA Res 43/131 (8 December 1988) UN Doc A/RES/43/131 § 2, and UNGA Res 45/100 (14 December 1990) UN Doc A/RES/45/100 § 2, UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182 Annex § 4
Security Council Resolutions	<ul style="list-style-type: none"> • Primary responsibility to protect vulnerable groups lies with states 		<ul style="list-style-type: none"> • UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 preamble
	<ul style="list-style-type: none"> • Call to states to comply strictly with their obligations under international humanitarian, human rights and refugee law 		<ul style="list-style-type: none"> • UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 § 4; UNSC Res 1296 (19 April 2000) UN Doc S/RES/1296 preamble and § 19
	<ul style="list-style-type: none"> • Primary responsibility of states to protect civilians (in general) 		<ul style="list-style-type: none"> • UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 § 13; UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894 preamble and § 15. See also amongst others: UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325; UNSC Res 1430 (14 August 2002) UN Doc S/RES/1430; UNSC Res 1906 (23 December 2009) UN Doc S/RES/1906; and UNSC Res 1861 (14 January 2009) UN Doc S/RES/1861
	<ul style="list-style-type: none"> • 'Responsibility to Protect' population; incorporation of RtoP 		<ul style="list-style-type: none"> • UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 preamble and UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 preamble and § 3; UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975 'The situation in Côte d'Ivoir' preamble; UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996 § 3(b)(iv); UNSC Res 2014 (21 October

	Duty of Affected State	Right of Affected Population	Source
			2011) UN Doc S/RES/2014 § preamble; UNSC Res 2016 (27 October 2011) UN Doc S/RES/2016 § 3; UNSC Res 2040 (12 March 2012) UN Doc S/RES/2040 § 4; UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139 § 9; UNSC 2165 (14 July 2014) UN Doc S/RES/2165 preamble
	<ul style="list-style-type: none"> Primary responsibility under general international law to 'take all feasible steps to ensure the protection of affected civilians' as well as responsibility of parties to an armed conflict to 'respect, protect and meet the basic needs of civilian populations within their effective control' 		<ul style="list-style-type: none"> 'Aide Memoire Protection of Civilians in Armed Conflict' UN Doc S/PRST/2010/25 (22 November 2010) preamble; 'Aide Memoire Protection of Civilians in Armed Conflict' UN Doc S/PRST/2013/2 (12 February 2013) 1 and 3; 'Aide Memoire Protection of Civilians in Armed Conflict' UN Doc S/PRST/2014/3 (12 February 2014) 2; UNSC 2165 (14 July 2014) UN Doc S/RES/2165 preamble
General Assembly Resolutions	<ul style="list-style-type: none"> Primacy of the role of the affected countries 'in caring for the victims of natural disasters and other disaster situations' 		<ul style="list-style-type: none"> UNGA Res 36/225 (17 December 1981) UN Doc A/RES/36/225 preamble and § 2; UNGA Res 38/202 (20 December 1983) UN Doc A/RES/38/202 preamble & § 4; UNGA Res 41/201 (8 December 1986) UN Doc A/RES/41/201 § 2
	<ul style="list-style-type: none"> Primary role and responsibility of affected state to take care of the victims of natural disasters and other emergencies occurring on its territory 		<ul style="list-style-type: none"> UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182 Annex § 4; UNGA Res 47/168 (22 December 1992) UN Doc A/RES/47/168; UNGA Res 48/57 (14 December 1993) UN Doc A/RES/48/57; UNGA Res 48/188 (9 March 1994) UN Doc A/RES/48/188; UNGA Res 49/139 (20 December 1994) UN Doc A/RES/49/139; UNGA Res 51/194 (10

The Duty of the Affected State to Provide, and the Right of Persons
to Receive Humanitarian Assistance

	Duty of Affected State	Right of Affected Population	Source
			February 1997) UN Doc A/RES/51/194; UNGA Res 52/167 (18 February 1998) UN Doc A/RES/52/167; UNGA Res 52/168 (18 February 1998) UN Doc A/RES/52/168; UNGA Res 53/87 (27 January 1999) UN Doc A/RES/53/87; UNGA Res 53/88 (29 January 1999) UN Doc A/RES/53/88; UNGA Res 54/95 (28 January 2000) UN Doc A/RES/54/95; UNGA Res 54/192 (21 February 2000) UN Doc A/RES/54/192; UNGA Res 54/233 (25 February 2000) UN Doc A/RES/54/233; UNGA Res 55/163 (7 February 2001) UN Doc A/RES/55/163; UNGA Res 55/164 (7 February 2001) UN Doc A/RES/55/164; UNGA Res 55/175 (7 March 2001) UN Doc A/RES/55/175; UNGA Res 56/99 (31 January 2002) UN Doc A/RES/56/99; UNGA Res 56/103 (5 February 2002) UN Doc A/RES/56/103; UNGA Res 56/107 (7 February 2002) UN Doc A/RES/56/107; UNGA Res 56/217 (19 February 2002) UN Doc A/RES/56/217; UNGA Res 57/150 (27 February 2003) UN Doc A/RES/57/150; UNGA Res 57/152 (3 March 2003) UN Doc A/RES/57/152; UNGA Res 57/153 (3 March 2003) UN Doc A/RES/57/153; UNGA Res 58/25 (29 January 2004) UN Doc A/RES/58/25; UNGA Res 58/114 (5 February 2004) UN Doc A/RES/58/114; UNGA Res 59/141 (25 February 2005) UN Doc A/RES/59/141;

	Duty of Affected State	Right of Affected Population	Source
			UNGA Res 59/212 (3 March 2005) UN Doc A/RES/59/212; UNGA Res 60/124 (8 March 2006) UN Doc A/RES/60/124; UNGA Res 60/125 (15 March 2006) UN Doc A/RES/60/125; UNGA Res 60/123 (24 March 2006) UN Doc A/RES/60/123; UNGA Res 61/131 (22 February 2007) UN Doc A/RES/61/131; UNGA Res 61/133 (1 March 2007) UN Doc A/RES/61/133; UNGA Res 61/134 (1 March 2007) UN Doc A/RES/61/134; UNGA Res 62/92 (1 February 2008) UN Doc A/RES/62/92; UNGA Res 62/94 (25 January 2008) UN Doc A/RES/62/94; UNGA Res 62/95 (29 January 2008) UN Doc A/RES/62/95; UNGA Res 63/138 (5 March 2009) UN Doc A/RES/63/138; UNGA Res 63/139 (5 March 2009) UN Doc A/RES/63/139; UNGA Res 63/141 (10 March 2009) UN Doc A/RES/63/141; UNGA Res 64/76 (2 February 2010) UN Doc A/RES/64/76; UNGA Res 64/77 (8 February 2010) UN Doc A/RES/64/77; UNGA Res 64/251 (30 April 2010) UN Doc A/RES/64/251; UNGA Res 65/132 (1 March 2011) UN Doc A/RES/65/132; UNGA Res 65/133 (3 March 2011) UN Doc A/RES/65/133; UNGA Res 65/264 (21 June 2011) UN Doc A/RES/65/264; UNGA Res 65/307 (25 August 2011) UN Doc A/RES/65/307; UNGA Res 66/117 (1 March 2012) UN Doc A/RES/66/117; UNGA Res

The Duty of the Affected State to Provide, and the Right of Persons
to Receive Humanitarian Assistance

	Duty of Affected State	Right of Affected Population	Source
			66/119 (7 March 2012) UN Doc A/RES/66/119; UNGA Res 66/227 (15 March 2012) UN Doc A/RES/66/227; UNGA Res 67/85 (21 March 2013) UN Doc A/RES/67/85; UNGA Res 67/87 (26 March 2013) UN Doc A/RES/67/87; UNGA Res 67/231 (9 April 2013) UN Doc A/RES/67/231; UNGA Res 68/101 (18 February 2014) UN Doc A/RES/68/101; UNGA Res 68/102 (12 February 2014) UN Doc A/RES/68/102; UNGA Res 68/103 (19 February 2014) UN Doc A/RES/68/103
	<ul style="list-style-type: none"> • Obligation of all States and parties to an armed conflict to protect civilians in armed conflicts 		<ul style="list-style-type: none"> • UNGA Res 58/114 (5 February 2004) UN Doc A/RES/58/114 § 12; UNGA Res 59/141 (25 February 2005) UN Doc A/RES/59/141 § 15; UNGA Res 60/124 (8 March 2006) UN Doc A/RES/60/124 § 3; UNGA Res 62/94 (25 January 2008) UN Doc A/RES/62/94 §19; UNGA Res 63/139 (5 March 2009) UN Doc A/RES/63/139 §21; UNGA Res 64/76 (2 February 2010) UN Doc A/RES/64/76 §22; UNGA Res 65/133 (3 March 2011) UN Doc A/RES/65/133 § 23; UNGA Res 66/119 (7 March 2012) UN Doc A/RES/66/119 § 29; UNGA Res 67/87 (26 March 2013) UN Doc A/RES/67/87 § 33; UNGA Res 68/102 (12 February 2014) UN Doc A/RES/68/102 §36.
H uman	<ul style="list-style-type: none"> • Obligation on UN Member States to ensure universal 		<ul style="list-style-type: none"> • Articles 55 & 56 UN Charter

	Duty of Affected State	Right of Affected Population	Source
Rights Law	respect for human rights		
	<ul style="list-style-type: none"> Duty to not arbitrarily deprive persons of their life 	<ul style="list-style-type: none"> Right to life 	<ul style="list-style-type: none"> Article 3 UDHR, 6 ICCPR, Article 2 ECHR, Article 4 ACHR, Article 4 ACHPR; Article 6 & 22 CRC
	<ul style="list-style-type: none"> Obligation for states to provide food (as part of humanitarian assistance in the event of a humanitarian crisis) 	<ul style="list-style-type: none"> Right to adequate food 	<ul style="list-style-type: none"> Article 11 ICESCR (and Article 2 ICESCR); Article 24(2)(c) CRC, Article 12(2) CEDAW, Article 28 CRPD, Article 12 of the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights and Article 15 of the Additional Protocol to the ACHPR on the Rights of Women in Africa, Article 25 UDHR.
	<ul style="list-style-type: none"> Obligation upon states parties to ensure that persons have access to certain minimum essential levels of food, health facilities, basic shelter, water and sanitation (more narrowly: prevention of diseases) 	<ul style="list-style-type: none"> Right to health 	<ul style="list-style-type: none"> 25 UDHR and Article 12 ICESCR (and Article 2 ICESCR) [<i>in particular: 12(2)(c) ICESCR</i>]; Article 5(e)(iv) ICERD, Article 24 CRC, Article 11 European Social Charter, Article 10 of the Additional Protocol to the ACHR in the area of Economic, Social and Cultural Rights, Article 16 ACHPR, Article 14 of the African Charter on the Rights and Welfare of the Child and Article 14 of the Protocol to the ACHPR on the Rights of Women in Africa
	<ul style="list-style-type: none"> General obligation resting upon states to provide access to safe drinking water (this obligation is only found in several specific treaties and in regional conventions) 	<ul style="list-style-type: none"> Right to water 	<ul style="list-style-type: none"> Article 24(1)(c) CRC, Article 14(2)(h) CEDAW, Article 28 CRPD, Article 15(a) Additional Protocol to the ACHPR on the Rights of Women in Africa, Article 14(2)(c) African Charter on the Rights and Welfare of the Child
<ul style="list-style-type: none"> Obligation on State Parties to provide for the fulfilment of human rights of 		<ul style="list-style-type: none"> Article 11 CRPD 	

The Duty of the Affected State to Provide, and the Right of Persons
to Receive Humanitarian Assistance

	Duty of Affected State	Right of Affected Population	Source
	persons with disabilities, in the event of a humanitarian crisis		
Law of Armed Conflict	<i>International Armed Conflict</i> <ul style="list-style-type: none"> • Prohibition of parties to destroy objects that are 'indispensable to the survival of the civilian population' 	<i>International Armed Conflict</i>	<i>International Armed Conflict</i> <ul style="list-style-type: none"> • Article 54 AP I
		<ul style="list-style-type: none"> • (Right of a civilian population to receive humanitarian assistance in circumstances where it should be in need) 	<ul style="list-style-type: none"> • ICRC Customary IHL Study
	<i>Non-International Armed Conflict</i> <ul style="list-style-type: none"> • Obligation of humane treatment 	<i>Non-International Armed Conflict</i>	<i>Non-International Armed Conflict</i> <ul style="list-style-type: none"> • Common Article 3 GC
	<ul style="list-style-type: none"> • Prohibition of starvation of civilians 'as a method of combat' 		<ul style="list-style-type: none"> • Article 14 AP II
Law of Occupation	<ul style="list-style-type: none"> • Occupier must ensure 'public order and safety' 		<ul style="list-style-type: none"> • Article 43 Regulations Concerning the Law and Customs of War on Land – annex to Convention Respecting the Laws and Customs of War on Land
	<ul style="list-style-type: none"> • Duties of occupier to 'ensure to the fullest extent of the means available' that the population is provided with food and medical supplies 		<ul style="list-style-type: none"> • Article 55 GC IV
	<ul style="list-style-type: none"> • Responsibility to provide relief remains with the occupying power 		<ul style="list-style-type: none"> • Article 60 GC IV
	<ul style="list-style-type: none"> • Obligation to ensure and maintain hospitals and public health, particularly taking measures concerning the prevention of 		<ul style="list-style-type: none"> • Article 56 GC IV

	Duty of Affected State	Right of Affected Population	Source
	epidemics ('with the co-operation of national and local authorities')		
	<ul style="list-style-type: none"> Occupier must 'to the fullest extent of the means available to it', also ensure clothing, shelter and other supplies that may be 'essential to the survival of the civilian population' 		<ul style="list-style-type: none"> Article 69 AP I
IDRL / ILC Protection of Persons	<ul style="list-style-type: none"> Duty of affected state to ensure the protection of persons and provision of disaster relief and assistance on its territory. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance 		<ul style="list-style-type: none"> Inter-American Convention To Facilitate Disaster Assistance Article 3 (a) Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency Draft Article 12 ILC
	<ul style="list-style-type: none"> Duty to seek assistance should the disaster not be manageable through States own resources 		<ul style="list-style-type: none"> Draft Article 13 ILC
	<ul style="list-style-type: none"> (Affected state as primary responsible actor in the provision of assistance in the event of a disaster) 		<ul style="list-style-type: none"> (Article 3 of the IDRL Guidelines)
		<ul style="list-style-type: none"> (Right of persons 'both to offer and receive humanitarian assistance') 	<ul style="list-style-type: none"> (ICRC Conference 2007, Resolution 4, preamble)
Refugee Law	<ul style="list-style-type: none"> Obligation of State Parties to provide same treatment with respect to public relief and assistance as is accorded to their nationals 		<ul style="list-style-type: none"> Article 23 Refugee Convention
		<ul style="list-style-type: none"> Refugee child is entitled to receive 	<ul style="list-style-type: none"> Article 22 CRC and Article 23 African Charter on the

The Duty of the Affected State to Provide, and the Right of Persons
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	Duty of Affected State	Right of Affected Population	Source
		humanitarian assistance within the context of the enjoyment of the rights of the Conventions	Rights and Welfare of the Child
IDP Framework	<ul style="list-style-type: none"> • Obligation for State Parties to provide assistance to IDPs by meeting their basic needs and respecting their rights 		<ul style="list-style-type: none"> • Article 3(1)(j) Kampala Convention
	<ul style="list-style-type: none"> • Obligation to prevent conditions that may lead to arbitrary displacement and, 'where necessary, provide immediate protection and assistance to internally displaced persons' 		<ul style="list-style-type: none"> • Article 4 Kampala Convention
	<ul style="list-style-type: none"> • Primary obligation and responsibility in the provision of humanitarian assistance to all IDPs within their territory or jurisdiction, specifying a duty to 'take necessary steps to effectively organize, relief action that is humanitarian, and impartial in character' 	<ul style="list-style-type: none"> • Right of IDPs to peacefully request or seek protection and assistance 	<ul style="list-style-type: none"> • Article 5 Kampala Convention • Article 5(9) Kampala Convention
	<ul style="list-style-type: none"> • Obligation to protect the rights of IDPs regardless of the cause of the displacement, and to refrain amongst others from 'genocide, crimes against humanity, war crimes and other violations of international humanitarian law' as well as from starvation 		<ul style="list-style-type: none"> • Article 9(1) Kampala Convention
	<ul style="list-style-type: none"> • Duty to provide IDPs to the fullest extent practicable and with 	<ul style="list-style-type: none"> • IDPs allowed to participate in the 	<ul style="list-style-type: none"> • Article 9(2)(b) Kampala Convention

	Duty of Affected State	Right of Affected Population	Source
	the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services	process of receiving assistance	<ul style="list-style-type: none"> Article 9(2)(k) Kampala Convention
	<ul style="list-style-type: none"> Prohibition for armed groups of hampering the provision of protection and assistance to IDPs under any circumstances and denying IDPs the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter 		<ul style="list-style-type: none"> Article 7(5)(b) and (c) Kampala Convention
	<ul style="list-style-type: none"> Obligation in situations of displacement to ensure that all possible measures must be taken to ensure that the IDPs are 'received under satisfactory conditions of shelter, hygiene, health, safety and nutrition' 		<ul style="list-style-type: none"> Article 17 AP II
		<ul style="list-style-type: none"> IDP child is entitled to receive humanitarian assistance within the context of the enjoyment of the rights of the Convention 	<ul style="list-style-type: none"> Article 23 African Charter on the Rights and Welfare of the Child
		<ul style="list-style-type: none"> IDPs have a right to request assistance, the right to receive such assistance and 	<ul style="list-style-type: none"> (Guiding Principles 3 and 18 IDPs)

The Duty of the Affected State to Provide, and the Right of Persons
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	Duty of Affected State	Right of Affected Population	Source
		right to an adequate standard of living	

