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

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CHAPTER IX

CONCLUSIONS AND RECOMMENDATIONS

The tragedies of World War II, in particular the persecutions and horrendous death camps, were the epitome of a humanitarian crisis and caused the international community to cry out ‘never again!’. Yet within a single century, the world has been witness to numerous disasters, emergencies and conflicts, resulting in millions of people in dire need of aid, but not receiving it. The provision of aid to persons in need, a concept founded on basic human dignity and the principle of humanity, turned out not to be as self-evident as perceived. The provision of humanitarian assistance continues to raise legal questions and faces legal barriers to this day. These struggles have triggered the present research into the legal framework on the provision of humanitarian assistance.

9.1 Conclusions Pertaining to the Existing Legal Framework

This research has proposed addressing the provision of humanitarian assistance from an all-encompassing and integral ‘umbrella’ perspective, to ensure a common denominator for all persons who may find themselves in need of humanitarian assistance. Although recognising the historical context through which the delivery of humanitarian assistance – as a concept – has developed in times of war, separately from in times of peace, it must be concluded that the *persons* in need of assistance remain a constant factor, as do their needs: regardless of facing a conflict or hurricane, basic human *needs* remain constant. Indeed, the *purpose* of humanitarian assistance: protecting victims of crises, should allow their equal protection. In international law, a clear-cut definition of the concept of humanitarian assistance remains lacking. Therefore, based upon the various definitions suggested in soft law, it has been proffered in Chapter 2 that for the purpose of this research,

*humanitarian assistance shall be considered assistance consisting of food, medicine, shelter and logistics for its provision, for urgent purposes and which is indispensable to the survival of the people at whom it is aimed.*¹

This succinct definition restricts humanitarian assistance to emergency aid for the immediate survival of persons in need. Similar to the fact that a plethora of potential definitions of assistance exist, so do various actors involved with its provision hold different viewpoints on the manner in which it should be provided, amongst which the ICRC/IFRC and the UN. Again, in searching for a common denominator, this research has confirmed three principles that find common ground amongst the main providers of aid. These principles are the principles of humanity, impartiality and

¹ 2.2 The Concept of Humanitarian Assistance.

neutrality. Human dignity plays a central role, as well as non-discrimination and refraining from involvement in the crisis on the territory in which assistance takes place. From the principles through which assistance is provided, the recipients and providers of said assistance can be distilled.² Chapter 2 addresses that these recipients shall be civilians, regardless of the specific circumstances in which aid is provided, and may include refugees or IDPs. With the principles of assistance in mind, this ‘civilian’ requirement is indeed necessary for aid to be considered humanitarian assistance, and similarly requirements exist for those providing aid. First and foremost, the affected state has a primary role, as it is the authority in the territory in which the crisis takes place. Secondly, when abiding by the principles of humanity, neutrality and impartiality, international organisations and third states may also provide assistance.

Establishing the boundaries of this research thus immediately brings several initial gaps in the legal framework pertaining to the delivery of humanitarian assistance to the forefront. Whilst ‘humanitarian assistance’ is a common term involving legal rights and duties, the concept itself has not been defined definitively or conclusively, thereby warranting a definition in this research. Furthermore, several of the providers of assistance hold differentiating views on the manner in which assistance should be provided, leading to the need to distil common denominators that are accepted by all those who provide aid.

The need for humanitarian assistance, as argued in this research, arises in times of a humanitarian crisis. A crisis in reality can be any factual circumstance, provided that it meets a certain threshold of severity and as such aligns with the overarching approach to the provision of assistance taken in this research. To this end, the definition for such a crisis is stipulated in Chapter 3:

A humanitarian crisis is a situation deriving from a variety of origins, including natural or man-made disaster, armed conflict and occupation; causing grave damages of a personal or material nature to persons, where (external) assistance is needed as the local capacity is either overwhelmed, unable or sometimes unwilling to manage the circumstances.³

This definition of a humanitarian crisis allows for a multitude of factual circumstances to ‘amount’ to a crisis, as long as a basic threshold is met, regardless of the legal qualification of such circumstances. As is well-known, the law follows the facts, not the other way around. When considering these circumstances, it becomes apparent that the law pertaining to the provision of aid differentiates between assistance in times of natural disasters, (non-) international armed conflicts and occupation. A variety of rights and duties exists regarding the provision of assistance that are dependent on the specific legal qualification, which is not conducive to the comprehensive assertion that a person in need of aid should receive such aid, as human dignity proscribes. In practice therefore, ‘classifying’ a crisis

² 2.2.3 The Principles for the Delivery of Assistance.

³ 3.3.3. Defining a Humanitarian Crisis.

results in a disparity in the level of protection of persons in need of aid, warranting this research. The law is most explicit concerning relief provided in circumstances of occupation, a logic that originates from the law being created in the aftermath of Nazi occupation throughout Europe. Yet today, a trend developing since the early 1990s, non-international armed conflicts and natural disasters claim most casualties, as victims of these circumstances often desperately need emergency aid but remain without receiving it.

For these purposes, this research has assessed in Chapter 3 the definitions of these legal denominations, as well as their thresholds. Circumstances of natural disaster are not clearly delimited, as the notion of a natural disaster itself is not properly defined in international law. Therefore, this research has suggested upon distilling from various offered soft law definitions that:

*A natural disaster is a sudden or slow-onset natural occurrence or course of events that may include a variety of environmental origins (including biological, climatological, geophysical, hydrological, etc.), resulting in an overwhelming of the local or national capacity and an immediate need for assistance to a civilian population.*⁴

Such a wide scope allows for a broad range of circumstances that may create a need for persons to receive aid. Perhaps consequential to a lacking definition to apply to legal rights and duties, so is a specific legal framework lacking for the provision of assistance in times of disaster. For the applicable rights and duties in times of natural disaster, resort must therefore be had to general international law and human rights law. For armed conflicts, the determination that such a circumstance is occurring, remains factual and is done case-by-case, most often through the judiciary's application of the well-known *Tadić*-definition. Upon determination of this and thereby application of international humanitarian law, the duties pertaining to the delivery of aid specific to this field of law immediately apply, simultaneous to general international law and human rights law.⁵ Establishing a circumstance such as occupation is also a factual assessment and requires the ascertainment that a form of authority is established in a territory, which is also exercised and covers parts of or the whole territory. However, the legal rights and obligations pertaining to the provision of assistance, unlike in times of armed conflict, do not *immediately* apply to the occupier due to this abovementioned 'exercise of control' criterion. It must be reiterated that the threshold of a *humanitarian crisis* must be applied to each of these circumstances: not every conflict, disaster and particularly not every circumstance of occupation warrants the delivery of aid. Such aid should be provided if and when the situation amounts to a *humanitarian crisis*. In the 21st century, the first decade has shown that such circumstances amounting to a crisis more often than not are natural disasters and non-international armed conflicts.

⁴ 3.2.5 Defining a (Natural) Disaster.

⁵ 3.2.2 Armed Conflicts and the Provision of Humanitarian Assistance.

Chapter 3 has also addressed the particular relationship between human rights law and humanitarian law, given their simultaneous applicability to certain instances that may amount to humanitarian crises. Acknowledging the various perspectives on the *lex specialis*-doctrine in international law, as well as the debate on the extra-territorial applicability of human rights law, it can be firmly established that both human rights law and humanitarian law share the common goals of serving the protection of persons and humanity. As a result, this research submits that the *lex specialis*-principle must be read as a manner in which to apply the most specific provision in a specific circumstance; resulting in the application of a human rights provision in some instances, and a provision deriving from humanitarian law in others. Given the topic of the research, this will result in the application of the most *protective* clause in all circumstances. This converging approach of the *lex specialis*-doctrine again aligns with the overarching approach taken by this research that persons in need of assistance should be able to receive such assistance, equally protected by the law, regardless of which factual circumstance has amounted to the humanitarian crisis in which they find themselves.⁶

Determining the circumstances in which aid is needed, as well as the applicable law, has raised more issues pertaining to the existing legal framework. The above portrays the difficulties arising in the assessment of what in fact amounts to a circumstance in which assistance is necessary, which has prompted this research to provide not only a definition of a natural disaster, but more importantly, a definition of a 'humanitarian crisis'. Likewise, offering a perspective on the *lex specialis*-doctrine is done for the purpose of establishing which provisions must be adhered to, in the event of a lack of clarity in the law *that has the purpose of protecting individuals*. It is for this reason that it is suggested that the most specific and protective *clause* must be adhered to in various circumstances, as opposed to an *entire* body of law, which has more and less specific provisions. More support and clarification of this position in international law would benefit the persons the law is attempting to protect.

Critical to the provision of humanitarian assistance is furthermore the concept of 'state sovereignty', addressed in Chapter 4. The Westphalian notion of state sovereignty today is somewhat outdated, as well as the *Lotus*-perspective of the PCIJ. The erosion of the notion of sovereignty as a 'shield' over the course of the 21st century followed various developments, such as greater international interdependence, the embracement of the UDHR and various human rights treaties allowing for a larger role of individuals on the international plane and the subsequent creation of multiple international tribunals and courts. With the embracement of the 'Responsibility to Protect'-doctrine in the UN, another effort has been taken to pierce the sovereign veil. Indeed, in the 21st century, sovereignty must be seen as a reciprocal relationship between rights and duties *of the sovereign authority*. Whilst the principles relevant to the provision of humanitarian assistance, such as those of non-intervention, respect for the domestic jurisdiction of a state and consent continue to be upheld, not only do such *rights* exist for the sovereign, duties exist also. In

⁶ 3.4.3 Hierarchy or Convergence of International Legal Norms?.

other words, these principles are not void of boundaries: a responsibility rests upon the sovereign to take care of those under its jurisdiction. Consequently, when the sovereign fails to fulfil its obligations in this regard, the obligation to protect civilians falls to the international community. In particular, this obligation arises under RtoP for crimes such as genocide, war crimes, crimes against humanity and ethnic cleansing. RtoP may not be fully developed yet nor put into much practice, but it does represent a tendency in the international community to view sovereignty increasingly as a notion that includes a responsibility towards those under the sovereign's authority, as well as a secondary responsibility for the international community itself.⁷ Furthermore, as international law recognises individuals as legal subjects, it allows such individuals to reach out to the international community through a request to fulfil their human rights through the provision of humanitarian assistance. The provision of humanitarian assistance in this sense is a key example of the manner in which sovereignty is exercised. It is a method for sovereign authorities to fulfil their responsibilities, but upon failing to do so, it becomes a vehicle through which the international community can fill the sovereign's void. Sovereign responsibilities then become translated from internal, belonging to the sovereign, to external; for the international community to provide. Such duties are discussed in Chapters 6, 7 and 8, in consideration of responsible state sovereignty.

From the perspective of the individuals receiving humanitarian assistance, Chapter 5 addresses the matter of a potential human right to receive aid. At this time, no such individual, independent human right exists. However in treaty law, the CRC, CRPD and African Charter on the Rights and Welfare of the Child recognise a right to receive aid *in connection to* the fulfilment of other rights within the respective treaties. Equally, in customary international law no such right can be distilled, despite various soft law initiatives that refer to the potential existing of *opinio juris* on the matter. A problematic aspect of the determination of an independent human right is the assessment of the content and scope of the right, with a view to assessing rights-holders and duty-bearers in the particular provision of humanitarian assistance.⁸ Chapter 5 has addressed that a right to humanitarian assistance would potentially fall in the category of 'third generation', or 'solidarity' rights, which often have very broad scopes. Whilst this would not be the case for humanitarian assistance given the quite narrow definition of the concept provided above in relation to its provision in times of emergencies only, it remains that the entire collective of individuals needing assistance would be considered rights-holders. Furthermore, whilst the state would be the first and foremost duty-bearer, a responsibility to provide aid may rest upon the international community as a whole. As such, the development of a human right to receive humanitarian assistance would place such a right in the problematic category of 'collective rights'. From this perspective, as well as taking into consideration the lack of development in treaty incorporation, it is more pragmatic to consider the provision of humanitarian assistance within the context of existing human rights.

⁷ 4.2.3.3 Towards a new Definition of Sovereignty.

⁸ 5.3 A Human Right to Receive Humanitarian Assistance in International Law?.

Indeed, when assessing the existing body of human rights from the perspective of the provision of humanitarian assistance, it becomes clear that the need for the development of an individual right is not necessarily acute in international law today. Humanitarian assistance can – and does – function as a vehicle in the fulfilment of existing human rights. A strong basis is found in Articles 55 and 56 of the UN Charter and in particular, given the content of emergency aid, in the rights to life, food, health (and water). Chapter 5 has discussed these existing rights as incorporated in the UDHR, ICESCR, ICCPR, ECHR, ACPHR, ACHR, ICERD, CRC, CRPD, CEDAW and various other human rights treaties.⁹ The formulations of these rights, the lack of restrictions by states in their reservations to the various treaties and moreover the interpretations of the treaty bodies accumulatively allow for the assessment that the delivery of humanitarian assistance is a manner in which to fulfil the rights to life, food, health (and water). This assessment is supported by the fact that those treaties which include a ‘state of emergency’-clause, exclude the right to life from such derogation, as well as the fact that, whilst the ICESCR does not contain such a clause and is considered generally to entail mostly obligations of conduct, the treaty does recognise certain ‘minimum core obligations’. Adding to this, the ICJ has declared in its *Nicaragua*-case that humanitarian assistance serves for the protection of ‘life and health’, providing additional arguments for the framing of humanitarian assistance in such a human rights context.

Therefore it can be concluded that the absence of a specific individual *human right* to humanitarian assistance is not necessarily an absence of a right to receive humanitarian assistance in itself. The right to receive assistance forms part of the entire body of human rights, most specifically the rights to life, food, health (and water) as enshrined in existing international law. Whereas the development of an individual human right might facilitate claiming such receipt, it may also attribute to the proliferation of human rights. Strengthening the current body of rights and simultaneously strengthening the function of humanitarian assistance as a vehicle in the fulfilment of such rights is more pragmatic and realistic, when considering the lack of developments of such a potential individual right. Furthermore, such a development should also not be considered *necessary* for individuals in their receipt of assistance, as they are currently able to receive assistance through claiming such a need based on the existing rights to life, food, health (and water).¹⁰

A core part of this research (in Chapters 6, 7 and 8) has focused on the specific legal rights and duties of the potential providers and recipients of humanitarian assistance according to the various legal sources that are of relevance to its provision. Legal sources such as human rights law, international humanitarian law and refugee law have been examined as well as Security Council resolutions. The primary responsibility for the provision of humanitarian assistance lies first and foremost with the authority of the territory on which the crisis takes place. In essence, this is a reflection of the newer interpretation of state sovereignty, and is recognised also by the Security Council in resolutions dating from 2006, as well as General

⁹ 5.4 Humanitarian Assistance Within the Context of Existing Human Rights and further.

¹⁰ 5.5.2 Humanitarian Assistance as a Vehicle in the Fulfilment of Existing Human Rights.

Assembly resolutions concerning natural disaster situations, the first dating back to 1991 and which later also embraced duties under international humanitarian law. Both *corpora juris* do not recognise an explicit ‘right’ of persons to receive aid, but do assert that the duties to provide assistance are not limited to the state, and can include other ‘parties’ such as non-state actors. In particular concerning the provision of aid in non-international armed conflicts, this is of relevance. That such actors – exercising a certain level of control – hold responsibilities under international law has also been asserted by the ICJ in its *Namibia*-opinion.¹¹

In human rights law as seen in Chapter 5, rights and duties concerning the provision of humanitarian assistance can also be found, at a greater level of specificity than through the UN bodies’ resolutions. With a strong foundation in Articles 55 and 56 of the UN Charter, UN member states are obliged to promote observance of human rights; which can today also be applied to non-state actors acting as (local) sovereigns. More specifically concerning the right to life, states have a positive obligation to not arbitrarily deprive persons of the right to life under Article 3 UDHR, Article 6 ICCPR, Article 2 ECHR, Article 4 ACHR and Article 4 ACHPR. This includes an individual’s right to protection in this regard from the state, and as interpreted by the HRC an obligation of the sovereign to reduce ‘malnutrition’, which is of relevance in the provision of assistance. Specifically Articles 6 and 22 CRC recognise the duty to provide assistance in the fulfilment of the non-deprivation of life for children. The right to adequate food has been codified mostly as a state duty in Article 11 ICESCR, where the sovereign needs to demonstrate, in order to fulfil its minimum core obligations under the convention, having utilised all possible resources; including seeking international cooperation under Article 2 ICESCR. The CESCR has interpreted the non-provision of humanitarian assistance as a violation of this duty. The obligation to provide food – rather formulated as such than as a right to receive – can also be found in 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, as well as Article 15 of the Additional Protocol to the ACHPR on the Rights of Women in Africa. The right to health finds a main provision in Article 12(2)(c) ICESCR, specifically calling upon the ‘prevention, treatment and control of epidemic, endemic, occupational and other diseases’, where international cooperation continues to be a fulfilment of the minimum core obligations. The right to health is furthermore codified in Articles 25 UDHR, 5(e)(iv) ICERD, 24 CRC, 11 European Social Charter, 10 Additional Protocol to the ACHR in the area of Economic, Social and Cultural Rights, 16 ACHPR, 14 African Charter on the Rights and Welfare of the Child and 14 of the Additional Protocol to the ACHPR on the Rights of Women in Africa. There are some differentiations amongst the provisions, and as a result, difficulties ensue in formulating this as a clear-cut ‘right’ to receive for individuals. Concerning humanitarian assistance specifically, a consensus can be found in the obligation of the sovereign to prevent diseases and in the provision of aid, to prioritise a vulnerable population. Although water is of essential value to human

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

beings, no distinct international right to water has been codified. With a more haphazard incorporation, provisions can be found in Articles 24(1)(c) CRC, 14(2)(h) CEDAW, 28 CRPD, 15(a) Additional Protocol to the ACHPR on the Rights of Women in Africa and 14(2) African Charter on the Rights and Welfare of the Child. These treaties recognise a duty of the sovereign to provide access to safe drinking water, and the CESCR has also ‘read’ this right in Articles 11 and 12 ICESCR. From a more general perspective, the CRPD quite uniquely has also asserted in Article 11 that states parties have the obligation to take ‘all necessary measures’ to ensure the protection of those with disabilities in humanitarian emergencies. Turning to soft law instruments, equally the well-known Vienna Declaration has asserted the importance of the provision of humanitarian assistance in the context of human rights. The provision of humanitarian assistance therefore functions as a method through which states can fulfil their duties under human rights law.¹²

International humanitarian law contains a variety of provisions specifically tailored to the delivery of assistance, formulated as *duties* of the sovereign rather than as rights of individuals to receive assistance. The law however differentiates the duties of the authorities (or non-state actors, depending on the circumstances) according to the situation in which the need for assistance arises. Should a humanitarian crisis arise in times of international armed conflict, non-international armed conflict or occupation, the duties are diverse. Whilst the latter is rarely topical in international law today, the opposite can be said for non-international armed conflicts. Upon examining the law, it becomes apparent that in an international armed conflict, Article 54 AP I contains the obligation to refrain from causing starvation amongst civilians, but the Geneva Conventions and Protocols do not contain a strong positive obligation to provide aid. From Article 70 AP I, referring to the fact that relief schemes ‘shall be undertaken’ when a civilian population is in need, a right to receive aid might be *inferred* at best, but is not explicitly mentioned.¹³ Furthermore, ‘military necessity’ may be a reason for a state to temporarily delay or not be capable of providing aid, although it may not be utilised as an argument to withhold assistance entirely. In times of occupation, no explicit rights are mentioned, but duties rest upon the occupying force under Article 55 GC IV to ensure food and medical supplies in the territory if it should be inadequately supplied, under Article 56 to maintain hospitals, public health and prevention of epidemics (but all in cooperation with the local authorities) and under Article 69 AP I also to ensure clothing, shelter and other essential items for the civilian population.¹⁴ Conversely, in times of non-international armed conflict, no specific rights to receive and no positive obligations to provide aid are codified. The provision of humanitarian assistance in times of a non-international armed conflict is based upon the duty to provide humane treatment as codified in common Article 3 of the Geneva Conventions, and the prohibition of starvation as incorporated in Article 14 AP II. Whereas ‘military necessity’ is not a grounds for exception in non-international

¹² 6.3 Duties and Rights under Human Rights Law.

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

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

armed conflicts, the Geneva Conventions and Protocols unfortunately are based upon the somewhat rosy perspective – reflecting the timeframe of their codification – that in a non-international armed conflict, the sovereign is inclined to provide for those in need upon its territory. Today, where civilian suffering is a constant integral *part* of warfare in non-international armed conflict, it is apparent that this view is no longer tenable.¹⁵

Chapter 6 has also addressed the rights and duties as available to those in times of natural disasters amounting to humanitarian crises. Human rights law remains applicable, and the General Assembly has – as noted above – asserted as early as 1991 a primary duty of the affected state in the provision of aid. A body of law tailored to the protection of persons in such times is currently under development with the ILC, and its Draft Articles call for a respect for human rights (Draft Article 6) and also such a primary duty for the state to ensure protection of persons through the provision of assistance on its territory (Draft Article 12). The likelihood of this codification initiative materialising into treaty law however remains to be seen. In current law, this duty has been codified regionally through Article IV(a) of the Inter-American Convention to Facilitate Disaster Assistance and Article 3 of ASEAN Disaster Management Agreement. Again, the absence of law indicates a presumption by the international community that the affected sovereign shall be keen to provide aid to its civilians, a presumption not always reflected in reality.¹⁶

Should emergencies cause the creation of groups of IDPs or refugees, several distinct duties pertaining to the provision of assistance can be found and the Security Council has asserted that such persons are entitled to protection.¹⁷ Article 23 of the Refugee Convention notes that a state has the duty to treat refugees as its own nationals in the provision of public relief. Furthermore, Articles 22 CRC and 23 African Charter on the Rights and Welfare of the Child note a right to receive assistance as within the context of the enjoyment of the human rights in both conventions. The latter Charter also reflects the protection of IDPs. IDPs on the African continent are furthermore protected in the new Kampala Convention, which codifies a duty to ensure assistance to IDPs, in combination with the participation of IDPs in this process under Article 9. The same views are reflected in the non-binding, but well-known, Guiding Principles on Internal Displacement. A limited protection can finally also be found in Article 17 AP II, prohibiting the forced movement of populations.

From the above reflection of the law as discussed in Chapter 6, it can be concluded that the current law is by no means all-encompassing. The applicable law is dependent on the specific circumstance amounting to a humanitarian crisis. Whilst a primary duty for the affected state or authority can be discerned, a need exists for harmonisation and a common minimum standard. Currently, a rather ‘sectoral’ protection exists, risking fragmentation in the law and in the level of protection for

¹⁵ 6.5.1.2 Duties of the Affected State and Non-State Actor in Times of a Non-International Armed Conflict.

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

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

those in need. Although the international community is hesitant to recognise a right to receive aid, a duty to provide such assistance can be derived from the above. International humanitarian law contains several detailed provisions, but lacks general duties, in particular concerning non-international armed conflicts, often resulting in acute problems such as the issues seen in the protracted conflict in Syria. Conversely, human rights contain more general provisions, yet it can be argued that the law is specific enough to be considered the *lex specialis* on various occasions when international humanitarian law is lacking such duties. In particular, the human rights provisions regionally on the African continent and topically for children and IDPs are very suitable for the adequate fulfilment of such a role. In an attempt to fill certain gaps, soft law documents such as the San Remo Principles, the Bruges Resolution and the Mohonk Criteria all recognise a duty of the sovereign to provide aid, as well as a right to request the receipt of such assistance from the sovereign. Again, such recognition goes to the argument of existence of *opinio juris* on the matter, but does not fill the gaps in the *lex lata*.

Following an ascertainment of the legal rights and duties of the civilian population and the affected state, Chapter 7 expands upon this with the assessment of the legal framework concerning assistance from outside the affected territory; the examination of a potential right to offer and provide assistance, and a related right to access therefore. State sovereignty continues to function as a constant and consistent thread throughout international law and therefore also in this aspect of the research. In relation to external humanitarian assistance, sovereignty plays a continuing crucial role, as the state is the primary responsible actor for the provision of assistance.

In human rights law, a distinction can be made between the civil right to life, and the economic and social rights to food, health and water when considering the manner in which duties manifest themselves. As the right to life can be considered a right to be 'free from arbitrary deprivation' thereof, human rights law does not proscribe a specific duty of the affected state or right of third parties in human rights conventions to positively ensure such a right. Conversely, the rights to food and health in the ICESCR acknowledge an obligation of conduct of the affected state as well as in particular in Article 2 ICESCR, which includes a responsibility of the international community in cooperation and assistance to help the affected state. Article 2 ICESCR furthermore proscribes a duty of the affected state to in fact seek that international assistance in fulfilling the rights of the ICESCR. Whilst Article 11 ICESCR does not allow for a 'right to access' in relation to the right to food as it evolves around state consent, of course resort may be had to enforcement mechanisms should certain core rights be violated. Similarly, Article 12 Additional Protocol to the ACHR in the area of Economic, Social and Cultural Rights and 15 Additional Protocol to the ACHPR on the Rights of Women in Africa recognise an obligation upon states parties to take measures in cooperating to ensure food security and ending malnutrition. Article 12 ICESCR pertaining to the right to health does not call for the consent of the affected state, but also does not formulate a right to access. As seen in Chapter 5 pertaining to the right to water, no consensus exists

regarding such a right in international treaty or customary law and hence no right to access in this regard can be discerned.¹⁸

Support for a duty to cooperate in the fulfilment of human rights can also be found in the UN Charter and through the perspectives of various UN bodies, adding to the argument that some *opinio juris* exists on an emerging responsibility or duty to cooperate in the fulfilment of such human rights through the provision of humanitarian assistance, as reflected also in Article 2 ICESCR. Relevantly, the ICJ has as recently as 2007 declared in the *Georgia v. Russia* case a need to refrain from impediments to humanitarian assistance, in support of a population's human rights under the ICERD; such as concerning Articles 5 (b) regarding security of persons and (e) regarding economic, social and cultural rights. Such a formulation, although focusing on the duty-bearer to allow access, also appears to presuppose a right to offer assistance by third parties. In human rights law therefore, obligations of conduct and non-impediment of assistance can be found, as well as a potential responsibility of the international community to provide assistance in the fulfilment of human rights of the affected population.

Furthermore within the UN framework, the Security Council has as a primary actor in circumstances requiring the cooperation of the international community for many decades addressed the humanitarian responsibilities of the UN as well as making appeals to the international community of states to provide assistance in circumstances where it was needed. Increasingly, towards the end of the 20th century, the Council acted under Chapter VII and called upon the global responsibilities of the international community in various country-resolutions. In its resolutions, the Council does not differentiate between circumstances of international armed conflict or of non-international armed conflict, but bases itself solely on the establishment of a potential threat to the peace, providing a more egalitarian approach. Whilst such resolutions are not 'thematic', they are an indication of the perspective of the Council, as it commenced (in Resolution 688) formulating calls to the affected sovereign to 'allow access' as well as 'safe and unhindered' access and passage for the provision of assistance from 1991 onwards. Rather than formulating a right of third parties, the Council does so by calling upon the affected state to comply with its duties under international law. In fact, by arguing that the affected state should allow access for the provision of assistance in line with its duties under international law, the Council actually somewhat foregoes a 'right to offer' as this is presupposed in such an assertion, to the point where the 'right to access' becomes the flip side of the coin of a duty of 'allowing access'. However, although the Council calls or urges the affected state to comply with the law, it does not actually assert a right to access of third parties. The furthest the Council has gone to date, acting under Chapter VII, is 'demanding' of the affected state to 'ensure' access and safe passage in compliance with its duties under international law, as done for example with regard to Iraq in 2003. In case-specific circumstances therefore, the Council has shown its willingness to act under Chapter VII of the UN Charter and assert a duty of the affected state to allow access for humanitarian aid, culminating in its novel approach towards Syria

¹⁸ 7.3 The Provision of Humanitarian Assistance by Third Parties Under Human Rights Law.

in 2014 where humanitarian assistance was called upon without force, but circumventing the state sovereign.¹⁹

Similar to the Security Council, the General Assembly has assumed a need for the international community to assist. In its well-known Resolution 46/182, the General Assembly has furthermore argued the need to strengthen the collective efforts of the international community in the provision of humanitarian aid and subsequently in the Millennium Declaration, the General Assembly has expressed the view that such provision is a shared, collective responsibility. Unlike the Security Council, the General Assembly has not expressed an international legal ‘duty to provide’ or a right to access a territory. Although such expressions would not have been legally binding, they would have expressed broad viewpoints from member states and as such contributed to the potential formation of customary norms. With time, the General Assembly has however broadened its scope when discussing humanitarian assistance, to include more complex emergencies and circumstances of conflict. At first asserting this need primarily in times of natural disaster, the General Assembly has broadened this to include times of ‘war’, and has argued that such assistance is an expression of the principle of international solidarity. In the late 1990s the General Assembly commenced reiterating the stance taken by the Security Council, using similar wording in resolutions, and thereby leading to the conclusion that indeed the overall impression from these UN bodies may be that a duty exists of affected states to allow access in compliance with norms in international law, which in itself is a presupposition of a right to offer assistance by third parties.²⁰

Chapter 7 has furthermore addressed the rights and duties in the external provision of assistance in specific circumstances in international law, such as armed conflict and natural disaster. In case of international armed conflicts, Article 10 GC IV proscribes a right to offer assistance of international organisations, subject to the consent of the affected state, which must merely be seen as an invitation and not entailing legal duties. Article 23 GC IV cites an obligation of the affected state that passage ‘shall’ be allowed for relief, save for ‘serious reasons’. Article 70(1) AP I then asserts that relief ‘shall’ be undertaken when a territory is inadequately supplied. This provision too is subject to agreement with the affected state, but the state does not have unlimited freedom in this regard as Article 70 AP I must be read in conjuncture with 54 AP I concerning the duty to refrain from starvation. The ‘shall’ in Article 70 AP I implies an obligation, and even if read in the least stringent manner, still entails a right to offer assistance. Article 70(2-5) AP I subsequently broadens the content of Article 23 GC IV, but balances this with further control rights of the affected state. Lastly, Article 71(2) AP I addresses the safety of humanitarian personnel, a prerequisite in the delivery of assistance. Thus, in an international armed conflict, again the right to offer assistance is somewhat presupposed, as deduced from the formulations in the provisions which call for a *duty* of the affected state to

¹⁹ 7.4.2 Security Council Resolutions and the Right to Access.

²⁰ 7.4.4 General Assembly Resolutions and the Right to Access.

allow passage of humanitarian assistance, subject to various specific control rights and in specific circumstances the right of the affected state to refuse assistance.²¹

In non-international armed conflicts, Chapter 7 has seen a similar development from the Conventions to the Additional Protocols. Common Article 3 merely states that humanitarian organisations may offer ‘services’, whilst Article 18 AP II (to be read in line with Article 14 regarding the prohibition of starvation), states that ‘relief actions shall be undertaken’ when a population is suffering ‘undue hardship’, but again such relief is subject to consent of the ‘concerned party’.²² AP II assumes this party to be the state, but given the non-international character of the conflict, it has been argued that this may include a non-state actor acting as an authority, or alternatively when the authority is not to be determined, consent must be presupposed. In drafting Article 18 AP II, consensus was difficult to find concerning the concept of humanitarian access, and it is regrettable that stricter wording was not agreed upon, given the amount of problems faced today in non-international armed conflicts.

Conversely, as seen in Chapter 6 also, the law concerning humanitarian assistance in times of occupation is rather explicit: Article 59 GC IV states that an occupying power ‘shall’ accept relief if a territory is inadequately supplied, subject to control rights, and facilitate its rapid distribution according to Article 61 GC IV. The latter Article also declares that all states have a duty to allow the transit of such assistance. As seen before, the law of occupation stems from the circumstances in World War II and in subsequent times has not been developed much: Article 69 AP I succinctly declares that civilians in times of occupation are subject to the provisions of GC IV and API. Hence, it can be concluded that similar to circumstances of armed conflict, an offer to provide external assistance is presupposed, the occupying force has an obligation to accept assistance when a territory is inadequately supplied, and it continues to exercise control rights over the provision of assistance.

Chapter 7 has shown that – as is the case in the legal framework pertaining to the duties of the affected state – no specific field of law is applicable in times of external provision of assistance in the aftermath of (natural) disasters. Whilst human rights law and general principles of international law are applicable at all times, very few conventions are tailored to address the external provision of assistance. An example includes the Inter-American Convention to Facilitate Disaster Relief, which presupposes an offer of assistance, but leaves the power to accept such an offer in the hands of the affected state, thereby not addressing a right to access. Should however the sovereign concede to access, then Article V asserts that such access shall be fully facilitated. Also, the ASEAN Agreement on Disaster Management and Emergency Response recognises a duty of states to promptly respond to the affected states’ requests for aid in Article 4(c), thereby envisioning an international duty to cooperate. This duty is furthermore reflected in Article 8, asserting an obligation of states to coordinate the provision of aid amongst themselves, whilst Articles 3 and 11(2) continue to assert the right of the affected state to consent to assistance. Thus,

²¹ 7.5.2.1 The Potential Right to Access in Times of International Armed Conflict.

²² 7.5.2.2 The Potential Right to Access in Times of Non-International Armed Conflict.

these smaller regional conventions – although in areas of the world prone to disasters – envision a right of the affected state to consent, as opposed to a right to access for third parties. However, the ASEAN Agreement does reflect, as seen earlier in human rights law and the UN Security Council and General Assembly resolutions, a duty to cooperate for third states. A similar approach regarding cooperation and consent is held by the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency in Articles 1 and 3. With a view to potential future regulation in times of disaster, the ILC Draft Articles explicitly formulate a right to offer assistance in Draft Article 16, and calls upon states to cooperate in Articles 8 and 9. As reflected in *lex lata*, Draft Article 14 asserts that consent continues to be required, although it may not be withheld arbitrarily, and according to Article 15 the affected state may place conditions on the provision of external assistance: a reflection of the ‘control rights’ as seen in international humanitarian law.²³

With regard to the external delivery of assistance, not only circumstances but also specific *subjects* may be of relevance, such as refugees. The nature of refugee law does not exactly allow for provisions relating to the access of a territory. The Refugee Convention merely states in Article 23 that refugees in this sense must be treated as a state’s national, given the fact that the third state is the *recipient* state. The regional African Kampala Convention on IDPs interestingly restricts offers from, and the seeking of assistance by, the affected state to ‘international organizations’, merely referring to ‘other relevant actors’ in Article 5(6) which could be interpreted as third states. Articles 3(1)(j) and 5(7) declare that the affected state must allow and facilitate the rapid and unimpeded access of humanitarian assistance, a duty which is also upheld for armed groups in Article 7(5)(b) and (g). Again, as other provisions have done, the Convention formulates such allowance of assistance as a duty of the affected state, rather than as a right of external parties. Furthermore, it remains problematic to the protection of IDPs – a group associated both with natural disasters and non-international armed conflicts – that only a regional binding document such as the Kampala Convention serves for their specific protection.²⁴ Outside of the African continent, no binding provisions exist, although both the UN General Assembly and other UN bodies have expressed their concern in this regard.

The discussion of the legal framework on the external provision of humanitarian assistance in Chapter 7 has brought several clear gaps in the rights and duties to the forefront. A (legal) right of third parties to offer humanitarian assistance is often presupposed, and taken for granted. The law tends to commence its regulation at a ‘next’ step or level: access. The notion of access however is not formulated from the perspective of the external providers, but rather from the perspective of an obligation of the affected state to *allow* such access for the provision of aid. Throughout the various bodies of law, a consensus can be found to exist with regard to the initial power of the affected state to ‘consent’ to the delivery of aid, but no consensus exists on the threshold of such consent. Such consent can be subject to various degrees of sovereignty or freedom, depending on the ‘arbitrariness’ of the refusal, but consent

²³ 7.5.6 The Potential Right to Access in Times of (Natural) Disaster.

²⁴ 7.5.10 The Potential Right to Access under the (Potential) IDP Framework.

as a concept nevertheless continues to play a crucial role. Such a role for the sovereign is also seen in the formulation in international humanitarian law that a territory must be determined 'inadequately supplied'. Yet, no definition of this, or of 'arbitrary denial' is provided, nor is the abuse of 'control rights' precluded. What however also surfaces, in a *positive* development, is the recognition throughout the various bodies of law, that an (emerging) duty of the international community exists to cooperate in the provision of humanitarian assistance. As such the UN Security Council and General Assembly resolutions contribute to the formation of *opinio juris* and state practice, in conjuncture with the various conventions. Furthermore, from the developments in the various *corpora juris*, it can also be concluded that at times, a duty to allow access exists: consent must be provided when its refusal would amount to a violation of international law such as for example the right to food.

It must, however, be noted that the proliferation of 'sectoral' regulations and codifications result in this present wide range of provisions and diversity regarding the aspect of the provision of aid by third parties in the legal framework on the provision of assistance. Each individual circumstance in which assistance may be necessary has been subject to a variety of different regulations and conventions, such as the Kampala Convention or the ASEAN Agreement. As such, the rights and duties vary greatly according to the specific circumstances, and whilst the Kampala Convention for example may serve to aid IDPs in Africa, it may hinder a more comprehensive protection internationally. A minimum level of protection is difficult to discern, as the control rights and consent thresholds vary throughout the bodies of law, the regions and the circumstances. A lack of clarity ensues concerning the responsibilities of various rights-holders and duty-bearers. To this end, the various soft law doctrines on the topic all recognise a third party's right to offer assistance, and a duty of the affected state not to arbitrarily refuse such an offer. Furthermore, the San Remo Principles and the Bruges Resolution also note an obligation to allow for safe passage, and the latter asserts an obligation of the affected state to seek assistance from third parties. In order to coerce the international community to pursue the international provision of humanitarian assistance, clarity is needed in the determination of the extent to which assistance can be 'enforced', which is what Chapter 8 has sought to deliver.

The *enforcement* of the provision of humanitarian assistance touches the very core of the relationship between humanitarian assistance and state sovereignty. Legal enforcement of assistance is possible if and when a sovereign is in violation of international law by denying those in need of the aid they are entitled to. A violation of international law exists when (1) a humanitarian crisis warranting the delivery of humanitarian assistance exists, (2) the affected state is not providing (sufficient) assistance and (3) a lawful offer of external assistance is refused for reasons outside of those allowed for in international human rights and humanitarian law. If these circumstances take place, (4) a violation of international law occurs as the affected state is obstructing or denying the provision of humanitarian assistance, resulting in enforcement possibilities. Currently in international law, such assessments are made

by either the Security Council, or judicial entities such as the ICJ, ICC or human rights bodies.²⁵

Chapter 8 has addressed the various methods through which the enforcement of assistance might take place, upon the establishment of state responsibility for the violation of international law. State responsibility arises under Articles 2 and 3 ARSIWA and is today no longer considered purely bilateral, as considered by the ICJ in the *Barcelona Traction*-case (amongst other cases). This assessment is particularly relevant to the establishment of responsibility by other states for the non-provision of assistance by the affected state. Articles 42 ARSIWA (invocation by an injured state) and somewhat more progressively Article 48 ARSIWA (invocation by the international community) assert a responsibility that is owed towards a larger community, such as states parties to a treaty, or responsibility for a violation of a norm of customary international law. Attribution of acts to the state is possible under Articles 4-11 ARSIWA, and although Articles 20-25 ARSIWA note circumstances precluding wrongfulness, with regard to the provision of humanitarian assistance only Article 23 may potentially be argued and it will most likely not be accepted given the nature of such provision. Relevant to the provision of humanitarian assistance, by means of enforcement through state responsibility potentially in combination with the use of force, Articles 40 and 41 ARSIWA assert a duty for states to cooperate in the ending of breaches of peremptory norms. With regard to humanitarian assistance, such violations of norms of *jus cogens* are the commission of racial discrimination, war crimes, crimes against humanity and genocide. The principle of humanity is furthermore also placed within the context of intransgressible norms of international law. Thus, the law of state responsibility distinctly places a duty not only upon the affected state not to commit such acts, but also upon the international community to cooperate in ending their commission.²⁶ The ICJ has supported this stance in its 2007 *Bosnian Genocide*-case, arguing an obligation of conduct to end the commission of genocide. This perspective is also voiced in Article 89 AP II, where third states are called upon to cooperate with a view to ending ‘serious violations’ of the Geneva Conventions taking place in a non-international armed conflict. Equally, with a view to the future, the ILC Draft Articles on the protection of persons in the event of disasters deduce a ‘secondary role’ for third states in the provision of assistance in Draft Article 12 and also reflected in Draft Article 8; although the Articles are too hesitant to assert such a role as ‘responsibility’.

State responsibility can be enforced through judiciary means, largely utilised after a crisis has taken place. An alternative method of enforcement at this state *vis-à-vis* state level, is the use of force under the auspices of the UN Security Council. The use of force must naturally always be seen as an ultimate resort, upon establishment by the Security Council that a threat to the peace according to Article 39 exists (to date it is not used in cases of natural disasters), and as a potential mechanism to give effect to prior measures such as those under Articles 40 and 41 of the UN Charter.

²⁵ 8.3.3 The Denial or Obstruction of Assistance: a Violation of International Law.

²⁶ 8.2.3 State Responsibility and the Potential Duty to Cooperate in the Event of a Breach.

The Security Council has the role of enforcer in this regard, with a view to Articles 2(4), 25 and 103 UN Charter. A determination by this body that the use of force may be warranted to ensure the provision of humanitarian aid simultaneously functions as the determination that in fact (1) a territory is inadequately supplied at a times of crisis and (2) the affected state is not providing for those in need within its jurisdiction or not allowing aid into the territory. It remains essential when discussing the use of force as an enforcement mechanism to distinguish between those *providing* the emergency aid, and those *enforcing* it; in order to allow those providing aid to adhere to the core principles of neutrality, impartiality and humanity. The Council has alluded to the use of force by asserting a need for ‘appropriate measures’ in its Resolution 1265 on the protection of civilians, and equally has cautiously eased into the use of force in the early 1990s in Somalia and the Former Yugoslavia, for the purpose of the delivery of aid, although state sovereignty remained a constant factor. Over time, peacekeeping operations have been entrusted with the enforcement of humanitarian assistance and from the turn of the century, increasingly coalitions of states have been entrusted to do so too. The Security Council is comfortable asserting a need to provide assistance under Chapter VII, but this also includes measures under Article 40 as opposed to solely the use of force in Article 42. With the recognition of the doctrine of the Responsibility to Protect, and continuing with thematic resolutions pertaining to the protection of civilians, the use of force also with regard to the provision of aid, has become more embedded, such as in Somalia through troops of the African Union in 2007. The Security Council in particular has increasingly referred to violations of international law as a reason leading to these forceful actions.²⁷ A well-known and discussed example is Resolution 1973 (2011) where under RtoP, the use of force was asserted in particular relation to the provision of humanitarian assistance in Libya. Since then however, the Council has been hesitant, which leaves a clear line lacking in the Council’s work.

It is apparent from previous country-specific resolutions that the Council is willing to use force *for the purpose of the delivery of aid*, yet in which circumstances and with what threshold, is currently not to be distilled. Such reasoning of course also lies within the political mandate of the Council. Yet, useful on the other hand is the increasing level of specificity in the Council’s resolutions, which is helpful in providing more clarity in distilling the direction of the body. Chapter 8 has concluded that the Council *does* in fact see itself fit to resort to the use of force *for the purpose of the provision of aid*, with and on occasion without, the cooperation of the sovereign. Whilst in practice a more ‘standard’ formulation or threshold might not be viable, it would be necessary or at least helpful to ascertain some more consistency in the work of the Council, as its inactivity in Syria (despite the more recent authorisation of humanitarian assistance without the consent of Syrian authorities) is a painful failure to act, following the assertive resolutions concerning Libya. Furthermore, should the scope of the concept ‘threat to the peace’ as formulated in Article 39 UN Charter be given a wide interpretation so as to not be

²⁷ 8.4.3 Security Council Action since the UN embracement of the Responsibility to Protect.

exclusively reserved for armed conflicts, they might include for example widespread crimes against humanity. Such crimes are relevant with regard to the provision of humanitarian assistance, and although they no longer need a nexus to an armed conflict, they do by nature result in a threat to the peace. In such instances, Security Council action might in the future also be possible in circumstances of natural disaster. Again, as in the case of Syria, the Council's inaction in the face of disasters such as the one in Myanmar following cyclone Nargis make the political character of the body painfully apparent. Indeed the notion of sovereignty, changing over the decades, would also allow for a more active role of the Council in circumstances where the consent of the affected state is lacking, and the potential duty to cooperate under the law of state responsibility discussed above furthermore supports such an attitude.

From the enforcement of assistance through to the use of force, at an inter-state level, Chapter 8 has progressed to the level of enforcement of assistance through human rights law. Human rights treaty bodies such as the HRC, CESCR and regional courts like the ECtHR recognise both inter-state and individual complaint mechanisms. The inter-state mechanism, although a reflection of the concept of shared responsibility as codified in Article 48 ARSIWA, has proven too political to be used in practice. Both the HRC and CESCR have also not had the opportunity to express themselves regarding the provision of humanitarian assistance through the individual complaint mechanism, the latter due to the fact that it has only recently opened up to such a mechanism. A problem may also well lie in the 'obligation of conduct'-nature of the rights enshrined in the ICESCR, as the minimum core obligations the states parties must fulfil at all times might not be sufficiently explicit to allow for such an individual complaint mechanism. The HRC, however, has addressed its concerns regarding humanitarian assistance and Article 6 ICCPR in its own investigations. Both bodies, although legal in nature, do not have the power to create binding legal findings, but have both asserted that the non-provision of humanitarian aid may amount to a violation of the rights in their respective Conventions.²⁸ The ECtHR has in its case law touched upon the non-provision of humanitarian assistance, although not in direct correlation to a violation of a human right, but calling it a 'serious abuse'. Furthermore, rather than placing such an abuse in the context of the right to life, the ECtHR addressed it in relation to torture. Thus, the main human rights bodies have not (yet) taken it upon themselves to determine in specific cases brought before them whether or not an affected state *in casu* violated international human rights law by falling short of the obligation to ensure the provision of assistance in the fulfilment of the rights to life, food and health. Conversely, the ICJ has in the *Georgia v. Russia*-case asserted that the non-provision of assistance may amount to a violation of the rights enshrined in the ICERD.

A second human rights approach used for enforcement, rather than the legal treaty bodies, is through the more political UN mechanisms under the Human Rights Council, such as the UPR system and the Special Rapporteurs. As a political mechanism, these Rapporteurs are often very vocal and they have on many occasions

²⁸ 8.5.1 Enforcement through Human Rights Treaty Mechanisms.

asserted states' violations of human rights when denying the provision of assistance. The inter-state UPR rather focuses on recommendations, inciting states to allow or facilitate humanitarian assistance. Rather than 'naming and shaming', such a positive formulation may help in the creation of more willingness to allow for external assistance, although the political nature of these mechanisms continues to overshadow their potential value.

From a different viewpoint of enforcement, Chapter 8 has discussed two methods of individual responsibility for the non-provision of humanitarian assistance in international law. Firstly, the possibility to bring about 'targeted sanctions' towards individuals and their assets has increasingly been utilised by the Security Council in recent years following violations of international law in particular relation also to the obstruction and denial of humanitarian assistance. Specifically, the Council has opted for enforcement mechanisms such as travel bans and financial asset freezing targeted towards those individuals and entities the Council assessed as having obstructed humanitarian aid. Such sanctions provide a specific coercion mechanism to entice those involved in conflict to allow access for the providers of assistance, without resorting to force which may have an impact on society as a whole on a larger scale.²⁹

Moreover, aside from targeted sanctions, individual responsibility for specific *crimes* in international criminal law – reflecting violations of human rights law and international humanitarian law, has been addressed. Two specific crimes in the ICC Statute are most relevant for the incurrence of individual responsibility for such violations that pertain to the denial of the provision of aid, namely war crimes and crimes against humanity.

The ICC Statute criminalises violations of international humanitarian law as war crimes in Article 8 of its Statute, and differentiates between provisions tailored towards an international and a non-international armed conflict. Concerning the former, several provisions within Article 8 ICC Statute are most relevant in relation to the obstruction of aid. Article 8(2)(b)(xxv) criminalises the use of starvation by depriving civilians of means for survival, Article 8(2)(b)(iii) concerns the unlawfulness of attacks on those providing humanitarian assistance, to which Article 8(2)(b)(xxiv) is closely related, concerning attacks on personnel. Furthermore, Article 8(2)(a)(iii) concerning the wilful causing of 'great suffering, or serious injury to body or health' is considered a grave breach of international humanitarian law and arguably the non-provision of humanitarian assistance, when amounting to such serious injury, would also be considered such a breach. For the above crimes, a level of intentionality and knowledge is required, which is however not required for Article 8(2)(a)(ii) concerning 'inhuman treatment' and might therefore be argued more easily concerning the withholding of humanitarian aid, although being less tailored as a provision in and of itself. Furthermore, the ICC provisions concerning attacks that result in damages to the environment (Article 8(2)(b)(iv)) or acts that lead to 'outrages upon personal dignity' (Article 8(2)(b)(xxi)), can be violated, when they lead to obstructing humanitarian assistance. Concerning the former, an

²⁹ 8.6.1 Enforcement through Targeted Sanctions.

assumption is made regarding the presupposition of knowledge of the extent of the damages caused, and it must be excessive in relation to military advantages, formulating a reflection of the principle of proportionality. ‘Outrages upon personal dignity’ can be placed within a human rights context, allowing the argument that violations of the right to life, food, or health may have occurred resulting in such outrages when humanitarian assistance is not provided, but must at least amount to humiliation, degradation or other violations of dignity. Throughout the criminalisation of war crimes in an international armed conflict, military necessity remains an argument to which those being held responsible may resort in their defence.

Such an argument cannot be made in times of non-international armed conflict. Many of the provisions of the ICC Statute are similar, but not all acts are criminalised in the same manner. In a non-international armed conflict, Article 8 ICC Statute does *not* criminalise starvation as a method of warfare, which *has* been recognised by Article 14 AP II and conviction is thus only possible should the ICC accept it as a norm of customary international law and would then be incorporated through Article 21 ICC Statute, an argument that has been made by the ICRC.³⁰ Also absent is Article 8(2)(b)(iv) concerning damages to the environment from the provisions of Article 8 ICC Statute with regard to non-international armed conflicts, as is Article 8(2)(a)(iii) regarding the ‘grave breach’ of doing wilful damage to a person’s health. Yet, attacking those persons or objects involved in the provision of humanitarian assistance shall amount to war crimes (Article 8(2)(e)(ii) and (iii)) needing a level of intentionality and awareness that the objects of the attack were under protection of the Geneva Conventions, as is the case for international armed conflicts. Also the concept of ‘outrages upon personal dignity’ which is criminalised according to Article 8(2)(c)(ii) ICC Statute is recognised as unlawful in times of non-international armed conflicts.³¹

Conversely to the situation of war crimes, no nexus to an armed conflict is necessary for the categorisation of a crime as a crime against humanity, which allows for prosecution of such crimes under all circumstances relevant to the provision of assistance. As such, whilst both war crimes and crimes against humanity may give rise to responsibilities (amongst which the resort to the use of force) under the RtoP doctrine, this is especially relevant given that such responsibilities might now also arise outside the framework of an armed conflict. A resort may be had to the use of force should a threat to the peace in the widest sense be asserted by the Security Council, as discussed above. In practice however, this has yet to be ascertained. Key to the assessment of an act as a crime against humanity, is the fact that it must have occurred ‘as part of a widespread or systematic attack’, which in the context of the unlawful deprivation of humanitarian assistance means that a form of systematic or widespread targeting of a particular group must have taken place, or in the alternative, a single strategic action with the *intent* of impacting a large group of

³⁰ In these circumstances, Article 22 ICC Statute regarding the principle of ‘*nullum crimen sine lege*’ must be taken into consideration.

³¹ 8.6.2.1 War Crimes and Humanitarian Assistance

people. Article 7(1)(b) (k) and 7(2) ICC Statute criminalise the ‘deprivation of access to food and medicine’ as part of the ‘extermination’ of civilians as well as ‘other inhumane acts’, the latter of which are explained as an infliction of ‘serious injury to body or to mental or physical health, by means of an inhumane act’. Whilst the provisions relevant to the criminalisation of the denial or obstruction of humanitarian assistance are clearly not as elaborate as the provisions concerning war crimes, it is interesting to note that the deliberate choice was made to include the ‘deprivation of access to food and medicine’ *within* the Statute of the ICC, rather than as an explanation in the Elements of the Crimes. Such an inclusion can only be considered as an acknowledgment of the seriousness of the violation of international law that the obstruction or denial of humanitarian assistance constitutes. Whilst intentionality is difficult to argue, and shall have to occur on a case-by-case basis, case law has given indications with regard to the notion of how ‘widespread’ extermination must be to amount to a crime against humanity as opposed to singular persons. As such the ICTY has argued that less than 1700 people, and in referral to the Nuremberg Tribunal, less than 800 people, may be a sufficiently large group of persons to amount to the collective and widespread element of such a crime.³² Indeed, the notion of a *humanitarian crisis* will by its very nature affect a larger amount of persons, making it possible to ‘fit the profile’ of a crime against humanity.

Lastly, Chapter 8 has addressed the manner in which enforcement of humanitarian assistance might take place should a state sovereign be absent in a territory. A distinction has been made in circumstances where a level of authority exists, such as certain organised non-state actors in non-international armed conflicts, which carry responsibilities in international law that have been addressed throughout this research, and situations where in fact authorities are absent such as in failed states or even complex emergencies. Problems arise as no primary responsible actor is present, leading to a vacuum in the primary responsibility. Article 9 ARSIWA argues for a responsibility of *de facto* regimes, whereas the ICJ in its *Namibia*-Opinion is somewhat more pragmatic, arguing that actual physical control of a territory as opposed to ‘sovereignty or legitimacy of title’ serves as the basis for liability in international law. It is indeed generally accepted in international law today that – as established in this research – those in *de facto* control or non-state actors carry obligations under human rights law and humanitarian law. Yet, enforcement mechanisms in human rights law do not allow non-state actors to be held accountable in their courts or before their council or committee, nor can they be held responsible by the ICJ. Equally, whilst addressing individuals, Articles 7 and 8 ICC Statute assume some form of responsibility, either through a sense of authority in *de facto* regimes and armed groups or the existence of persons exercising governmental authority. These enforcement mechanisms are therefore merely relevant in the circumstance that ‘some’ form of authority exists. In the assumption that no request has been made to the international community welcoming the provision of aid, or that no sovereign authority is identifiable, resort may be had to the Security Council, in line with the doctrine of RtoP, as the international

³² 8.6.2.2 Crimes Against Humanity and Humanitarian Assistance.

community takes on a responsibility in the absence of a sovereign to provide aid. The *Commentary* to Article 18 AP II envisions such action too, as it argues a level of consent is presumed in circumstances of uncertainty of a sovereign. As judicial bodies are unable to deal with circumstances of denial of aid in the absence of a responsible actor, the Security Council – as the designated authoritative body dealing with impending crises – shall therefore be considered the most appropriate enforcer of humanitarian assistance in such circumstances and when the crisis is still ongoing.³³ With a potential future perspective, the ILC Draft Articles appear to follow the line of reasoning of the *Commentary* to AP II, as Draft Article 14(3) cites that the affected state shall ‘whenever possible, make its decision regarding the offer known’ pursuant to an external offer of assistance, which has been explained by the Drafting Committee as an acknowledgement of the possibility that consent must be implied in the circumstance a functioning sovereign is absent. This stands to reason, as in the absence of a sovereign wilfully denying aid or access for its delivery, the affected persons remain in need of assistance.

The final Chapter of this research has assessed the manner in which international law allows for the enforcement of the provision of aid, which in fact, considering the amount of gaps in the earlier stages of the research, are relatively satisfying. Although some of the provisions in the ARSIWA are considered progressive development, a responsibility (if not duty) to cooperate in the enforcement of assistance in order to end violations of humanitarian law or human rights law – general human suffering – can be discerned. Indeed, whilst none of the bodies with authority in the matter of enforcement: the ICJ, Security Council, ICC and human rights bodies are all-encompassing or infallible, their combined strength allows for enforcement mechanisms in a variety of ways. A large gap however remains in the international judicial enforcement of the denial of humanitarian assistance by non-state actors. However, such entities might be held accountable before the ICC or in national proceedings. The Security Council as a political and ‘forceful’ body must in fact be differentiated from legal and judiciary bodies. The various types of enforcement bodies fulfil different roles, from specific case-assessments after the fact as done by the ICJ, ICC and human rights bodies, to immediate decisions in the midst of a crisis as done by the Security Council. As such, each functions in its own merit, but the fact remains that not one ‘single’ high authority exists in international law, to determine enforcement in *all* circumstances of humanitarian crisis. As seen above, the Security Council restrains its actions to circumstances reflecting a threat to the international peace, which to date has meant refraining from action in times of natural disaster. Yet, as has been seen in the discussed interaction between the RtoP doctrine and the notion of a crime against humanity, such crimes no longer warrant a nexus to armed conflict and as such may now, as a core crime of RtoP as established in the World Summit Outcome Document, potentially trigger Security Council action. Lastly, it has become apparent that enforcement in the absence of a sovereign is obtained largely via inference, clearly not the strongest or most reliable method.

³³ 8.7 The Enforcement of Humanitarian Assistance and the Absence of a Sovereign.

These gaps point out the need to strengthen the law, also in this final aspect of the legal framework on the provision of humanitarian assistance.

9.2 Recommendations for Improvement of the Legal Framework Concerning Humanitarian Assistance

The above conclusions have distilled the current *lex lata* pertaining to the provision of humanitarian assistance and laid bare the gaps in the law. Prior to addressing these gaps in more depth and discussing potential solutions, it is relevant to establish which legal framework can be discerned for the provision of humanitarian assistance in times of a humanitarian *crisis*, that is to say: which rights and duties exist *at all times*, regardless of the factual circumstances on the ground, provided that the circumstance meets the threshold of the notion of a ‘humanitarian crisis’ as defined in this research. Humanitarian assistance need only be provided if it can be ascertained that such a *crisis* is taking place; acknowledged by all parties involved and/or a relevant authoritative body in international law. Such an assessment will prevent legal disputes concerning the status of the situation and thereby also the legality of the provision of assistance. The basic threshold for the provision of assistance therefore commences with the assessment that a humanitarian crisis is taking or has taken place.

Following on from this, it is important to assess which aspects of the legal framework result in legally binding obligations for states or other actors. This assessment firmly brings the framework regarding the delivery of humanitarian assistance from the notion of an ‘imperfect obligation’, not entailing binding legal duties, into the realm of ‘perfect obligations’ that do not allow as much leeway and oblige actors to abide by their legal duties and rights.

9.2.1 The Basic Existing Legal Framework and Problems with Fragmentation

It has become very apparent that the law varies according to circumstances, leading to much more explicit provisions for the delivery of humanitarian aid in times of applicability of humanitarian law, as well as, recently, for those falling within the scope of the Kampala Convention. How can we explain that no aid is provided because those who needed it were ‘merely’ victims of a natural disaster and the international community did not enforce it? Or, as argued by the UN High Commissioner for Refugees, because the persons in need of assistance lived in certain ‘parts of the world’?³⁴ That simply will not do. It is precisely for this purpose that this research has taken a more overarching, comprehensive and integral view of the delivery of humanitarian assistance and its legal framework. In 2007, the ICRC noted how dispersed, underutilised and lacking harmonisation the law can be in

³⁴ Repertoire of the Practice of the Security Council (1996-1999), Chapter VIII, ‘Consideration of questions under the responsibility of the Security Council for the maintenance of international peace and security’ Section 40 Promoting peace and security: humanitarian assistance to refugees in Africa 766.

disaster relief.³⁵ Fragmentation of the law is a serious problem in the provision of humanitarian assistance, as it leads to a lack of clarity concerning the applicable law in certain given circumstances. Regional and ‘sectoral’ law are the effects of such fragmentation, creating a patchwork, as opposed to a single framework. Fragmentation is furthermore exacerbated by the legal difficulties surrounding the simultaneous applicability of various bodies of law, as well as potential domestic legal regulations. Such problems continue to highlight the undesirable circumstance that certain types of emergencies or locations might result in more or less provision of aid, whilst the persons in need continue to share one single common denominator: a need for humanitarian assistance. It is precisely this *need* which should define *them* and determine the *law*, as opposed to being defined by their location in the world. Throughout this research, an attempt has therefore been made to discern those rights and duties that are continuous, regardless of the specific circumstance where humanitarian assistance may be needed.

Firstly, this research has shown that the notion of state sovereignty entails a *responsibility* of the sovereign towards all persons under its jurisdiction, which coincides with the primary responsibility in the provision of humanitarian assistance lying with the affected state itself. This duty is also recognised by the UN Security Council and General Assembly and is also embraced in the notion of the Responsibility to Protect. Indeed the legal developments concerning the provision of humanitarian assistance and those regarding the notion of state sovereignty as responsibility reinforce and mutually support each other.

Secondly, whereas no independent human right to receive humanitarian assistance exists, its provision is a vehicle in the fulfilment of the rights to life, food and health as enshrined in the ICCPR and ICESCR that both have widespread accession. The rights to life (which is excluded from derogation in times of emergency), food and health (for which the state must continue to fulfil the minimum core obligations) continue to be applicable at all times, resulting in an obligation of the affected state to provide humanitarian assistance in times of crisis in order to fulfil its obligations under international human rights law. This includes refraining from the impediment of assistance. As such, human rights law forms a legal basis for the provision of humanitarian assistance in all circumstances amounting to a humanitarian crisis.

Thirdly, the current law can be seen to *presuppose* the right of the international community – including both international organisations and third states – to offer the provision of humanitarian assistance, provided that such delivery abides by the principles of humanity, neutrality and impartiality. The offer and provision of such neutral, humane and impartial assistance cannot be considered an infringement on the affected state’s sovereignty.

Lastly, whilst no general right to access a territory exists, upon the initial consent to access by the affected state, a duty rests on said state to facilitate the passage of aid and provide a safe environment for its provision. Furthermore, consent may not

³⁵ ICRC Resolutions, 30th International Conference (Geneva, 26-30 November 2007) § preamble.

be arbitrarily withheld, and the Security Council has, in line with obligations under human rights law, asserted in some specific instances that a duty to allow access exists. State sovereignty is therefore curtailed by the international legal duties under human rights law (such as Article 2 ICESCR), as well as following Security Council assertions, to allow access for the provision of humanitarian assistance.

Whilst these basic duties exist *at all times* in the law today, international law is of course ever changing, and new norms are continually emerging. Indeed, one such emerging norm is the responsibility of the international community to cooperate, based on provisions in the ARSIWA, Additional Protocol II, ICJ jurisprudence, human rights law and Security Council resolutions, in ending circumstances of denial of humanitarian assistance, as such denial is a violation of international law. In other words: an emerging responsibility exists for the international community to contribute to the provision of humanitarian assistance.

Creating *more* law is however not necessarily the solution and does not necessarily help persons facing an emergency. Proper application of the law which exists, and which can be applied *to all circumstances amounting to a humanitarian crisis*, will provide more clarity and will – relevantly – also align with the principle of human dignity. Equity and the principle of humanity can be considered as a source of law to fill lacunae. In a similar manner, the General Assembly and ILC Draft Articles on the protection of persons consider the principle of solidarity as a basis upon which a duty to cooperate might exist for the international community (although it is not explicitly incorporated in the Draft Articles).³⁶ For this purpose, it is relevant to distil the remaining needs for the existing comprehensive and overarching legal framework. Many tools are present, and bringing them together will allow for equal protection of all those in need of humanitarian assistance. Without attempting to ‘universalise’ certain legal provisions into applications for which they were not designed, it is possible to assert which sources of law are available to potentially fill the gaps in the current patchwork of law pertaining to the provision of assistance. The cornerstone notion of human dignity clearly supports such an overarching approach to the provision of assistance. Furthermore, the principles of humanity and solidarity stress the importance of the need to treat all humans equally, as codified also in the UN Charter and supported by the ICJ’s assertion that the principle of humanity is related to the intransgressible norms of international law. Such principles may serve as a basis upon which this framework is founded. Protection of individuals’ rights, by way of the provision of humanitarian assistance, must therefore be ensured in times of a humanitarian crisis.

³⁶ 7.4.3 General Assembly Resolutions and the Right to Offer Assistance.

9.2.2 Fixing the Problems and Gaps in the Law

The above research has pointed out areas in which the law is missing necessary provisions, or areas in which fragmentation has led to other issues in protection. It must be noted that the solutions offered attempt to find a realistic and pragmatic conjoining and synchronisation between the *practical realities* faced in times of crisis, and the *legal rights and legitimate needs* of those in need of assistance. It is precisely this that Henry Dunant attempted to do nearly two centuries ago.

Firstly, this research has pointed out that a single definition of both the notion of humanitarian assistance and the concept of a natural disaster are lacking. Whilst this may not amount to legal problems *per se*, those involved in the provision of assistance both from a practical and legal perspective, may benefit from the development of one generally used and applicable definition of ‘humanitarian assistance’ as well as that of a ‘natural disaster’, such as the definitions proposed in this research.³⁷ Furthermore, as multiple actors in the provision of aid held diverse views as to the principles according to which such aid is provided, a common denominator in the principles of humanity, neutrality and impartiality had to be distilled. Also, the division of legal protection according to circumstances such as conflict or disaster do not enhance equal protection, resulting in the suggestion of the notion of a ‘humanitarian crisis’ in this research, to form a single basis upon which the legal framework can operate.

Prior to addressing the existing problems and gaps in the legal framework, such problems and gaps are therefore immediately apparent at the outset, due to a lack of synchronisation of what in fact the framework *is* and *where* its boundaries lie. A delimitation has therefore been made regarding the notion of ‘humanitarian assistance’, the principles for its provision and the concept of a ‘humanitarian crisis’.

Secondly, regarding the existing legal framework, it is first and foremost clear that an individual human right to receive humanitarian assistance is lacking. Such an absence in the human rights framework, however, is not problematic, nor should such a right necessarily be created: the absence can well be compensated by acknowledging that provision of assistance is a vehicle in the fulfilment of the existing rights to life, food and health, as can be done in international law today.³⁸ Whilst these individual human rights do not contain many specificities pertaining to the delivery of aid, the ICJ has determined that at the very least, states must ensure to abide by non-discrimination measures in such provision. Ascertaining that the delivery of emergency aid functions as the fulfilment of the rights to life, food and health in times of a humanitarian crisis will allow for the elaboration of this by various human rights courts, without the need to develop new regulations. Indeed, this provision is the fulfilment of the ‘minimum core obligations’ that must be respected at all times, as enshrined in the ICESCR.

³⁷ 9.1 Conclusions Pertaining to the Existing Legal Framework.

³⁸ 5.5.2 Humanitarian Assistance as a Vehicle in the Fulfilment of Existing Human Rights.

Thirdly, whilst humanitarian law contains various detailed provisions pertaining to aid, it lacks a *general* codification of the duty of the affected state to provide assistance in times of a crisis. In particular in the increasingly frequent circumstances of non-international armed conflicts over the past decades, such an absence is painfully visible in the realities on the ground. The result is a fragmentation of regulations that does not enhance the protection of persons in need. A solution may be sought in the approach to the *lex specialis*-doctrine in this research. It has been suggested that the most specific clause – in this field concerning the provision of assistance thereby also the most protective clause – must be adhered to as opposed to considering an entire body of law the most specialised law. In times of a humanitarian crisis, such an interpretation would allow for the assertion of duties of the affected state to provide assistance to be found in human rights law or general international law principles such as concerning state sovereignty or the principle of humanity. Indeed, the developments regarding human rights law over the past century have influenced the concept of state sovereignty, which has evolved with time to incorporate a responsibility to protect its citizens. Such a general duty to provide assistance can therefore be sought in the more overarching concept of state sovereignty and the more broadly applicable human rights law. Through this approach to the *lex specialis*-doctrine, human rights provisions concerning the right to life, food and health would function as the most protective clauses.

Fourthly, the existing legal framework does not specifically recognise a right of international organisations or third states to offer assistance. In fact as also seen in the *Nicaragua*-case, such a *bona fide* offer does not violate international law, and is generally even presupposed. Given the attitude of various bodies such as the Security Council to indeed presuppose such a right, it is not necessary to establish, but again, might assist in clarification of the law, should an authoritative body decide to do so. Unequivocally establishing that such a right exists, adds to the responsibilities to cooperate in bringing humanitarian crises to an end. Problems with regard to the provision of assistance by third parties, following the circumstances in which a sovereign does not fulfil its own obligations under international law, do in fact form a large component of the issues that the legal framework on the delivery of humanitarian assistance faces. Indeed, such problems clearly flow from the initial problem of a sovereign not fulfilling its own duties. Whilst this non-provision may arise through both incapacity and unwillingness of the sovereign to fulfil its duties, it is more often than not the latter which results in problems for external or international access.

Fifthly therefore, it is key to note that no right to access a territory exists for third parties, for the purpose of the provision of humanitarian assistance. Indeed, determining whether or not such a right *should* exist is a normative question that is bound by the legal parameters of the current law. Currently, the provisions relating to provision of aid by third parties are formulated from the perspective of the obligation of the affected state to *allow* such assistance. These obligations are

formulated in international humanitarian law from the perspective of a duty to allow access in relation to certain ‘control rights’. The obligations are absent in circumstances of natural disaster due to the lack of a specific body of law. In such circumstances as also possible in times of armed conflict, recourse must currently be had to the obligations of the affected state to seek international cooperation as found under Article 2 ICESCR. This latter obligation is arguably not as strongly formulated as that in international humanitarian law which dictates that relief ‘shall’ be provided. However, fulfilment of the rights to food and health under the ICESCR *does require seeking international assistance*. Indeed, the basic provisions of humanitarian assistance are considered ‘minimum core obligations’.

Whilst it may not be problematic to be lacking a ‘right’ to access, such access should then however be formulated from the perspective of the sovereign as an *obligation* in international law, taking into account and recognising in particular the content of the concept of state sovereignty. When state sovereignty includes a duty to provide emergency assistance to those within its jurisdiction, such a duty must be seen to include the prohibition of arbitrarily refusing external aid that might be able to do just that.

Yet, this duty proves to be lacking uniformity in international law. A general basis is currently found in human rights law, but not formulated as an obligation of result, although the minimum core obligations must be fulfilled at all times. A further obligation to allow access is furthermore only established on an *ad hoc* basis by the Security Council, given the explicit control rights that otherwise exist under international humanitarian law.

Indeed, sixthly, in the only field of law addressing an obligation to allow access (humanitarian law), such access is subject to the consent of the affected state, which then in turn may not be ‘arbitrarily refused’. This consent-issue is one of the greatest concerns pertaining to those attempting to provide aid, as no clear threshold can be established regarding what precisely constitutes ‘arbitrary’ refusal of consent in relation to the provision of humanitarian assistance. Such attempts at a legal definition have also not been made in soft law documents, and it stands to reason that this must be determined on a case-by-case basis.³⁹

Creating an exhaustive list of potential ‘arbitrary refusals’ by a sovereign is simply not realistic, as practice will always surpass the attempted regulation. However, determining which acts *as a minimum* would amount to such a threshold or ‘arbitrariness’ would be an aid in practice. Indeed, circumstances where the affected sovereign authority acquiesces, concedes or grants access without outright

³⁹ However, in an attempt at more clarity, the Resolution ‘Humanitarian Assistance’ (2 September 2003) Institute of International Law, Sixteenth Commission, Bruges Session Principle VIII(1) does note that: “Affected States are under the obligation not arbitrarily and unjustifiably to reject a bona fide offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare”. Such clarification however is not comprehensive, as it does not address issues falling short of ‘starvation’ or outside the context of armed conflict.

'consent' are not the contested problem in international law today. Currently, the 'baseline' in humanitarian law can be found in the provisions prohibiting the starvation of civilians. Arguably, such a baseline in human rights law would be the threshold of the fulfilment of the minimum core obligations of the rights to food and health, as well as the non-arbitrary deprivation of the right to life. The risk of proliferation of definitions and of minimum standards of protection is ever-present, and thus such an assessment of what in fact amounts to an 'arbitrary refusal' of humanitarian assistance should be done by an authoritative judiciary body in international law.

Seventhly and closely related to the matter of the prohibition of the arbitrary denial of access, is the fact that the obligation in humanitarian law to allow access, resting upon the sovereign, is dependent on the assessment that a territory is 'inadequately supplied'. This law is inherently flawed, as it grants leeway to the sovereign itself to determine and interpret this 'inadequateness' of supply. Similarly outside of armed conflict, gaps exist in international legal regulation, as it is often mistakenly assumed that a sovereign will show willingness to call for assistance from abroad when it is overwhelmed. Yet here too, a margin of appreciation is left to the sovereign to ascertain whether or not those within its jurisdiction are adequately supplied.

One of the great difficulties in the current framework is determining whether or not the affected territory is 'inadequately supplied', when no legal direction is provided in this regard. Again, a case-by case analysis is currently the only viable manner in which a pragmatic solution to these difficulties may be found; the concept is too vast to exhaustively delimitate. In proffering a solution to these two related problems concerning access, calls have been made for the creation of a new treaty.⁴⁰ Yet, states are understandably and necessarily attached to their sovereign rights, including the notion of non-intervention and that of non-interference with domestic affairs. It does not seem viable therefore that states shall be willing to forego these in an international convention and effectively address the concerns regarding the adequacy of supply of a territory and the right to refuse consent, through the codification of methods of enforcement to tackle such crucial issues. The potential new legal document addressing the provision of assistance would then be created without addressing issues of enforcement, and therefore be futile from its birth. Human rights law as a basis continues to be a constant factor that may provide guidance, as an 'inadequate' supply of humanitarian assistance amounts to violations of the rights to life, food and health, which can be ascertained through legal standards of enforcement. The focus then lies with the establishment of a violation of the rights to life, food or health, rather than establishment of the 'inadequate supply' of a territory.

⁴⁰ Amongst others Yoram Dinstein, 'The Right to Humanitarian Assistance' (2000) LIII *Naval War College Review* 4, 88-89; Rohan J Hardcastle & Adrian T L Chua, 'Humanitarian Assistance, Towards a Right of access to victims of natural disaster', (1998) 38 *International Review of the Red Cross* 325, 596-597; Report of the Representative of the Secretary-General, Mr. Francis M. Deng (5 December 1995) UN Doc E.CN.4/1996/52/Add.2 § 416.

This brings forward the eighth and final issue faced by the current legal framework that must be addressed. Upon deciding that the need for access must be determined on a case-by-case basis, the question is raised: who shall determine whether or not a territory is inadequately supplied, and whether or not consent is arbitrarily withheld when an offer of assistance is made? If such circumstances are affirmatively assessed, enforcement becomes possible as violations of international law arise through the unlawful obstruction and denial of assistance.

Enforcement issues in international law are not new, nor are they unique to the legal framework on the delivery of humanitarian assistance. Leaving the determination of such matters regarding the use of force solely in the hands of the Security Council, as (political) authoritative body in international law concerning the use of force, risks widening the gap between the protection in times of armed conflict and that in times of natural disasters, as the Security Council operates within the realm of peace and security and its related functions and powers under Chapters VI and VII, most notably of course the concept of a 'threat to the peace' as established in Article 39 UN Charter. Yet, handing such matters solely to international courts and tribunals shall also not provide timely, satisfactory enforcement, as such judiciaries shall not have the opportunity to act in the midst of a humanitarian crisis. With the current judiciary bodies, enforcement will occur well *after* the crisis has taken place.

An ensuing issue pertaining to having sole recourse to enforcement by means of the judiciary, is the fact that existing human rights bodies cannot enforce a situation of denial by non-state actors. Non-state actors are, given the proliferation of non-international armed conflict, in reality often those denying humanitarian assistance. Equally, in the absence of a responsible authority, such as in the circumstance of a failed state, the ICJ and ICC face problems with adjudication as they are not equipped to adjudicate such actors. The absence of a sovereign, as seen from the above assessment that the existing duties all rest *upon* a sovereign, results in the need for legal recourse to immediate action for those persons finding themselves in a crisis in a 'failed state' with no sovereign.

It cannot be denied that all these authoritative bodies therefore have their limitations, as well as shortcomings and flaws. Yet, as addressing *and overcoming* these crucial enforcement issues in a potential new treaty regarding the framework on the provision of assistance does not appear viable, solutions from within the current international legal system must be sought. Granted, the International Fact Finding Committee as envisaged by Article 90 AP I exists, but aside from the fact that it is indeed in practice not being sought out in conflict resolution, it merely has authority over international armed conflicts. As such, it is currently also not a realistic enforcer, with the most pressing crises arising in non-international armed conflicts, natural disasters and complex emergencies.

In the current international legal arena, the ICJ, ICC, human rights courts and Security Council are the bodies available to address enforcement issues. A combined solution might provide the answer: the advice of a judiciary body or committee to

the Security Council, in *ad hoc* circumstances amounting to a humanitarian crisis. Such an informal (*ad hoc*) judiciary body or committee would provide more judicial backing for the otherwise political decisions of the Council.

As the above shows, the law regarding the rights and duties concerning the *provision* of assistance is largely in place. Human rights law and general principles in international law allow for a broad basis to build on. Problematic is especially the situation in which an affected state does not *allow* access, and international law must dictate how to *enforce* access.

This is indeed a normative issue: *how* the denial of humanitarian assistance is enforced – either *ex post facto* by the judiciary, or immediately by the Security Council – is directly related to the manner in, and speed with which, the rights of the affected persons are fulfilled. It has been argued above that a responsibility of third states to cooperate to provide humanitarian assistance in the ending of violations of international law (the denial of humanitarian assistance) can be seen to be emerging in international law, through the combination of norms in existing human rights law, the ARSIWA, appeals of the Security Council and the General Assembly, as well as the Draft ILC Articles. These assertions must be considered the most protective clauses concerning the external provision of assistance at this time, and furthermore relate to the violation of norms of *jus cogens* as such cooperation becomes a potential duty when the affected state may violate norms of *jus cogens* in the denial of emergency aid. This emerging duty also falls in line with Security Council action as seen over the past years ranging from measures under Articles 40 and 41, to the use of force under Article 42 UN Charter regarding for example Somalia, as well as the emerging doctrine on the Responsibility to Protect, which has been embraced by the Security Council and put into practice by that body with regard to the situation in Libya.

Whilst this doctrine is by no means well-established in international law, it *does* acknowledge Security Council authorisation for the use of force in circumstances amounting to ‘crimes against humanity’, a circumstance that does not require a nexus to an armed conflict. The denial of humanitarian assistance may in fact, as discussed above, amount to such a crime.⁴¹ When a state sovereign does not provide assistance and denies access to third parties wishing to do so, the result might be a humanitarian crisis that can be qualified as a crime against humanity. The scope and magnitude of such a crime can in reality often result in a threat to the peace. Indeed, whilst the Council remains bound by the text of the UN Charter, requiring the existence of a ‘threat to the peace’ to warrant the enforcement by means of the actual use of force, it is viable to argue that a threat to the peace may arise should crimes against humanity be committed also outside of the context of an armed conflict.

Therefore, should for instance a natural disaster occur where humanitarian assistance is not being provided, resulting in vast amounts of IDPs and/or refugees and risking for example a spill-over effect or instability in a larger area, the Security Council might find such circumstances to be a threat to international peace, and have

⁴¹ 8.6.2.2 Crimes Against Humanity and Humanitarian Assistance.

the tools to resort to the use of force in order to enforce the provision of humanitarian assistance. Similarly, circumstances not meeting the threshold of a non-international armed conflict as considered by Additional Protocol II may nevertheless concern the Council with regard to a threat to the peace in that area, and equal recourse may be had. In such circumstances, where an armed conflict *can* however be ascertained, recourse may *also* be had to the use of force when ‘war crimes’ are committed through the denial of humanitarian assistance. Security Council action is thereby possible through a variety of means. Through such a view of the meaning of Article 39 UN Charter, the Security Council would remain within its mandate, yet also ensure enforcement options *at all times that the provision of humanitarian assistance may be necessary* due to the existence of a humanitarian crisis amounting to a threat to the peace, even when this does not involve a ‘classic’ armed conflict. The Council shall evidently remain bound by the determination that indeed a crisis exists warranting the provision of assistance. Should the provision of assistance not be initially required, then its denial also does not result in a violation of international law.

Currently, legal developments regarding the concept of ‘crimes against humanity’ are underway, as the ILC announced in July 2014 that it would move the topic of crimes against humanity from its long-term agenda and now include it in its ‘programme of work’. This might provide more insights into the possibility to view crimes against humanity as a threat to the peace in the absence of an armed conflict and for the purpose of the provision of humanitarian assistance. Potentially, this new study might develop into greater protection for persons in times of a humanitarian crisis.

The use of force is never the first, nor the perfect solution, but sometimes it is the only option when all others fail and the international community is witness to massive human suffering. As such, the use of force must always be proportional to the goal it is serving: the relief of a civilian population in need. Naturally, all other (coercive) measures to entice a sovereign to allow access to a territory should have prior preference. These include methods of access as discussed, such as for example through diplomatic channels, to establish means of access to provide aid on a more consensual basis. Such methods may be followed by measures within Chapter VII but still exempting the use of force. Furthermore, regardless of Security Council action, judicial enforcement mechanisms shall remain open to those wishing to enforce the delivery of humanitarian assistance through other means. As argued by Schwendimann, although the norms of international law can at most represent the *minimum standards* in obtaining access, the legal framework remains a useful mechanism in the insurance that aid is delivered to those who need it most.⁴²

Indeed, establishing the minimum legal framework does not withhold international actors to take further steps to protect persons in times of a humanitarian

⁴² Felix Schwendimann, ‘The legal framework of humanitarian access in armed conflict’, (2011) 93 *International Review of the Red Cross* 884, 1008.

crisis. International law has developed over time to protect the interests of persons through human rights law and humanitarian law: both branches have developed parallel to each other and thus so should the protection of persons be parallel and equal.⁴³ It is therefore *essential* to the protection of persons in need of aid that the legal framework be addressed in this integral, over-arching and comprehensive manner, as uncertainty regarding the applicability of the law results in a *lack* of application and thereby a *lack of protection* on the ground. The existing legal framework pertaining to the provision of humanitarian assistance and its enforcement mechanisms must therefore be communicated, disseminated and endorsed in all possible manners towards all actors involved in the provision of assistance. With an increase in knowledge of the legal regulations to ensure the provision of humanitarian assistance, comes an increase in power to implement them, resulting in an increase of protection of those in need. In the end, that is the ultimate goal of this research.

⁴³ 3.4.1 Development of the Interaction between both Fields of Law.

