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

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CHAPTER II

DEFINING HUMANITARIAN ASSISTANCE, THE PRINCIPLES FOR ITS PROVISION AND DETERMINING THE RELEVANT ACTORS

In the summer of 2014, Russia attempted to bring goods to the Ukraine whilst clashes were ongoing. As was reported:

“A Russian convoy of trucks carrying tonnes of humanitarian aid left on Tuesday for eastern Ukraine, where government forces are closing in on pro-Russian rebels, but Kiev said it would not allow the vehicles to cross onto its territory [...] ‘No political or any other objectives must be pursued,’ EU humanitarian aid commissioner Kristalina Georgieva told a news conference. ‘The content of humanitarian aid must be exactly that, humanitarian aid, and obviously cannot be taken on face value’”.

What makes certain goods humanitarian assistance? What makes their providers humanitarian actors? This chapter addresses these questions and provides legal resolutions.¹

2.1 Introduction

To start an analysis of the legal framework regarding humanitarian assistance, including all relevant rights and obligations, it is necessary to establish and define the legal concepts that form part of this research. To that extent, this Chapter explores and establishes the legal definitions and parameters of relevant concepts related to humanitarian assistance. Firstly, the notion of humanitarian assistance itself is examined, as well as the manner in which it may be provided. Relevant actors are discussed, considering both those who provide assistance and those that may receive it. This examination commences with a brief historical overview of the development of humanitarian assistance, first within the context of armed conflict, where the notion was born, but later in the 20th century also with a discussion of its incorporation in times of (natural) disaster. By assessing the origins of humanitarian assistance, it will be possible to address the notion as a contemporary concept, and make it possible to proffer a working definition of the concept of humanitarian assistance as it is understood today.

¹ <<http://uk.reuters.com/article/2014/08/12/uk-ukraine-crisis-russia-aid-idUKKBN0GC08O20140812>> accessed 9 September 2014.

2.2 The Concept of Humanitarian Assistance

Understanding humanitarian assistance as it exists today, also entails understanding its origins and history. Tracing the origins of humanitarian assistance acknowledges its foundation and explains the manner in which it has developed in international law.

2.2.1 Historical Development

The precursors of the modern provision of humanitarian assistance can be found in the efforts throughout history to constrain the use of force in conflict as well as occasional early efforts to spare the lives of prisoners of war.² The growth of religions throughout the world furthermore spurred limits to warfare, as well as enhancing humanitarian initiatives.³ The development of the notion of humanitarian assistance was however not solely confined to religious spheres, as secular humanitarianism developed through natural law notions and the enlightenment of the eighteenth and nineteenth centuries.⁴ In 1758, Emer de Vattel argued:

“[...] si un peuple est désolé par la famine, tous ceux qui ont des vivres de reste doivent l’assister dans son besoin, sans toutefois s’exposer eux-mêmes à la disette [...] L’assistance, dans cette dure extrémité, est si essentiellement conforme à l’humanité, qu’on ne voit guères de Nation un peu civilisée y manquer absolument [...] De quelque Calamité qu’un peuple soit affligé, la même assistance lui est dûe”.⁵

De Vattel refers to English actions of humanity with regard to calamities in Portugal in the eighteenth century where tens of thousands died, as well as Swiss initiatives at that time towards neighbouring countries.⁶ With these initiatives, a period ensued in which further steps were taken in the development of the more contemporary notion of humanitarian assistance. The notion of humanitarian assistance as we understand it today was particularly developed by the Swiss businessman Henri Dunant, upon witnessing the battle of Solferino on June 24, 1859.⁷ Dunant shared his experiences

² Frits Kalshoven & Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Cambridge University Press 2011) 3.

³ Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff 1985) 8.

⁴ *Ibid.* 9.

⁵ Emerik de Vattel, *Le Droit de Gens: ou Principes de la Loi Naturelle*, Vol. II Chapitre I (1758) 260-261. English translation: “If a people is visited with famine, all those who have provisions enough and to spare should come to its assistance, though not to the extent of exposing themselves to scarcity... Help in such an extremity is so much in accordance with humanity that no civilized nation could altogether fail to respond... Whatever the nature of the disaster that afflicts a nation, the same help is due to it”.

⁶ *Ibid.* 261.

⁷ The battle of Solferino was part of the Italian unification process. It was fought in northern Italy between Austrian and Franco-Italian soldiers, leaving ten thousands dead, injured or missing. For more information on this battle, see Spencer C. Tucker, *Battles That Changed History: An Encyclopedia of World Conflict* (Greenwood Publishing Group 2011) 331-334.

of that battle in *Un Souvenir de Solferino*, first published in 1862.⁸ In this book, Dunant related the horrors of the battlefield, in particular the incapacity of the present medical services to deal with the number of victims. Having shared his experience in this publication, Dunant expressed his desire to develop organisations of a neutral and impartial character, to aid those wounded by war:

“Mais pourquoi avoir raconté tant de scènes de douleur et de désolation, et avoir peut-être fait éprouver des émotions pénibles? Pourquoi s’être étendu comme avec complaisance sur des tableaux lamentables, et les avoir retracés d’une manière qui peut paraître minutieuse et désespérante? A cette question toute naturelle, qu’il nous soit permis de répondre par cette autre question: N’y aurait-il pas moyen de fonder de Sociétés volontaires de secours qui auraient pour le but de donner ou de faire donner, en temps de guerre, des soins aux blessés?”⁹

Raising this simple question eventually led to the establishment of the International Committee for the Red Cross (ICRC), while his subsequent question led to the development of the original Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864:¹⁰

“Dans des occasions extraordinaires, comme celle qui réunissent, par exemple à Cologne ou à Chalons, des princes de l’art militaire, de nationalités différentes, ne serait-il pas à souhaiter qu’ils profitent de cette espèce de congrès pour formuler quelque principe international, conventionnel et sacré, lequel, une fois agréé et ratifié, servirait de base à des Sociétés de secours pour les blessés, dans les divers pays de l’Europe. Il est d’autant plus important de se mettre d’accord et d’adopter d’avance des mesures, que, lors d’un commencement d’hostilités, les belligérants sont déjà mal disposés les uns envers les autres, et ne traitent plus les questions qu’au point de vue unique de leurs ressortissants”.¹¹

Here, Dunant raised the idea of creating international standards that parties to a conflict should abide by. With his publication, Dunant wished to raise awareness amongst leaders of his time to create the abovementioned Convention and the ICRC and to that end, he distributed his book free of charge.¹² Thus, the notion of humanitarian assistance as we know it today, was first developed to relieve the

⁸ Henri Dunant, *Un Souvenir de Solferino* (self-published 1862); <http://www.icrc.org/eng/assets/files/other/icrc_002_0361_memory_of_solferino.pdf> accessed 23 June 2011.

⁹ Henri Dunant, *Un Souvenir de Solferino* (1863, 3rd ed. Imprimerie de J.G. Flick) 150. English translation: “But why have I told of all these scenes of pain and distress, and perhaps aroused painful emotions in my readers? Why have I lingered with seeming complacency over lamentable pictures, tracing their details with what may appear desperate fidelity? It is a natural question. Perhaps I might answer it by another: Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartime by zealous, devoted and thoroughly qualified volunteers?”

¹⁰ François Bugnion, ‘From Solferino to the Birth of Contemporary International Humanitarian Law’, online publication with the ICRC (April 22nd 2009), 5 <<http://www.icrc.org/eng/assets/files/other/solferino-bugnion-icrc.pdf>> accessed 24 June 2011.

¹¹ Dunant, *Un Souvenir de Solferino* (n 8) 165.

¹² Bugnion, ‘From Solferino to the Birth of Contemporary International Humanitarian Law’ (n 10).

wounded and other victims of wars. For his extraordinary achievement, Henri Dunant was the first recipient of the Nobel Peace Prize in 1901.¹³ Following the establishment of the Convention and ICRC, National Societies of the Red Cross were created. Returning in greater detail to the ICRC and its specific role as a major actor in this area of international law in Sections 2.2.2.2 and 2.3.2, other developments that have led to the current state of legal rights and obligations concerning humanitarian assistance will first be briefly addressed.

At first, notwithstanding De Vattel's influence, relief assistance remained within the sphere of armed conflict as developed through Dunant's ideas. From the late nineteenth century to the beginning of the twentieth century, the ICRC provided humanitarian assistance during instances such as the Franco-Prussian War, the Boer War and the Russian-Japanese War, reaching a larger scale with its assistance during World War I.¹⁴ With the increase of international awareness, the first civilian oriented assistance action was undertaken during that same war, aimed at the Belgian population that was threatened by famine due to the German occupation. The *Commission for Relief in Belgium* (CRB) was created in 1914 by Herbert Hoover, later president of the United States of America, and operated with a strictly humanitarian mandate to provide relief to civilians during World War I.¹⁵ Having convinced all parties to the conflict that providing relief to Belgian civilians was desirable, the CRB received support from *both* sides to the conflict, to operate while maintaining its neutrality.¹⁶ This particular scheme created a valuable precedent for ensuing attempts of humanitarian assistance, as neutrality, independence and communication towards all parties have continued to remain invaluable to relief organisations today, while subsequent organisations have benefitted from this first experience.¹⁷

During the *interbellum*, several developments occurred. In 1921, the President of the Italian Red Cross proposed the creation of an organisation focused specifically on assistance to victims of natural disasters, which was taken up by the League of Nations and resulted in the establishment of the International Relief Union (IRU) in 1927.¹⁸ The IRU's goals were the delivery of first aid, the procurement of means to do so and the coordination of other organisations providing relief, and as an organisation it was governed by the principles of non-discrimination and respect for

¹³ Dunant shared the first Nobel Peace Prize in 1901 with Frédéric Passy. For more information, see <http://nobelprize.org/nobel_prizes/peace/> accessed 23 June 2011.

¹⁴ Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (n 3) 10.

¹⁵ Yves Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: the Right and Duty to Humanitarian Assistance* (Martinus Nijhoff Publishers 1991) 22.

¹⁶ Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (n 3) 11.

¹⁷ *Ibid* 12; see also Beigbeder *The Role and Status of International Humanitarian Volunteers and Organizations: the Right and Duty to Humanitarian Assistance* (n 15) 23. On these principles, see Section 2.2.3 The Principles for the Delivery of Assistance.

¹⁸ Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (n 3) 18-19.

state sovereignty.¹⁹ Yet, as the first meeting of the IRU's General Council was held in 1933, ensuing developments leading up to World War II in Europe prevented it from actually providing the relief it was established for.²⁰ During this same period, the League of Nations involved itself with the numerous refugees following various revolutions and the aftermath of World War I, and installed a High Commissioner for Russian Refugees.²¹ In following years, a High Commissioner for Refugees from Germany was established, but both offices were dissolved in 1938 for the establishment of a general 'Office of the High Commissioner for all Refugees' under the protection of the League of Nations.²² The outbreak of World War II however cut short the further work of this Office. In 1943, still in the midst of the war, the United Nations Relief and Rehabilitation Administration (UNRRA) was created for international cooperation and the provision of humanitarian relief.²³ Interestingly, this organisation was thus created prior to the United Nations itself. UNRRA's main tasks consisted of the provision of relief to, rehabilitation and resettlement of specific groups of victims and displaced persons due to World War II.²⁴ Although UNRRA based many of its principles on its 'predecessor' the CRB, unlike the CRB it was not an NGO but an intergovernmental organisation, receiving funding from states on a voluntary basis.²⁵ While the organisation only lasted until 1948 when it was dismantled into several separate organisations, it managed to achieve quite massive relief operations throughout war stricken Europe.²⁶ Yet, as time went on, states became hesitant to continue with such a large-scale cooperative approach to humanitarian assistance.²⁷ Thus, although UNRRA was closed down as an organisation, its general goals of cooperation and provision of humanitarian relief were incorporated in the United Nations' fundamental purposes and as such continue to exist today.²⁸ Upon the closing of UNRRA, the International Refugee Organization (IRO) similarly existed for a few years, functioning as a specialised agency for the relief of refugees following from World War II.²⁹

¹⁹ Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: the Right and Duty to Humanitarian Assistance* (n 15) 24.

²⁰ Ibid 24-25; see also *Law and legal issues in international disaster response: a desk study* (International Federation of Red Cross and Red Crescent Societies 2007) 27.

²¹ Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: the Right and Duty to Humanitarian Assistance* (n 15) 23.

²² Paul Weis, 'Human Rights and Refugees', (1971) 1 *Israel Yearbook for Human Rights* 36.

²³ Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (n 3) 12-13.

²⁴ Article 1 Agreement for United Nations Relief and Rehabilitation Administration, November 9 1943; see also Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: the Right and Duty to Humanitarian Assistance* (n 15) 25.

²⁵ Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: the Right and Duty to Humanitarian Assistance* (n 15) 25.

²⁶ Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (n 3) 13 -14.

²⁷ Ibid 14.

²⁸ Ibid. See also Article 1(3) UN Charter.

²⁹ Emily Haslam, 'United Nations Relief and Rehabilitation Administration', (2006) *Max Planck Encyclopedia of International Law* 1.

2.2.1.1 *The Role of the UN in the Development of Humanitarian Assistance*

Major organisations currently involved in the provision of humanitarian assistance are the ICRC and the International Federation of the Red Cross (IFRC)³⁰ and the UN, including its specialised organisations. Both have had a parallel but separate development and warrant discussion. The United Nations as a major actor in the provision of humanitarian assistance will be discussed in Section 2.3.2, yet the development to its current status will be briefly addressed at this stage. Upon cessation of UNRRA, the United Nations did not partake in humanitarian assistance for several years. Rather, it focused in the 1950s and 1960s on promoting development aid.³¹

The Cold War and events surrounding decolonisation further enabled this attitude, but one specific and problematic instance invoked the UN's subsequent active participation in humanitarian assistance.³² In 1967, the eastern state of the Nigerian Federation, Biafra, declared itself independent, which resulted in a civil war within the Nigerian Federation.³³ As the UN viewed the conflict was an internal strife, it remained silent throughout the evolving humanitarian crisis, and efforts for the provision of humanitarian assistance were initiated through various organisations only at a regional level.³⁴ The UN had continuously struggled with the decision to involve itself situations of armed conflict. Rather, it laid the focus on situations of providing assistance in cases of natural disaster, doing so for the first time in a General Assembly resolution in 1965.³⁵ Yet in 1971, a few years after the UN's failure to act in the situation in Biafra, the UN General Assembly adopted a resolution establishing the UN Disaster Relief Organisation (UNDRO).³⁶ In doing so, the General Assembly set aside the UN Secretariat's position that the United Nations system should lay emphasis on 'good offices' rather than becoming actively involved in humanitarian relief operations. Unfortunately, UNDRO was unable to live up to expectations, and with each new crisis or disaster various specialised agencies mushroomed, making the UN's role in humanitarian assistance during the following two decades scattered and dispersed, rather than coherent.³⁷ In 1984, UNDRO attempted to address problems regarding the provision of disaster relief in times of natural or man-made disaster, *excluding* ongoing armed conflict, through the

³⁰ See (n 52) regarding the IFRC.

³¹ Ed Tsui & Thant Myint-U, 'The Institutional response: creating a framework in response to new challenges' (2004) II *The Humanitarian Decade: challenges for Humanitarian Assistance in the last decade and into the future* (OCHA) 2.

³² *Ibid.*

³³ Henning Lahmann, 'Biafra Conflict', (2009) *Max Planck Encyclopedia of Public International Law* § 1.

³⁴ *Ibid* § 20-23.

³⁵ UNGA Res 2034 (XX) 'Assistance in cases of natural disaster' (7 December 1965).

³⁶ UNGA Res 2816 (XXVI) (14 December 1971). In the same resolution at § 1, the appointment of a Disaster Relief Coordinator for the UN was also envisaged.

³⁷ Tsui and Myint-U, 'The Institutional response: creating a framework in response to new challenges' (n 31) 3; see also UNGA Res 36/225 (17 December 1981) UN Doc A/RES/36/225.

development of the Draft Convention on Expediting the Delivery of Emergency Relief (1984 Draft Convention).³⁸ Although this initiative had not been requested of UNDRO, the Organisation based itself on a 1977 resolution that instigated UN bodies to look more closely into the expedition of disaster relief.³⁹ Yet, the Draft Convention, having been presented to the UN Economic and Social Council (ECOSOC), never came beyond discussion by the UN's Second Committee, where no further official action was taken.⁴⁰ Although the reasons as to why this Draft Convention never came into existence are somewhat unclear, it has been speculated that the efforts may have been premature.⁴¹ Furthermore, various NGOs in the field, as well as the ICRC, were disappointed to not have been involved in the drafting process and expressed their concern for this new Draft Convention.⁴² These organisations argued that such a new convention, placing emphasis on the concept of state sovereignty, would not be beneficial to the provision of humanitarian assistance, and that the emphasis should lie on the further implementation of existing resolutions and instruments.⁴³ The emphasis on sovereignty however was a reflection of the Cold War time period in which the drafting had taken place. By the end of the Cold War era and with the changing times, the UN General Assembly called for an 'International Decade for Natural Disaster Reduction' in response to the vast increase of disasters occurring throughout the world:

"Decides to designate the 1990's as a decade in which the international community, under the auspices of the United Nations, will pay special attention to fostering international cooperation in the field of natural disaster reduction [...]"⁴⁴

In subsequent years, the General Assembly followed up on this initiative and emphasised its interest in natural disaster reduction.⁴⁵ The culmination of these efforts can be found in the landmark Resolution 46/182 'Strengthening the coordination of humanitarian emergency assistance of the United Nations', in which the General Assembly laid out a framework of 'Guiding Principles' for humanitarian assistance.⁴⁶ This resolution and theme followed the combined efforts of providing

³⁸ UNGA Res 39/367 (18 June 1984) UN Doc. A/39/367/Add.2 and E/1984/96/Add.2 'Draft Convention on Expediting the Delivery of Emergency Relief'.

³⁹ ECOSOC Resolution 2102 (LXIII) (3 August 1977) UN Doc E/2102 (LXIII) § 2.

⁴⁰ IFRC's 'Law and legal issues in international disaster response: a desk study' (n20) 28. The UN's Second Committee is also known as the Economic and Financial Committee, and deals with economic issues at its meetings. For further information on the Second Committee, <<http://www.un.org/en/ga/second/index.shtml>> accessed 4 January 2012.

⁴¹ IFRC's 'Law and legal issues in international disaster response: a desk study' (n20) 28.

⁴² Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations: the Right and Duty to Humanitarian Assistance* (n 15) 378.

⁴³ *Ibid.*

⁴⁴ UNGA Res 42/169 (11 December 1987) UN Doc. A/42/169 § 3.

⁴⁵ UNGA Res 43/202 (20 December 1988) UN Doc A/43/202 and also UNGA Res 44/236 (22 December 1989) UN Doc A/44/236 where the General Assembly in § 1 "Proclaims the International Decade for Natural Disaster Reduction, beginning on 1 January 1990".

⁴⁶ UNGA Res 46/182 (19 December 1991) UN Doc. A/RES/46/182, General Assembly Resolution 'Strengthening the coordination of humanitarian emergency assistance of the United Nations', Annex I.

relief to southern Sudan by UN agencies and NGOs, which started in 1989 and is known as ‘Operation Lifeline Sudan’.⁴⁷ Following this resolution a first Emergency Relief Coordinator, Jan Eliasson, was appointed and UNDRO was enveloped into the newly instated UN Department for Humanitarian Affairs (UNDHA).⁴⁸ Another drastic change occurred in 1998 when UN reform, under the auspices of then Secretary-General Kofi Annan led to the dissolution of DHA into the newly established Office for the Coordination of Humanitarian Affairs (OCHA), which still exists today.⁴⁹ The UN furthermore established its ‘International Strategy for Disaster Reduction’ followed by the well-known Hyogo Framework for Action, both focused on disaster risk reduction and prevention.⁵⁰ With these structural changes also came the UN’s realisation that coordination between its various agencies was necessary, as well as cooperation with its partners in the field.⁵¹

2.2.1.2 The Role of the ICRC and IFRC in the Development of Humanitarian Assistance

One of the UN’s major counterparts is the abovementioned ICRC, which similar to the UN has also broadened its focus over the last century. Whereas the UN now also embraces the provision of assistance in times of conflict as part of its work, the ICRC strives to encompass more than its original focus on assistance in times of armed conflict, resulting in often overlapping areas of interest of the two organisations. The development of the ICRC and its founding in 1863 has already been touched upon, but the Red Cross and Red Crescent Movement also comprises the IFRC as the umbrella organisation of the national Red Cross Societies,⁵² which since 1919, then

⁴⁷ For more detailed information on Operation Lifeline Sudan, see amongst others Larry Minear *Humanitarianism under siege: A Critical Review of Operation Lifeline Sudan* (The Red Sea Press 1991).

⁴⁸ Tsui and Myint-U, ‘The Institutional response: creating a framework in response to new challenges’ (n 31) 10.

⁴⁹ *Ibid* 11. See also <<http://www.unocha.org/about-us/who-we-are/history>> accessed 3 January 2012.

⁵⁰ UNGA Res 56/195 (21 January 2002) UN Doc A/RES/56/195, ‘International Strategy for Disaster Reduction’. Disaster risk reduction as a topic falls outside the scope of this research. Through risk reduction however, the need for the provision of humanitarian aid can often be greatly reduced.

⁵¹ Tsui and Myint-U, ‘The Institutional response: creating a framework in response to new challenges’ (n 31) 11-13.

⁵² The International Federation of the Red Cross, forming a federation of the various Red Cross National Societies, will be discussed more in depth in Sections 2.2.3 The Principles for the Delivery of Assistance and 2.3.2 Providers of Humanitarian Assistance. At this stage it is relevant to briefly mention the distinction between the ICRC and the IFRC, as well as the National Red Cross and Red Crescent Societies through their separate mandates. This distinction of the three prongs can be found in the Article 1 of the 2006 Statute of the International Red Cross and Red Crescent Movement: “The International Red Cross and Red Crescent Movement (hereinafter called “the Movement”) is composed of the National Red Cross and Red Crescent Societies recognized in accordance with Article 42 (hereinafter called “National Societies”), of the International Committee of the Red Cross (hereinafter called “the International Committee”) and of the International Federation of Red Cross and Red Crescent Societies (hereinafter called “the Federation”)”. With regard to the ICRC, the Statutes of the Movement declare in Article 5: “The International Committee, founded in Geneva in 1863 and formally recognized in the Geneva Conventions and by International Conferences of the Red Cross, is an independent humanitarian

known as the ‘League of Red Cross Societies’, has been involved in the provision of assistance and cooperation between the national Red Cross entities.⁵³ In the aftermath of World War I, the formation of a federation was proposed, to continue the close cooperation amongst the National Red Cross and Red Crescent Societies that had proven fruitful during that war.⁵⁴ In the Statute of the Red Cross and Red Crescent Movement, the combined effort between the ICRC, the IFRC and the National Societies can be found:

“the National Red Cross and Red Crescent Societies, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies together constitute a worldwide humanitarian movement, whose mission is to prevent and alleviate human suffering wherever it may be found, to protect life and health and ensure respect for the human being, in particular in times of armed conflict and other emergencies”.⁵⁵

Since 2001 the IFRC has developed its interest in legal issues pertaining to disaster relief. Although the original idea of the International Conference of the Red Cross and Red Crescent had been to develop a comprehensive treaty regarding international disaster response law, the organisation was unable to decide on the matter and initiated the ‘International Disaster Relief Laws, Rules and Principles Programme’ (IDRL programme).⁵⁶ Subsequently in 2003, the goal was set forth at the 28th International Conference of the Red Cross and Red Crescent⁵⁷ to:

“Enhance international disaster response through support for the compilation and application of the laws, rules and principles applicable to international disaster response”.⁵⁸

organization having a status of its own. It co-opts its members from among Swiss citizens”. Article 5(2) and 5(3) of the Statute proceed to formulate the specific tasks and mandate of the ICRC, particularly relevant for this research is the fact that it is the ICRC that is given tasks under international humanitarian law, as mentioned in the Geneva Conventions and their Protocols. With regard to the IFRC, the Statutes proclaim in Article 6: “The International Federation of Red Cross and Red Crescent Societies comprises the National Red Cross and Red Crescent Societies. It acts under its own Constitution with all rights and obligations of a corporate body with a legal personality”. Article 6(4) of the Statutes envisage the task of the IFRC to lie mainly within the area of disaster relief, outside the scope of international humanitarian law. For the purpose of this research, the ICRC and IFRC will be addressed independently. Use of the formulation ‘Red Cross’ will be done in referral to the umbrella organization of the ‘Red Cross Movement’.

⁵³ See <<http://www.ifrc.org/en/who-we-are/history/>> accessed 23 February 2012.

⁵⁴ Ibid.

⁵⁵ Preamble of the Statutes of the International Red Cross and Red Crescent Movement, (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006).

⁵⁶ Red Cross/Red Crescent Council of Delegates Resolution 5 ‘International Disaster Response Law’ (14 November 2001). See also Heike Spieker, ‘The Right to Give and Receive Humanitarian Assistance’, in HJ Heintze & A Zwitter (eds), *Humanitarian Assistance and International Law* (Springer 2011) 23.

⁵⁷ For a discussion on the Red Crescent as part of the Red Cross movement see the Statutes of the International Red Cross and Red Crescent Movement.

⁵⁸ XXVIIIth International Conference of the Red Cross and Red Crescent, ‘Agenda for Humanitarian Action’ (6 November 2003) Final Goal 3.2.

Thus, the possibilities of the *law* as part of disaster response were to be explored, including the identification of gaps, for which the IFRC was designated as coordinator.⁵⁹ Accordingly, the IFRC developed ‘Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance’, which were adopted by the Red Cross and states parties to the Geneva Conventions in 2007.⁶⁰ The UN General Assembly quickly supported this development by encouraging their use in the following year.⁶¹ The IDRL Guidelines function as a non-legal initiative, striving to assist governments in practical ways to ensure the enhanced dissemination of humanitarian assistance in the aftermath of a disaster.⁶²

2.2.2 Defining Humanitarian Assistance

The above discussion of the historical development of humanitarian assistance serves as a means to a more thorough understanding of what precisely the notion of humanitarian assistance entails today. With a (legal) definition in place, a more in depth discussion of the current status of various actors in the field of humanitarian assistance and their particular work can be provided, as well as an analysis of the existing international legal framework. The legal framework does not exist in a vacuum and the realities on the ground in various circumstances must be taken into consideration. The concept of humanitarian assistance⁶³ was developed largely by Dunant as part of the envisaged relief of victims of war, and thus the definition of this concept will firstly be sought in the law of war. Yet over time, the provision of humanitarian assistance has also developed outside the realm of conflict, in situations of natural disaster; therefore a wide range of sources will be addressed and incorporated in the determination of the content of humanitarian assistance. Naturally, assistance is time- and case specific, and not defining it too strictly can be relevant to its adaptation to various different situations.

Within international humanitarian law,⁶⁴ the actual *content* of humanitarian assistance is not defined as such. The ‘Convention (IV) relative to the Protection of

⁵⁹ Ibid § 3.2.6.

⁶⁰ ICRC Resolution 30IC/07/R4 ‘Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance’, 30th International Conference of the Red Cross and Red Crescent (30 November 2007).

⁶¹ UNGA Res 63/137 (11 December 2008) UN Doc A/RES/63/137 § 6; UNGA Res 63/139 (11 December 2008) UN Doc A/RES/63/139 § 8; UNGA Res 63/141 (11 December 2008) UN Doc. A/RES/63/141 § 5.

⁶² See in this regard <<http://www.ifrc.org/what-we-do/disaster-law/about-disaster-law/international-disaster-response-laws-rules-and-principles/idrl-guidelines/>> accessed 1 September 2014.

⁶³ This research will use the term humanitarian assistance, while acknowledging the use of terms such as humanitarian and disaster relief assistance, emergency (international) assistance, aid, relief actions, etc. For the purposes of this research however, one phrase has been chosen.

⁶⁴ The law of war, or *ius in bello*, is often divided into ‘The Hague law’, relating to the regulation of hostilities or combat and the ‘law of Geneva’, also known as international humanitarian law. An in depth discussion of the distinction between ‘The Hague law’ and ‘Geneva law’ will remain outside the scope of this research. For further reading on these notions see amongst others Frits Kalshoven & Liesbeth

Civilian Persons in Time of War’ (Fourth Geneva Convention or GC IV) of 1949 makes reference to ‘relief schemes’ that should consist:

“in particular, [of] the provision of consignments of foodstuffs, medical supplies and clothing”.⁶⁵

Additional Protocol I to the Geneva Conventions (Additional Protocol I or AP I) adds to this by stating that such relief schemes are to be ‘implemented without delay’,⁶⁶ emphasising the character of urgency that is attached to humanitarian assistance.⁶⁷ No further specificities are mentioned, nor is the (non-exhaustive) list of Article 59 of the Fourth Convention further developed. Importantly however in light of the application of Article 59 GC IV, humanitarian assistance can amongst other things be distinguished by its *urgent* character.

Similarly, the ICRC has not provided much insight into what it includes as humanitarian assistance; referring in a resolution to it as ‘providing food, shelter, clothing, health care, first aid, psycho-social support, etc’.⁶⁸ This non-limitative approach is reflective of the manner in which the ICRC follows humanitarian law, as well as its desire not to restrict its work.

Within the UN system, in relation to the deliverance of humanitarian assistance, the General Assembly referred in 1970 to:

“emergency supplies, including medicines, non-perishable food-stuffs, blankets, tents and clothing, and ... other facilities such as logistical equipment and helicopters”.⁶⁹

Quite narrowly, this preliminary list thereby solely includes those supplies necessary for the immediate survival of people, as well as the equipment to ensure the arrival of such supplies. ECOSOC elaborated on this definition, stating in 1971 that aid in emergency situations may include not only food supplies and medicines, but also personnel, transportations and communications”.⁷⁰ The failed UN 1984 Draft Convention on Expediting the Delivery of Emergency Relief proposed emergency assistance to entail relief consignments such as the abovementioned foodstuffs, medical supplies, blankets and shelter materials, but also vehicles, seeds and

Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Cambridge University Press 2011); Yoram Dinstein, *The conduct of hostilities under the law of international armed conflict* (Cambridge University Press 2010).

⁶⁵ Article 59, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

⁶⁶ Article 69 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁶⁷ Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross 1987) Protocol I Article 69, 814.

⁶⁸ ICRC Resolution 1 ‘Together for Humanity’, 30th International Conference (Geneva, 26-30 November 2007) 75.

⁶⁹ UNGA Res 2717 (XXV) (15 December 1970) UN Doc A/2717 §5(c).

⁷⁰ ECOSOC Resolution 1612 (LI) (23 July 1971) UN Doc E/1612 (LI) § 57.

agricultural equipment, as well as other goods of prime necessity.⁷¹ The Draft Convention however also considered services such as personnel, equipment, means of transport and necessary action to meet the needs as part of emergency assistance.⁷² A few years after this Draft Convention, the UN General Assembly stated in its Resolution ‘Strengthening the coordination of humanitarian emergency assistance of the United Nations’ that particular focus should lie on the supply of food, medicines, shelter and health care.⁷³ Although the UN Security Council has referred to the concept of humanitarian assistance frequently in resolutions, it has never defined or elaborated upon the concept as such. Hence, a definition provided by this UN organ is absent. According to the criteria formulated by other UN organs therefore, humanitarian assistance at least encompasses the supply of food, medicines or health care, as well as clothing and shelter. Arguably, certain aspects of transportation necessary for the provision of these items, also form part of this definition. In recent years, the ILC has concerned itself with the study of the ‘Protection of persons in the event of disaster’, and as such performed in-depth research into humanitarian assistance.⁷⁴ Although the ILC study discusses many of the definitions of humanitarian or emergency relief and assistance provided by other organisations, it does not itself provide for a definition of the concept of humanitarian assistance.⁷⁵ It also remains uncertain whether the efforts of the ILC pertaining to the protection of persons in the event of disasters will in time evolve into a binding document. In a rather broad manner, the ILC puts forward:

“assistance can be described as the availability and distribution of the goods, materials and services essential to the survival of the population. The elements of the concept of protection depend largely on the context or area of law in which the concept is employed”.⁷⁶

Thus, in the current phase of its study, the ILC has unfortunately decided not to formulate a Draft Article on the concept of humanitarian assistance, rather leaving its definition open to interpretation, without explaining its choice to do so.

⁷¹ UNGA Res 39/367 ‘Draft Convention on Expediting the Delivery of Emergency Relief’ (n 38) Article 1(c).

⁷² *Ibid* Article 1(d).

⁷³ UNGA Res 46/182 (19 December 1991) UN Doc A/RES/46/182 §6.

⁷⁴ The work of the ILC is not in itself binding by nature, both prior and after the adoption of its work by the General Assembly. However, its draft work is frequently cited, amongst others the ICJ relied on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts numerous times prior to their adoption by the General Assembly in 2001. See in this regard *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Merits Judgment 25 September 1997, I.C.J. Reports 1997, p.7, § 47, 50, 52-53, 79 and 83. As a result, it is submitted that the work of the ILC is highly esteemed and authoritative; in particular upon its adoption by the General Assembly and when referenced by international courts.

⁷⁵ ‘Protection of persons in the event of disasters’ (26 February 2008) Memorandum by the Secretariat (ILC), Addendum, UN Doc A/CN.4/590/Add.1.

⁷⁶ ‘Preliminary report on the protection of persons in the event of disasters’ (5 May 2008) International Law Commission UN Doc. A/CN.4/598 § 51.

Yet not only the UN bodies have concerned themselves with finding a clear definition of what constitutes humanitarian assistance; such attempts can also be found in legal scholarship. In 1991, Peter Macalister-Smith⁷⁷ formulated the ‘International Guidelines for Humanitarian Assistance Operations’⁷⁸ at the Max Planck Institute in Heidelberg, defining humanitarian assistance as including urgent material consignments, which in turn aligns with those goods also listed by the UN.⁷⁹ The International Institute of Humanitarian Law in San Remo (San Remo Institute) declared in its 1993 ‘Guiding Principles on the Right to Humanitarian Assistance’ (San Remo Principles) that:

“Humanitarian assistance may consist of any material indispensable to the survival of victims, such as foodstuffs, water, medication, medical supplies and equipment, minimum shelter, clothing; of services such as medical services, tracing services, religious and spiritual assistance, as well as civil defence, in conformity with the tasks defined in international humanitarian law”.⁸⁰

Clearly, this definition is broader than the one formulated by the Geneva Conventions and the UN, as it includes religious and spiritual assistance, ‘civil defence’ and other services that are more extensive than the preceding definitions have provided for. Subsequently in 2003 the Institute of International Law⁸¹ adopted the ‘Bruges Resolution’ pertaining to humanitarian assistance, in which it declared the following:

“1. “Humanitarian assistance” means all acts, activities and the human and material resources for the provision of goods and services of an exclusively humanitarian character, indispensable for the survival and the fulfillment of the essential needs of the victims of disasters.

a) “Goods” includes foodstuffs, drinking water, medical supplies and equipment, means of shelter, clothing, bedding, vehicles, and all other goods indispensable for the survival and the fulfillment of the essential needs of the victims of disasters; this term never includes weapons, ammunition or any other military material.

⁷⁷ Peter Macalister Smith is affiliated with the Max Planck Institute for Comparative Law and International Law at Heidelberg, Germany.

⁷⁸ The Guidelines were formulated at the request of the Federal Republic of Germany and the study was completed in 1988.

⁷⁹ P. Macalister-Smith, ‘International Guidelines for Humanitarian Assistance Operations’, (Max Planck Institute for Comparative Law and International Law, Heidelberg, 1991) Article 2 (a) and (d).

⁸⁰ ‘Guiding Principles on the Right to Humanitarian Assistance’ (April 1993) The International Institute of Humanitarian Law in San Remo, Principle 9. These Principles were adopted by the Council of the Institute after the Institute’s 17th Round Table on ‘Current Problems of International Humanitarian Law to “The Evolution of the Right to Assistance”’ in September of 1992. The International Institute of Humanitarian Law is a non-profit organisation established in 1970 with as main purpose the promotion of humanitarian law, human rights and refugee law.

⁸¹ Founded in 1873, the Institute of International Law aims to contribute to the development of international law, as an independent scientific institution. According to the Institute, the adopted Resolutions seek to highlight current international law and may sometimes be determinations *de lege ferenda*, so as to contribute to the development of the law and give assistance to progressive codification of international law: <http://www.idi-iil.org/idiE/navig_history.html> accessed 29 June 2011.

b) “Services” means the means of transport, tracing services, medical services, religious, spiritual and psychological assistance, reconstruction, de-mining decontamination, voluntary return of refugees and internally displaced persons, and all other services indispensable for the survival and the fulfillment of the essential needs of the victims of disasters”.⁸²

From the above, it is apparent that this definition also elaborates on the formulations of the UN and the San Remo Principles, including not only the basic elements of food, medicine, shelter and logistics, but also such aspects as religious and psychological assistance and the return of displaced persons and refugees. Whilst indeed religious and cultural particularities may be considered, it remains relevant to be aware of the extreme urgency in which humanitarian aid provision operates. In such circumstances of armed conflict or of (natural) disasters, the factual provision of assistance in itself is challenging and recourse must be had to the most urgently needed supplies such as water and food. Interestingly, the ‘Bruges’ definition explicitly excludes weapons, ammunition or any other form of military material.

Similarly the International Court of Justice determined in the 1986 *Military and Paramilitary Activities in and against Nicaragua Case*, in referral to United States’ legislation defining humanitarian assistance as including the provision of food, clothes, medicine and ‘other assistance’, that humanitarian assistance distinctly *excludes* weapons, ammunition or other material which can be used to inflict bodily harm.⁸³ The Court argued that in order to be considered humanitarian assistance rather than a breach of the principle of non-intervention, the assistance must be strictly limited to such humanitarian purposes.⁸⁴ Indeed, in a more recent example, the carrying of weapons was also put forward by Israel as an argument that the 2010 ‘Flotilla’ towards Gaza was in fact not providing humanitarian assistance, but rather also supplying materials for other purposes.⁸⁵ Such an argument may also be applied to the intentions of those providing the assistance, as will be seen in the subsequent Section 2.2.3.

Ascertaining the particularities of humanitarian assistance is relevant to establishing a definition of humanitarian assistance. From the above, it is clear that a single legal definition of the notion of humanitarian assistance is lacking. Although various institutions and resolutions, provided as soft law or secondary sources of international law, hold a rather broad definition of humanitarian assistance, the abovementioned views portray that common ground can at least be found in a more *narrow* definition of humanitarian assistance. Such a more narrow definition also

⁸² Resolution ‘Humanitarian Assistance’ (2 September 2003) Institute of International Law, Sixteenth Commission, Bruges Session § 1.

⁸³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment 27 June 1986 I.C.J. Reports 1986, p. 14 § 242-243.

⁸⁴ *Ibid* § 243.

⁸⁵ See amongst others: <http://www.mfa.gov.il/MFA/Government/Communiques/2010/Israel_Navy_warns_flotilla_31-May-2010.htm> accessed 3 December 2012 and <<http://www.jpost.com/Israel/Article.aspx?id=177342>> accessed 3 December 2012.

takes into consideration the attempts at definitions made through the UN, ICRC and case law. The definition of humanitarian assistance that is put forward by the author is that it is:

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.

According to the definition suggested here, the provision of humanitarian assistance is restricted to urgent purposes and the qualification that it is to be indispensable to the survival of people during and in the aftermath of a humanitarian crisis, suggests particular boundaries to the timeframe in which humanitarian assistance may be delivered. Arguably, as assistance could and should be provided as long as it is indispensable to the survival of victims of emergencies, such assistance should take place not only in the immediate aftermath of an emergency situation, but rather as long as it may remain necessary.⁸⁶ Evidently a crisis-like situation can last for a prolonged period of time and those persons finding themselves in such circumstances may not differentiate between searching for food and searching for a school for children. From a legal perspective however, a clear distinction must be made between humanitarian assistance as defined here and development assistance, although a possible transition from the former to the latter does often occur.⁸⁷ Whilst in factual circumstances both notions are often intertwined and recipients may not acknowledge the differentiation between both types of aid, such conceptual

⁸⁶ Budislav Vukas, 'Humanitarian Assistance in Cases of Emergency', (2007) *Max Planck Encyclopedia of Public International Law* § 7.

⁸⁷ Development assistance is (financial) assistance provided by international organisations or states to aid the development of other states, either economically, socially or politically. It can be distinguished from humanitarian assistance through its long-term perspectives. Development aid is furthermore not necessarily neutral or impartial, as it can be subject to conditions. For the purpose of this research, development assistance will however not be discussed, as it is not part of the scope of the research. See for the distinction between the two concepts amongst others Spieker 'The Right to Give and Receive Humanitarian Assistance' (n 56) 7. With regard to the UN's stance in general, see UNGA Res 46/182 'Strengthening the coordination of humanitarian emergency assistance of the United Nations' Guiding Principle 9: "There is a clear relationship between emergency, rehabilitation and development. In order to ensure a smooth transition from emergency to rehabilitation and development, emergency assistance should be provided in ways that will be supportive of recovery and long-term development. Thus, emergency measures should be seen as a step towards long-term development". For an alternative perspective, see the UN Educational, Scientific and Cultural Organization (UNESCO)'s stance with regard to humanitarian assistance in relation to development assistance in 'Contributing to Conflict Prevention and Post-Conflict Peace-Building', Medium-Term Strategy for 1996-2001 (1995) adopted by the General Conference at its 28th session § 190: <http://www.unesco.org/webworld/fed/temp/communication_democracy/conflict_resolution.htm> accessed 2 November 2011. For further information on development assistance, see also the United Nations Development Programme (UNDP) at <<http://www.beta.undp.org/content/undp/en/home/ourwork/overview.html>> accessed 4 January 2012 and the Organisation for Economic Co-operation and development at: <http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1,00.html> accessed 4 January 2012.

boundaries remain relevant to the research into the legal framework on the provision of humanitarian assistance, addressing the relevant rights and duties within this particular framework.

Furthermore, the provision of humanitarian assistance must not be seen as a substitute for otherwise engaging in international efforts that may advance peace or stability in a country or region.⁸⁸ Indeed, humanitarian assistance is often provided in conflict areas, where civilians are in dire need of protection from violence. The provision of food, water, medicine and shelter aimed at the survival of persons in these circumstances must therefore be distinctly acknowledged in this light. The provision of assistance is aimed at the survival of persons in circumstances of emergency and crisis, through the provision of supplies that are key to that survival. While various institutions and their resolutions apply a broad definition of humanitarian assistance, the abovementioned perspectives show that common ground can be found in the aforesaid more narrow definition of humanitarian assistance. Importantly, humanitarian assistance can amongst other things be distinguished by its *urgent* character and *indispensable* nature.⁸⁹

2.2.3 *The Principles for the Delivery of Assistance*

Ascertaining the particularities of humanitarian assistance, generically consisting of food, shelter, basic health care, and personnel and equipment to provide such items, is one part of defining humanitarian assistance. Yet, whether or not an act is humanitarian assistance is not only determined by *what* is provided, but also relates to the *manner* in which such assistance is provided: only when its delivery abides by certain principles of delivery can aid be considered ‘humanitarian assistance’.⁹⁰ Looking to international humanitarian law first, the Geneva Conventions and Additional Protocols of 1977 refer to the deliverance of relief schemes by an impartial humanitarian organisation, or to relief actions that are of an ‘exclusively humanitarian and impartial nature’.⁹¹ Such an organisation envisaged by the Conventions may be the ICRC, or any other organisation that acts according to the principles of the ICRC.⁹² In order to establish more in depth what humanitarian

⁸⁸ UNCHR ‘Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57: Internally displaced persons’ (22 February 1996) UN Doc E/CN.4/1996/52 § 78.

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, 590.

⁹⁰ For the various actors involved in the provision of humanitarian assistance, see Section 2.3.2 Providers of Humanitarian Assistance. The role of the affected state in particular will be dealt with in greater detail in that Section.

⁹¹ Common Article 3, Articles 10, 59 and 61 Convention (IV) relative to the Protection of Civilian Persons in Time of War; Article 70 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; Article 18(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

⁹² Article 63 GC IV states: “Subject to temporary and exceptional measures imposed for urgent reasons of security by the Occupying Power: (a) recognized National Red Cross (Red Crescent, Red Lion and

assistance encompasses, it is relevant to look into these notions of ‘humanity’ and ‘impartiality’, as well as specific principles of the ICRC referred to, for the organisation’s own characterisation of the delivery of humanitarian assistance. The Statutes of the International Red Cross and Red Crescent Movement declare the Movement *itself* to be guided by its ‘Fundamental Principles’:

“1) *Humanity*: The International Red Cross and Red Crescent Movement, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours, in its international and national capacity, to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, cooperation and lasting peace amongst all peoples.

2) *Impartiality*: It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent cases of distress.

3) *Neutrality*: In order to continue to enjoy the confidence of all, the Movement may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

4) *Independence*: The Movement is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with the principles of the Movement.

5) *Voluntary Service*: It is a voluntary relief movement not prompted in any manner by desire for gain.

6) *Unity*: There can be only one Red Cross or one Red Crescent Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

7) *Universality*: The International Red Cross and Red Crescent Movement, in which all Societies have equal status and share equal responsibilities and duties in helping each other, is worldwide”⁹³.

Thus, for assistance to be considered ‘humanitarian’ according to the Geneva Conventions and thereby also customary international humanitarian law,⁹⁴ it must

Sun) Societies shall be able to pursue their activities in accordance with Red Cross principles, as defined by the International Red Cross Conferences. Other relief societies shall be permitted to continue their humanitarian activities under similar conditions; (b) the Occupying Power may not require any changes in the personnel or structure of these societies, which would prejudice the aforesaid activities. The same principles shall apply to the activities and personnel of special organizations of a non-military character, which already exist or which may be established, for the purpose of ensuring the living conditions of the civilian population by the maintenance of the essential public utility services, by the distribution of relief and by the organization of rescues”.

⁹³ Statutes of the International Red Cross and Red Crescent Movement, (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006), Preamble. The Fundamental Principles of the Movement were proclaimed in Vienna in 1965. See also Article 2(a) of the Statute which states: “The role of the International Committee, in accordance with its Statutes, is in particular: a) to maintain and disseminate the Fundamental Principles of the Movement, namely humanity, impartiality, neutrality, independence, voluntary service, unity and universality”.

⁹⁴ To date, 194 states are party to the four Geneva Conventions of 1949, also granting them the status of customary international humanitarian law. The 1977 Additional Protocols do not have this customary law status, as not all states are party to these treaties. With regard to the customary status of

fulfill the criteria of humanity and impartiality, whereas the ICRC furthermore refers to the aspect of neutrality.⁹⁵ The latter two criteria of ‘unity’ and ‘universality’ refer to the Red Cross itself, and therefore fall outside the scope of the principles to be discussed.

2.2.3.1 *The Principle of Humanity*

Separate to the provision of humanitarian assistance, the principle of humanity has existed in international law for a long period of time. Humanity as a concept can be defined in various ways, but a common denominator can be found in ‘the state of being human’ or ‘humane’, as well as treating others with ‘benevolence’ or kindness.⁹⁶ As codified in the well-known ‘Martens-clause’ in 1899, the minimum requirements for belligerent parties would be those rules of international law as resulting from the practice between states, as well as ‘from the laws of humanity, and the requirements of the public conscience’.⁹⁷ Today, its equivalent can be found in Article 1(2) of AP I declaring:

“in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”.

The principle of humanity thereby serves as an underlying notion by which parties to a conflict must always abide, to ensure the protection of civilians. As such it also stands in close relation to the principle of distinction. Although codified within the context of international humanitarian law, the principle and concept of humanity can be found throughout history in major world faiths, and has origins also in natural law, with the notion of ‘human dignity’. According to Meron, and supported by the above definition of ‘humanity’, the principle of humanity is equal to the notion of ‘elementary considerations of humanity’.⁹⁸ These have been recognised by the ICJ as obligations resting upon states both in times of war and in times of peace.⁹⁹ The

the 1949 Geneva Conventions, see amongst others Theodor Meron, ‘The Geneva Conventions as Customary Law’ (1987) 81 *American Journal of International Law* 2. For further information on ratification of the Geneva Conventions, see <[http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf)> accessed 7 November 2011.

⁹⁵ Sections 2.2.3.4 An Alternative: The UN Principles Regarding Humanitarian Assistance and 2.2.3.5. Other Perspectives on the Principles for Providing Humanitarian Assistance explore the adoption of the ICRC Principles by other organisations, such as the UN and EU, as well as several resolutions pertaining to humanitarian assistance.

⁹⁶ See in this regard the definitions provided by the Oxford Dictionaries and Merriam-Webster.

⁹⁷ Hague Convention II with Respect to the Laws and Customs of War on Land of 1899.

⁹⁸ Theodor Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of the Public Conscience’ (2000) 94 *American Journal of International Law* 1, 82.

⁹⁹ Corfu Channel Case (UK v Albania) (Merits) 9 April 1949 I.C.J. Reports 4, §67: “The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the

ICJ has furthermore recognised such obligations, amongst which the Martens-clause and thereby also the principle of humanity, as ‘fundamental to the respect of the human person’ and ‘intransgressible principles of international customary law’.¹⁰⁰ In doing so, the Court also relates these principles to the obligation under humanitarian law to prohibit causing unnecessary suffering (to combatants).¹⁰¹ Indeed, the provision of humanitarian assistance aims to accomplish precisely that goal in relation to the *civilian* population also.

According to the ICRC, the principle of humanity is its supreme principle and the driving force behind its work.¹⁰² Aside from the Geneva Conventions, and the ICRC, the ICJ has also referred to the principles of humanity (and impartiality), declaring in the *Nicaragua* case that in order for the provision of aid to be considered humanitarian, it must be given without any form of discrimination to all those in need of aid and not merely to one party to a conflict.¹⁰³ Additionally, the assistance must be limited to those purposes echoed by the practice of the ICRC, namely the alleviation of human suffering and the protection of life, health and the human being:

“An essential feature of truly humanitarian aid is that it is given “without discrimination” of any kind. In the view of the Court, if the provision of “humanitarian assistance” is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely “to prevent and alleviate human suffering” and “to protect life and health and to ensure respect for the human being”; it must also, and above all be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents.”¹⁰⁴

This stance of the Court also aligns with the above formulated definition of humanitarian assistance which focuses on emergency aid. In this ruling, the ICJ declares these principles applicable to all providers of humanitarian assistance (such as the United Nations), not merely the ICRC itself.¹⁰⁵ This latter take on the principles by the Court echoes Article 63 of the Fourth Geneva Convention that in the same way declared (other) providers of aid to be able to operate under similar conditions

existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.

¹⁰⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, § 78-79.

¹⁰¹ *Ibid.*

¹⁰² ‘The International Committee of the Red Cross (ICRC): Its mission and work’, Adopted by the Assembly of the ICRC on 19 June 2008, (2009) 91 *International Review of the Red Cross* 874, 404.

¹⁰³ ICJ Military and Paramilitary Activities in and against (n 83) § 243. For support in legal scholarship, see also Vincent Chetail, ‘The contribution of the International Court of Justice to international humanitarian law’, (2003) 85 *International Review of the Red Cross* 850, 265.

¹⁰⁴ *Ibid* § 243.

¹⁰⁵ Chetail, ‘The contribution of the International Court of Justice to international humanitarian law’ (n103).

as the ICRC.¹⁰⁶ Yet the ICJ's stance that assistance must be given to *all* parties to a conflict is challenged by some. Firstly, it must be noted that the *Nicaragua* case did not concern an international armed conflict,¹⁰⁷ and as such there is no proscription to be found in the Geneva Conventions regarding the provision of assistance to only one side of a conflict by organisations providing humanitarian assistance. Conversely, in an international armed conflict, international organisations providing assistance are permitted to provide relief to civilians in need that are under the control of only one party to the conflict.¹⁰⁸ Frits Kalshoven argued that states often provide assistance to only one side of a conflict, especially in liberation wars, which is still considered by the larger community to be humanitarian in nature.¹⁰⁹ Furthermore, international organisations providing assistance also usually operate in the territory of just one side of the conflict, rather than being able to operate on both or multiple sides.¹¹⁰ Particularly significant is the fact that the assistance may not *contribute* to one side of a conflict, but pursues the goal of alleviation of human suffering.¹¹¹ As long as the *purpose* of the aid is not to support any party to a conflict rather than to alleviate the suffering of a civilian population in need, it can be considered humanitarian.¹¹² Given the abovementioned definition of humanity, as well as the ICRC's declaration that the principle of humanity entails but three main aspects, namely respect for the human being, the prevention and alleviation of human suffering, and the protection of life and health as well as legal debate, providing assistance to both sides of the conflict in order to be deemed humanitarian, as argued by the ICJ, does not appear to be a general consensus under international law.¹¹³

2.2.3.2 *The Principle of Impartiality*

Impartiality, the second criterion mentioned not only in the Geneva Conventions but also by the Fundamental Principles of the Red Cross for its own purposes, essentially

¹⁰⁶ See (n92) for the text of Article 63 GC IV.

¹⁰⁷ For the definition of an international armed conflict, see Section 3.2.1 Defining an Armed Conflict.

¹⁰⁸ Ruth Abril Stoffels, 'Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps', (2004) 86 *International Review of the Red Cross* 855, 541. See for example Article 25 GC II; Article 27 GC IV; and Article 8 of Additional Protocol I.

¹⁰⁹ Frits Kalshoven, 'Impartialité et neutralité dans le droit et la pratique humanitaires', (1989) 71 *International Review of the Red Cross* 780, 543-544.

¹¹⁰ Kate Mackintosh, 'The Principles of Humanitarian Action in International Humanitarian Law: Study 4 in: The Politics of Principle: the principles of humanitarian action in practice', *Humanitarian Policy Group Report* 5 (March 2000) 7.

¹¹¹ Joakim Dungel, 'A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems', (2004) *Journal of Humanitarian Assistance* § 2.2 <<http://sites.tufts.edu/jha/archives/838>> accessed 24 November 2014.

¹¹² Abril Stoffels, 'Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps' (n108) 540.

¹¹³ Statutes of the International Red Cross and Red Crescent Movement, (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006). See also Jean Pictet, '1979 Commentary to the Fundamental Principles of the Red Cross' (Principle of Humanity Commentary (a) (b) and (c)) <<http://www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm>> accessed 24 November 2014.

considers that assistance must be given in a non-discriminatory manner, with a focus on those who most urgently need to be aided.¹¹⁴ As seen above, the ICJ has echoed this principle in its judgement in the *Nicaragua* case.¹¹⁵ In his 1979 *Commentary to the Fundamental Principles of the Red Cross*, Jean Pictet divides this principle into three separate elements, namely non-discrimination, proportionality and impartiality itself as distinguished principle.¹¹⁶ Firstly, regarding non-discrimination, Pictet argues it is the primordial of the Red Cross Principles, and closely related to the principle of humanity.¹¹⁷ As seen above, the ICJ has echoed the importance of these two concepts within the provision of humanitarian assistance in the *Nicaragua*-case.¹¹⁸ The Geneva Conventions themselves in Common Article 3 prohibit ‘any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria’.¹¹⁹ Clearly, this list is non-limitative in its nature. Yet, considering the fact that assistance is to be provided based on the urgency of the need, non-discrimination does not mean that certain considerations such as age or sex may not be relevant to the determination of whom is to receive the most immediate relief of suffering.¹²⁰ As such, Common Article 3 of the Geneva Convention mentioned that no *adverse* distinction was to be allowed. The ICRC itself declares:

¹¹⁴ Statutes of the International Red Cross and Red Crescent Movement, (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006) and *ibid* Pictet, ‘1979 Commentary to the Fundamental Principles of the Red Cross’ (Principle of Impartiality).

¹¹⁵ ICJ Military and Paramilitary Activities in and against (n 83) §242.

¹¹⁶ Pictet, ‘1979 Commentary to the Fundamental Principles of the Red Cross’ (n 113) (Principle of Impartiality, I. Non-Discrimination).

¹¹⁷ *Ibid*.

¹¹⁸ ICJ Military and Paramilitary Activities in and against (n 83) § 243.

¹¹⁹ The full text of Article 3 common to the four Geneva Conventions of 1949 states: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict”.

¹²⁰ Dungen ‘A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems’ (n 111) § 2.2.

“Impartiality, a principle that rejects any form of discrimination, calls for equal treatment for people in distress, according to their needs. It enables the ICRC to prioritize its activities on the basis of the degree of urgency and the types of needs of those affected”.¹²¹

Evidently, the Red Cross envisages the possibility to distinguish based on need, whilst simultaneously adhering to the principle of non-discrimination. This reasoning also falls in line with Pictet’s second element within the principle of impartiality: the notion of proportionality, which entails that the relief is to be accorded in proportion to the degree of suffering and the degree of urgency.¹²² Thirdly, Pictet discerns the element of impartiality as a separate notion within the larger scope of the principle.¹²³ He argues that, once non-discrimination has been accepted as a norm, impartiality becomes secondary, due to the fact that it relates to the ‘lesser’ action without prejudice, namely not to be partial in one’s individual (organisation’s) actions.¹²⁴ Whereas non-discrimination and proportionality apply to the deliverance of humanitarian assistance, the distinct element of impartiality as noted by Pictet concerns the decision-making process of an organisation such as the ICRC in its entirety.¹²⁵ Particularly in situations of non-international conflicts, the notion of partiality can be an issue, as those providing aid, such as National Red Cross Societies, are often very familiar with all parties to the conflict.¹²⁶ This also adheres to the above discussion on whether or not aid may be provided to the civilian population of only *one* party to a conflict as addressed by the ICJ. Furthermore, there is also a different concept of impartiality to consider, where cooperation amongst relief providers may be in order, to ensure that distribution of aid is truly only determined based on need, and that impartiality can be discerned through the equal results of the assistance.¹²⁷ However, at this point in time, there is no legal requirement within international humanitarian law for this last concept of impartiality, as it would also impose obligations of cooperation on various relief providers.¹²⁸

¹²¹ ‘The International Committee of the Red Cross (ICRC): Its mission and work’, Adopted by the Assembly of the ICRC (n 102).

¹²² Pictet, ‘1979 Commentary to the Fundamental Principles of the Red Cross’ (n 113) (Principle of Impartiality, II. Proportionality).

¹²³ Pictet is not alone in distinguishing separate elements in the larger principle of impartiality, see also Abril Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps’ (n108) 540-541.

¹²⁴ Pictet, ‘1979 Commentary to the Fundamental Principles of the Red Cross’ (n 113) (Principle of Impartiality, III Impartiality).

¹²⁵ Denise Plattner, ‘ICRC neutrality and neutrality in humanitarian assistance’, (1996) 36 *International Review of the Red Cross* 311, 171.

¹²⁶ *Ibid.*

¹²⁷ Dungal, ‘A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems’ (n 111) § 2.2; and Abril Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps’ (n108) 540.

¹²⁸ Abril Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps’ (n108) 541.

2.2.3.3 *The Principle of Neutrality*

Lastly, the principle of neutrality needs to be addressed. Often confused with, and closely related to, impartiality, this principle relates to the ICRC's position that to be able to provide relief, the organisation needs to enjoy the trust of all sides to a particular conflict and to that extent may itself not take sides in any kind of armed conflict.¹²⁹ Importantly, both neutrality and non-participation of non-belligerent states with regard to a conflict are not intended by this principle of neutrality.¹³⁰ Neutrality as a principle in humanitarian assistance is furthermore absent from the Geneva Conventions, perhaps also due to this military connotation with regard to the abovementioned non-belligerent states.¹³¹ Yet as a legal concept it does appear in various provisions related to the field of humanitarian assistance,¹³² and has been widely described in guidelines relating to the manner in which humanitarian organisations or other actors provide relief. It can be considered an autonomous concept, independent of the entity that is actually providing the assistance: the body providing the assistance may not be neutral, but the assistance itself may still meet the requirements of the principle of neutrality of assistance.¹³³ Thus, third states and various international organisations *can* certainly meet these requirements. However, referring back to Article 63 of the Fourth Geneva Convention, any entity wishing to provide humanitarian assistance in accordance with international humanitarian law, must act according to principles similar to those of the ICRC, which has incorporated the notion of neutrality.¹³⁴ In their actions, humanitarian organisations or other actors such as third states must convey their neutrality to all sides of a conflict through refraining from any action that may be harmful or helpful to the parties in conflict, and in return, so should the neutrality of these organisations be respected by the

¹²⁹ Statutes of the International Red Cross and Red Crescent Movement, (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006) and 'The International Committee of the Red Cross (ICRC): Its mission and work', Adopted by the Assembly of the ICRC (n 102).

¹³⁰ Pictet, '1979 Commentary to the Fundamental Principles of the Red Cross' (n 113) (Principle of Neutrality, (b) military neutrality). For a more in depth discussion of the distinction between neutrality and non-participation in conflicts when applicable to states, as opposed to the neutrality of a relief organisation such as the ICRC, see Plattner, 'ICRC neutrality and neutrality in humanitarian assistance' (n 125) 164-165.

¹³¹ Mackintosh, 'The Principles of Humanitarian Action in International Humanitarian Law' (n 110) 8.

¹³² See Chapters 6 and 7. Also, see Plattner, 'ICRC neutrality and neutrality in humanitarian assistance' (n 125) 175.

¹³³ Plattner, 'ICRC neutrality and neutrality in humanitarian assistance' (n 125) 178. An example provided by Plattner includes the possibility of a non-neutral state providing humanitarian assistance that in itself is neutral.

¹³⁴ See Article 63 Fourth Geneva Convention (n 92).

parties.¹³⁵ Thus, the principle of neutrality obliges duties of abstention.¹³⁶ Neutrality as a principle of humanitarian assistance is not merely military, but also political, racial, religious and ideological.¹³⁷ Pictet refers to this aspect of neutrality as ‘ideological neutrality’ but notes that although it is distinct from military neutrality, in today’s world politicisation is a grave concern for the Red Cross, considering the change in warfare since the World War II.¹³⁸ Publicly voicing an opinion on a certain conflict or supporting one of the parties could be, and has in the past sometimes been, considered a violation of this principle; note in this regard the discussion on the delivery of aid by Russia to the Ukraine in the summer of 2014.¹³⁹ Yet there is no legal obligation to abstain from drawing attention to large-scale violations of human rights or humanitarian law, regardless of whether or not this may form part of an organisation’s own code of conduct.¹⁴⁰ In relation to this, the Red Cross’ perspective on neutrality has thus always been a *means* to provide humanitarian assistance rather than an *end* in and of itself.¹⁴¹ For an organisation providing humanitarian assistance, like the ICRC, there must be a choice between striving for justice or politics and striving for the provision of assistance to all those in need. To uphold the principle of neutrality, often only the latter can be chosen.¹⁴² Denise Plattner¹⁴³ observes that neutrality as a principle of humanitarian assistance may function as an umbrella under which the principle of impartiality, together with non-discrimination, may also fall.¹⁴⁴ Problematic for the principle of neutrality and in connection to Pictet’s views, is that it runs the risk of being compromised in the event where humanitarian assistance is to be delivered in a territory contrary to the will of the party that controls this territory.

¹³⁵ Pictet, ‘1979 Commentary to the Fundamental Principles of the Red Cross’ (n 113) (Principle of Neutrality, (b) military neutrality). An example given by Pictet is the neutrality of a hospital: parties to a conflict must never attack such a location and relief providers must for their part not allow the existence of for instance a military observation post on its roof. See also Abril Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps’ (n108) 543. Abril Stoffels notes examples such as the transportation of weapons, attacking combatants and spreading propaganda.

¹³⁶ Plattner, ‘ICRC neutrality and neutrality in humanitarian assistance’ (n 125) 170.

¹³⁷ Statutes of the International Red Cross and Red Crescent Movement, (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006) and ‘The International Committee of the Red Cross (ICRC): Its mission and work’, Adopted by the Assembly of the ICRC (n 102).

¹³⁸ Pictet, ‘1979 Commentary to the Fundamental Principles of the Red Cross’ (n 113) (Principle of Neutrality, (c) ideological neutrality).

¹³⁹ <http://uk.reuters.com/article/2014/08/12/uk-ukraine-crisis-russia-aid-idUKKBN0GC08O20140812> accessed 9 September 2014; Abril Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps’ (n108) 543; and Plattner, ‘ICRC neutrality and neutrality in humanitarian assistance’ (n 125) 171.

¹⁴⁰ Abril Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps’ (n108) 543 and Plattner, ‘ICRC neutrality and neutrality in humanitarian assistance’ (n 125) 171.

¹⁴¹ Plattner, ‘ICRC neutrality and neutrality in humanitarian assistance’ (n 125) 172.

¹⁴² Pictet, ‘1979 Commentary to the Fundamental Principles of the Red Cross’ (n 113) (Principle of Neutrality, ‘other aspects of neutrality’). See also Plattner, ‘ICRC neutrality and neutrality in humanitarian assistance’ (n 125) 162.

¹⁴³ Denise Plattner worked as a longtime legal advisor to the ICRC and in that capacity was also part of several missions for that organisation.

¹⁴⁴ Plattner, ‘ICRC neutrality and neutrality in humanitarian assistance’ (n 125) 177-178.

This particular issue will be dealt with extensively at a later stage, as issues relating to state sovereignty are a continuous thread in the discussion of the legal framework on the provision of humanitarian assistance.¹⁴⁵

Remaining within the scope of international humanitarian law, the San Remo Institute has also adopted the abovementioned three principles in its 1993 ‘Guiding Principles on the Right to Humanitarian Assistance’, stressing:

“that humanitarian assistance, both as regards those granting and those receiving it, should always be provided in conformity with the principles inherent in all humanitarian activities, namely the principles of humanity, neutrality and impartiality, so that political considerations should not prevail over these principles”.¹⁴⁶

The Institute furthermore declares that neutrality and impartiality vis-à-vis parties to a conflict must always be upheld in the provision of assistance during an armed conflict.¹⁴⁷ Legal scholarship thereby – through such soft law documents – supports this view of the principle of impartiality.

2.2.3.4 An Alternative: The UN Principles Regarding Humanitarian Assistance

The above Sections have addressed the development of the principles for the provision of assistance in times of conflict. The abovementioned principles have also been widely incorporated in humanitarian assistance outside the scope of armed conflict, for example in relation to the regulation of the provision of humanitarian assistance in the aftermath of natural or other disasters, in particular through the work of the UN warranting some further discussion. Both the principle of humanity and impartiality have been extensively referred to, as well as interestingly the principle of neutrality, which clearly finds its origins in conflict.¹⁴⁸ A first mention of such principles within the context of the UN can be found in some 1970 UN General Assembly Resolutions that declare to be ‘mindful’ of principles adopted by the Red Cross with regard to humanitarian relief the prior year as well as referring to their applicability.¹⁴⁹ The principles referred to by the General Assembly relate to the provision of relief without discrimination, by an impartial organisation, which is to be considered a humanitarian matter.¹⁵⁰ In fact, the General Assembly asserts that the

¹⁴⁵ For an in depth discussion of the problems relating to the delivery of assistance when a sovereign or other party in control of a territory is reluctant or unwilling to allow entry and access of humanitarian assistance, see Chapters 7 and 8.

¹⁴⁶ ‘Guiding Principles on the Right to Humanitarian Assistance’ (n 80) preambular § 5.

¹⁴⁷ Ibid Foreword § 3.

¹⁴⁸ Plattner, ‘ICRC neutrality and neutrality in humanitarian assistance’ (n 125) 175.

¹⁴⁹ UNGA Res 2675 (XXV) (9 December 1970) ‘Basic principles for the protection of civilian populations in armed conflict’ § 8 and UNGA Res 2717 (XXV) (15 December 1970) ‘Assistance in cases of natural disaster’, Preambular § 4.

¹⁵⁰ ‘Declaration of principles for international humanitarian relief to the civilian population in disaster situations’ XXVth International Conference of the Red Cross, Resolution XXVI (Istanbul September 1969) § 2 and §4.

principles shall apply equally to circumstances of natural disaster and conflict.¹⁵¹ The (failed) UN 1984 Draft Convention on Expediting the Delivery of Emergency Relief proposed that relief consignments and services be of an ‘exclusively humanitarian and non-political character provided to meet the needs of those affected by disasters’.¹⁵² As can be derived from the above, the scope of this Draft Convention lay outside international humanitarian law, focusing on disasters of a natural or other kind.¹⁵³ Furthermore, the Draft Convention declared that the provision of assistance should occur without discrimination.¹⁵⁴ In 1988 a clear reference to the principles of humanity, impartiality and neutrality occurred for the first time, as the UN General Assembly stated in its Resolution ‘Humanitarian Assistance to victims of natural disasters and similar emergency situations’:

“recalling that, in the event of natural disasters and similar emergency situations, the principles of humanity, neutrality and impartiality must be given utmost consideration by all those involved in providing humanitarian assistance”.¹⁵⁵

Following this Resolution, the General Assembly posed in 1990 that efficiency and speed of assistance often depend on organisations working ‘in an impartial manner and with strictly humanitarian motives’, as well as recognising the important contributions made by this manner of work.¹⁵⁶ Only one year later, the General Assembly fortified its earlier statements and declared:

“humanitarian assistance must be provided *in accordance with* the principles of humanity, neutrality and impartiality”.¹⁵⁷

During the 1990s several ensuing resolutions affirmed the importance the UN attaches to the principles of humanity, impartiality and neutrality.¹⁵⁸

¹⁵¹ UNGA Res 2675 (XXV) (9 December 1970) § 8.

¹⁵² UNGA Res 39/367 ‘Draft Convention on Expediting the Delivery of Emergency Relief’ (n 38) Article 1 (a).

¹⁵³ Article 1(b) of the Draft Convention on Expediting the Delivery of Emergency Relief states: “‘Disaster’ means any natural, accidental or deliberate event (not being an ongoing situation or armed conflict) as a result of which assistance is needed from outside the State upon whose territory the event occurred or which has been affected by the consequences of the event”. A more in depth discussion of the concept of a natural disaster can be found in Section 3.2.5 Defining a (Natural) Disaster .

¹⁵⁴ UNGA Res 39/367 ‘Draft Convention on Expediting the Delivery of Emergency Relief’ (n 38) Article 5 (c).

¹⁵⁵ UNGA Res 43/131 (8 December 1988) UN Doc A/RES/43/131 ‘Humanitarian Assistance to victims of natural disasters and similar emergency situations’ Preambular § 12.

¹⁵⁶ UNGA Res 45/100 (14 December 1990) UN Doc A/RES/45/100 ‘Humanitarian Assistance to victims of natural disasters and similar emergency situations’, Preambular § 11 and operational § 3.

¹⁵⁷ UNGA Res 46/182 (19 December 1991) UN Doc. A/RES/46/182 (n 46) § 2. [*Emphasis added EEK*]

¹⁵⁸ UNGA Res 48/57 (14 December 1993) UN Doc A/RES/48/57, ‘Strengthening the coordination of humanitarian emergency assistance of the United Nations’ § 18; and UNGA Res 49/139 (20 December 1994) UN Doc A/RES/49/139 ‘Strengthening the coordination of humanitarian emergency assistance of the United Nations’ § 3.

Interestingly, in 2004 the General Assembly not only reaffirmed the abovementioned principles, but also addressed a *new* principle relevant to the provision of humanitarian assistance, namely the principle of ‘independence’:

“Reaffirming the principles of neutrality, humanity and impartiality for the provision of humanitarian assistance, Recognizing that *independence*, meaning the autonomy of humanitarian objectives from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented, is also an important guiding principle for the provision of humanitarian assistance”.¹⁵⁹

In a following resolution, all four principles, including the newly phrased principle of independence, are subsequently reaffirmed by the General Assembly as relevant to the provision of humanitarian assistance.¹⁶⁰ Thus, independence as a principle is related to the provision of humanitarian assistance by the UN General Assembly, whilst the actor providing the actual assistance in question might also be concerned with certain other objectives.

In this sense, the definition is somewhat similar to Plattner’s perspective in international humanitarian law that an actor does not necessarily have to be neutral, as long as the humanitarian assistance itself is neutral.¹⁶¹ This principle of independence as coined by the UN also finds some overlap with the Red Cross’ principle of neutrality, whilst the Red Cross’ notion of independence is somewhat different.¹⁶² Whereas from the UN’s perspective the *objectives* must be independent; the Statutes of the Red Cross Movement state that the National Societies of the Red Cross *themselves* must maintain their autonomy.¹⁶³ This refers to political, economic and religious autonomy, which as an essential derivative principle, at the same time guarantees the neutrality of the ICRC.¹⁶⁴ Thus, where neutrality for the Red Cross entails to refrain from any political or otherwise explicit acts or statements, *independence* means that the authorities of the territories in which the National Societies are established must abstain from any interference with the work and functioning of these Societies, to enable them to act impartially without interference.¹⁶⁵ The differences in perspectives of both principles of independence can be derived from the difference in *addressees*. The UN addresses states in its resolutions, whilst the ICRC addresses its own National Societies. Both perspectives are not necessarily contradictory, given the difference in addressees, as well as the

¹⁵⁹ UNGA Res 58/114 (5 February 2004) UN Doc A/RES/58/114 ‘Strengthening the coordination of humanitarian emergency assistance of the United Nations’ Preambular § 4 and 5. [*Emphasis added EEK*]

¹⁶⁰ UNGA Res 60/124 (8 March 2006) UN Doc A/RES/60/124 ‘Strengthening the coordination of humanitarian emergency assistance of the United Nations’ Preambular § 4.

¹⁶¹ Plattner, ‘ICRC neutrality and neutrality in humanitarian assistance’ (n 125) 178.

¹⁶² See the Statutes of the International Red Cross and Red Crescent Movement, (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006) concerning the definition of the principle of Independence.

¹⁶³ *Ibid.*

¹⁶⁴ Pictet, ‘1979 Commentary to the Fundamental Principles of the Red Cross’ (n 113) (Principle of Independence).

¹⁶⁵ *Ibid.*

fact that the UN's notion of 'independence' is to a certain extent also expressed in the Red Cross principle of neutrality, a principle also adhered to by the UN in its resolutions.¹⁶⁶ However, given the discrepancy between the two definitions of the principle of independence, it is therefore not possible to derive one single definition of the principle of independence, applicable to the provision of humanitarian assistance, as the two major actors, the UN and the Red Cross, both hold different views of what this principle entails. Thus, although the UN commenced by incorporating the principles as defined by the Red Cross, it has continued to develop its own definition of the principle of independence. This development has then led to proliferation of principles, and more uncertainty as to their content.

Within the UN framework the concept of 'human security' has also been coined, in the United Nations Development Programme's 1994 'Human Development Report', stating that – although related to development – human security is a more narrow, centred and universal concept with an interdependent approach.¹⁶⁷ In 2005, in the World Summit Outcome Document, the UN accepted the concept, with a view to further clarifying it:

“We stress the right of people to live in freedom and dignity, free from poverty and despair. We recognize that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential. To this end, we commit ourselves to discussing and defining the notion of human security in the General Assembly”.¹⁶⁸

Given this explanation, the notion of human security exists of course in close relationship with the principle of humanity discussed above. It is precisely this common denominator of humankind that forms the foundation and supports the legal framework on the provision of humanitarian assistance. Furthermore, the principles for the provision of assistance, as recognised not only by the ICRC but also the UN and the ICJ exclude the concept of so-called 'conditional' humanitarian assistance, in which the receipt of aid is based on the fulfillment of certain conditions or obligations. This has also been asserted by the Security Council on recent occasions, where the Council has stressed the need to uphold 'humanitarian principles', whilst condemning the 'politicization', 'misuse' and 'misappropriation' thereof.¹⁶⁹

¹⁶⁶ UNGA Res 43/131 (8 December 1988) UN Doc A/RES/43/131 (n 155) Preambular § 12; UNGA Res 46/182 (19 December 1991) UN Doc. A/RES/46/182 (n 46) § 2; UNGA Res 48/57 (14 December 1993) UN Doc A/RES/48/57 (n 158) § 18; UNGA Res 49/139 (20 December 1994) UN Doc A/RES/49/139 (n 158) § 3.

¹⁶⁷ 'Human Development Report' United Nations Development Programme (UNDP) (Oxford University Press 1994) 22-33.

¹⁶⁸ UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 'World Summit Outcome Document' § 143.

¹⁶⁹ See amongst others UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100 preamble § 8; and UNSC Res 2060 (25 July 2012) UN Doc S/RES/2060 § 5.

2.2.3.5 Other Perspectives on the Principles for Providing Humanitarian Assistance

In his research into the ‘Protection of persons in the event of disasters’, the Special Rapporteur of the UN International Law Commission has suggested that Draft Article 7 states:

“Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable”.¹⁷⁰

With regard to these principles, the ILC’s discussion of the Draft Article had noted several different viewpoints on their relationship and their possible applicability to situations of natural disaster, but the Article has remained unchanged to date.¹⁷¹ Not only has the ILC incorporated these humanitarian principles and included the non-discriminatory basis upon which the provision of humanitarian assistance must take place, the Draft Articles also consider the concept of human dignity, stating in Draft Article 5:

“In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person”.¹⁷²

The ILC Draft Articles are thereby taking an inclusive approach; also incorporating concepts originally from humanitarian law although the Draft Articles themselves are restricted to circumstances other than conflict.

Although the UN is one of the major actors next to the ICRC in the provision of humanitarian assistance, other actors have also incorporated the various abovementioned principles relevant to the provision of humanitarian assistance, as well as many of the available soft law mechanisms and resolutions concerning humanitarian assistance.¹⁷³ Such soft law examples include Macalister-Smith’s 1991 Guidelines that argue that assistance provided should be of an exclusively humanitarian character, and that its provision should be ‘on an impartial basis without any adverse distinction to all persons in urgent need’.¹⁷⁴ Also, the ‘Mohonk Criteria for Humanitarian Assistance in Complex Emergencies’ (Mohonk Criteria) formulated in 1994 by the ‘Task force on Ethical and Legal issues in Humanitarian

¹⁷⁰ ILC ‘Protection of persons in the event of disasters: Texts and titles of the draft articles adopted by the Drafting Committee on first reading’ Draft Article 7 ‘Humanitarian principles’ UN Doc. A/CN.4/L.831 (15 May 2014).

¹⁷¹ ILC ‘Report of the International Law Commission’ UN Doc A/65/10 (3 May – 4 June, 5 July – 6 August 2010) § 309-313.

¹⁷² ILC ‘Protection of persons in the event of disasters’ Draft Articles UN Doc. A/CN.4/L.831 (15 May 2014).

¹⁷³ For a detailed discussion of the various actors relevant to the provision of humanitarian assistance, see Section 2.3.2 Providers of Humanitarian Assistance.

¹⁷⁴ Macalister-Smith’ ‘International Guidelines for Humanitarian Assistance Operations (n 79) Article 2(a) and Article 6(a).

Assistance’,¹⁷⁵ adopt the principles of humanity, impartiality and neutrality as developed by the ICRC, as well as a principle similar to its notion of independence.¹⁷⁶ However, the Mohonk Criteria furthermore add the principle of ‘empowerment’ to the aforementioned principles, declaring this to entail an effort for local institutions to build on the steps taken with humanitarian assistance to continue with reconstruction and development.¹⁷⁷ Thereby the Mohonk Criteria pursue a wider concept of humanitarian assistance than other organisations or resolutions have envisaged. Interestingly, the 2003 Bruges Resolution of the Institut de Droit International / Institute of International Law is not outspoken in this regard, declaring only that the provision humanitarian assistance must occur with an ‘exclusively humanitarian character’, as well as stating in general that the resolution is without prejudice to principles of international humanitarian law, yet not naming any specific principles.¹⁷⁸

Furthermore, the European Community (EC)¹⁷⁹ as an actor also adhered to the principle of impartiality, as well as the provision of aid without discrimination in its 1996 regulation concerning humanitarian assistance.¹⁸⁰ This approach was followed by the European Union (EU) in its 2008 ‘European Consensus on Humanitarian Aid’ declaring the principles of humanity, neutrality and impartiality to be fundamental principles of humanitarian assistance and also adhering to the UN’s abovementioned notion of independence as a principle.¹⁸¹ However, with the new Treaty on the Functioning of the European Union, Article 214 now stipulates that assistance provided by the EU shall comply with international law and the principles of ‘impartiality, neutrality and non-discrimination’.¹⁸² Thus, whilst incorporating ‘non-

¹⁷⁵ The Mohonk Criteria were developed in February 1994 by the ‘Task force on Ethical and Legal issues in Humanitarian Assistance’, established at the World Conference on Religion and Peace, during the ‘Program on Humanitarian Assistance’, under the lead of then UN affiliate J.M. Ebersole.

¹⁷⁶ ‘The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies’, (1995) reprinted in 17 *Human Rights Quarterly* 1, 196-197.

¹⁷⁷ *Ibid* 197.

¹⁷⁸ Bruges Resolution ‘Humanitarian Assistance’ (2 September 2003) (n 82) § I.1 and § X.a.

¹⁷⁹ For a more in depth discussion of the role of the European Community and Union as an actor within the provision of humanitarian assistance, see Section 2.3.2.2. International Organisations.

¹⁸⁰ European Council Regulation concerning humanitarian aid (EC) No. 1257/96 (20 June 1996) preambular § 10 and § 11.

¹⁸¹ ‘Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission’ (European Consensus on Humanitarian Aid) (30 January 2008) EU Doc 2008/C/25/01 § 10-14.

¹⁸² The full text of Article 214 of the Treaty on the Functioning of the European Union states: “1. The Union’s operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union. Such operations shall be intended to provide ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations. The Union’s measures and those of the Member States shall complement and reinforce each other. 2. Humanitarian aid operations shall be conducted in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination. 3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures defining the framework within which the Union’s humanitarian aid operations shall be implemented. 4.

discrimination' similarly to the ILC, the principle of humanity has been left out of this provision, although the final paragraph dictates that the aid provision of the EU shall have to be in conformity with that of the UN, thereby incorporating the principle in a backhand manner.

Most recently, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) declared an obligation for state parties to uphold and ensure respect for the principles of humanity, impartiality and neutrality, as well as independence of the humanitarian actors.¹⁸³ In a reciprocal manner, those organisations and actors providing assistance are themselves bound by the abovementioned principles.¹⁸⁴ This Convention, dating from 2009, recently entered into force in 2012.¹⁸⁵ Following from the above, it has become apparent that also outside the sphere of international humanitarian law the principles of humanity, impartiality and neutrality have been embraced on a large scale, with more recent developments including the notion of non-discrimination.

From the above analysis, a concise and narrow definition of humanitarian assistance can be discerned. Establishing such a definition is not only relevant to the purposes of this research, but can also clarify ambiguities between various actors in this field. Furthermore, clearly establishing the objectives and purpose of humanitarian assistance protects it from 'abuse' by certain actors for other goals.¹⁸⁶ Concluding, for the purpose of this research, humanitarian assistance can be defined as 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.¹⁸⁷ The main objective of humanitarian assistance can also be established, namely the alleviation of human suffering, and the purpose of saving lives.

Furthermore, the manner in which this assistance is provided must at least be in conformity with the principles of humanity, neutrality and impartiality. The ICRC's

The Union may conclude with third countries and competent international organisations any agreement helping to achieve the objectives referred to in paragraph 1 and in Article 21 of the Treaty on European Union. The first subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude agreements. 5. In order to establish a framework for joint contributions from young Europeans to the humanitarian aid operations of the Union, a European Voluntary Humanitarian Aid Corps shall be set up. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall determine the rules and procedures for the operation of the Corps. 6. The Commission may take any useful initiative to promote coordination between actions of the Union and those of the Member States, in order to enhance the efficiency and complementarity of Union and national humanitarian aid measures. 7. The Union shall ensure that its humanitarian aid operations are coordinated and consistent with those of international organisations and bodies, in particular those forming part of the United Nations system".

¹⁸³ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala 22 October 2009) Article 5(8).

¹⁸⁴ Ibid Article 6(3).

¹⁸⁵ In 2014, although all African Union members have signed the Kampala Convention, 22 member states had ratified the Convention. <http://www.au.int/en/sites/default/files/Convention%20on%20IDPs%20-%20displaced..._0.pdf> accessed 9 September 2014. The Convention entered into force 6 December 2012.

¹⁸⁶ Frances Stevenson & Joanna Macrae, 'Legislating for humanitarian aid', (2002) 21 *Humanitarian Exchange Magazine*, 34-35.

¹⁸⁷ See Section 2.2.2 Defining Humanitarian Assistance.

definition of the principle of independence is somewhat different from the UN's view of the same principle, preventing the further incorporation of this principle into the above definition of humanitarian assistance that is based purely on common ground amongst all actors. However, the principle of independence remains an equally relevant principle as a whole to most actors in the field. The concept of non-discrimination has been brought to the forefront more recently through the EU and ILC initiatives. As ever, the law does not operate in a vacuum. Whilst these principles are the legal basis upon which assistance may be provided, this unfortunately does not preclude an affected state from sometimes arguing that certain providers of assistance might not satisfy their view of the content of these provisions.

2.3 Actors Involved in Humanitarian Assistance

From the above Section on the manner in which assistance is provided, it becomes clear that the ICRC and other organisations distinguish several principles, amongst which the principle of humanity in their provision of assistance to those in need. When discussing humanitarian assistance, it is relevant to establish clearly to whom this assistance is provided. Although many may automatically assume that assistance is provided to certain victims, or a civilian population, it is necessary to briefly establish on what basis such an assumption is made.

2.3.1 Recipients of Humanitarian Assistance

With regard to humanitarian assistance in times of armed conflict or occupation, the Geneva Conventions and their Additional Protocols stipulate that the provision of humanitarian assistance must occur to a 'civilian population'.¹⁸⁸ This excludes prisoners of war from the receipt of humanitarian assistance, as many tailored provisions exist within humanitarian law for their specific protection.¹⁸⁹ The civilian population must furthermore be distinguished from civilians as 'protected persons' as mentioned in the Geneva Conventions, for which the Conventions also provide specifically.¹⁹⁰ A distinction must also be made between the civilian population and

¹⁸⁸ See amongst others Articles 10 and 55 GC IV; Article 69 AP I; Article 18 AP II.

¹⁸⁹ Note in particular GC III: Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950.

¹⁹⁰ Article 4 GC IV states in regard to protected persons: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. The provisions of Part II are, however, wider in application, as defined in Article 13. Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall not be considered as protected persons

‘internees’, although such internees may be civilians.¹⁹¹ According to Article 50 AP I:

“1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. 2. The civilian population comprises all persons who are civilians. 3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”.¹⁹²

Thus, within the Geneva Conventions and their Protocols, a presumption exists to consider a population as a ‘civilian population’ unless it can be otherwise defined. Furthermore, if individuals within that population cannot be considered civilians, humanitarian assistance can still be provided as the population in general is not deprived of its civilian character. As the abovementioned Section 2.2.3 has discussed, humanitarian assistance may only be provided in accordance with the principles of humanity, neutrality and impartiality. The distinction between civilians and combatants therefore remains relevant to date in relation to the principle of neutrality, as well as to specifically defining a civilian population.¹⁹³

Clearly, this distinction between civilians and combatants is only relevant to the situation of an international armed conflict or occupation, whereas the provision of humanitarian assistance is broader; also encompassing circumstances outside of conflict, such as man-made or natural disasters. Arguably, today the distinction made by the Geneva Conventions regarding ‘categories’ of civilians is not as relevant, due to the changing nature of conflict increasingly towards non-international armed conflicts, which results in less distinct groups of civilians.¹⁹⁴ Yet, Article 50 AP I regarding international armed conflicts also acknowledges this changing nature, as its final paragraph refers to the possible presence of combatants among the civilian population, something occurring more and more frequently in modern warfare. The provision of humanitarian assistance to the civilian population thereby remains protected under international law and the provider of assistance must do everything in its power to respect the principle of neutrality.¹⁹⁵

within the meaning of the present Convention”. For a discussion on the categories of ‘protected persons’ mentioned in Article 4 of GC IV, see Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949 Volumes I-IV* (International Committee of the Red Cross 1952-1959), Volume IV Commentary GC IV Article 4, 46-51.

¹⁹¹ The Geneva Conventions provide specifically for internees, amongst others in Articles 108-111 GC IV.

¹⁹² Article 43 AP I refers to those persons who are members of the armed forces, and the persons in Article 4 A (1), (2), (3) and (6) refer to several categories of prisoners of war.

¹⁹³ Abril Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps’ (n108) 542.

¹⁹⁴ Mackintosh, ‘The Principles of Humanitarian Action in International Humanitarian Law’ (n 110) 5

¹⁹⁵ Abril Stoffels, ‘Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps’ (n108) 542

The United Nations refers to a variety of subjects of humanitarian assistance, although all can be considered part of a civilian population. As such, UN resolutions refer to ‘victims’ or ‘affected populations’ of natural disasters or of other emergencies,¹⁹⁶ as well as ‘civilians’ or ‘civilian populations’ which should include ‘refugees and internally displaced persons’.¹⁹⁷ This line of reasoning by the UN follows the Guiding Principles on Internal Displacement that, although non-binding, are implemented by key actors in the field and provide that IDPs are subjects of the provision of humanitarian assistance when affected by a natural or man-made disaster.¹⁹⁸ Refugees and IDPs can be considered a distinct category of persons in international law, but are included in the recipients of humanitarian assistance.¹⁹⁹ The

¹⁹⁶ UNGA Res 46/182 (19 December 1991) UN Doc. A/RES/46/182 (n 46) § 1 and 4.

¹⁹⁷ UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 § 7; UNGA Res 52/167 (18 February 1998) UN Doc A/RES/52/167 ‘Safety and security of humanitarian personnel’ § 3; UNGA Res 53/87 (27 January 1999) UN Doc A/RES/53/87 ‘Safety and security of humanitarian personnel and protection of United Nations personnel’ § 11; UNGA Res 60/124 (8 March 2006) UN Doc A/RES/60/124 (n 160) § 2; UNGA Res 61/133 (1 March 2007) UN Doc A/RES/61/133 ‘Safety and security of humanitarian personnel and protection of United Nations personnel’ § 4; UNGA Res 62/94 (25 January 2008) UN Doc A/RES/62/94 ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations’ § 24; UNGA Res 63/139 (5 March 2009) UN Doc A/RES/63/139 ‘Strengthening of the coordination of humanitarian and disaster relief assistance of the United Nations, including special economic assistance: strengthening of the coordination of emergency humanitarian assistance of the United Nations’ § 25.

¹⁹⁸ ‘Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39’, Addendum ‘Guiding Principles on Internal Displacement’ (Guiding Principles on IDPs) (11 February 1998) UN Doc E/CN.4/1998/53/Add.2, Principle 3. The Guiding Principles are supported by the United Nations offices UNHCR and OHCHR, and furthermore the UN General Assembly declared in § 7 of UNGA Res 58/177 (12 March 2004) UN Doc A/RES/58/177 ‘Protection of and assistance to internally displaced persons’ that it ‘Expresses its appreciation of the Guiding Principles on Internal Displacement as an important tool for dealing with situations of internal displacement’. The former UN Special Rapporteur on the Human Rights of Internally Displaced Persons Walter Kälin has furthermore declared in his final ‘Report of the Representative of the Secretary-General on the human rights of internally displaced persons’, UN Doc A/HRC/13/21 (5 January 2010) § 10 that: “The Guiding Principles reflect and are consistent with international human rights and humanitarian law, restating existing norms and tailoring them to the needs of the displaced”. Furthermore the General Assembly has continued to embrace the Guiding Principles, amongst others in UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 ‘World Summit Outcome Document’ § 132 where the General Assembly recognises the Principles as an “important international framework for the protection of internally displaced persons”, a phrasing that is echoed by UNGA Res 60/124 (8 March 2006) UN Doc. A/RES/60/124 (n 160) § 6; UNGA Res 60/168 (7 March 2006) A/RES/60/168 ‘Protection of and assistance to internally displaced persons’ § 8; and UNGA Res 62/153 (6 March 2008) UN Doc. A/RES/62/153, ‘Protection of and assistance to internally displaced persons’ § 10; as well as UN HRC Res 6/32 (14 December 2007) A/HRC/6/32 § 5.

¹⁹⁹ Article 1 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention) declares anyone to be a refugee who: “(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section; (2) As a result of events occurring before 1 January 1951 and owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail

inclusion of IDPs as the recipients of humanitarian assistance flows from the increase of many internal disturbances and non-international armed conflicts during the 1990s, in which affected persons, although in need of aid, could not be granted the status of refugees as there was no crossing of borders involved.²⁰⁰ Furthermore, their situation often arises both from an ongoing situation, and in the aftermath of an event such as a natural disaster. To avoid gaps in the protection of such affected persons the UN High Commissioner for Refugees (UNHCR), followed by the Security Council, commenced incorporating the protection of IDPs in their mandate and actions.²⁰¹ The Guiding Principles on IDPs interestingly refer specifically to women, children and other vulnerable groups, stating that their special needs entitle them to protection that takes this status into account.²⁰²

Like the UN, the International Law Association (ILA) adopted a position with regard to IDPs.²⁰³ The ILA asserted in 2000 that all IDPs have the right to seek and receive humanitarian assistance.²⁰⁴ For the purpose of this research, refugees and IDPs will like other civilians be considered the subjects of humanitarian assistance, unless a separate discussion is warranted and relevant to the legal rights and obligations specific to their status. It remains to be noted however that the provision

himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national”. A thorough discussion of the notion of a refugee falls outside the scope of this research. For further reading, see Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press 2007) and Erika Feller, Volker Türk, Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003). Currently, no legal binding definition of IDPs exists, nor any legal binding document governing their status. The ‘Guiding Principles on Internal Displacement’ (11 February 1998) UN Doc E/CN.4/1998/53/Add.2 (n 198) declare in Preambular § 2 that: “For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border”. Furthermore, the African Union Kampala Convention on IDPs echoes this definition by the ‘Guiding Principles on Internal Displacement’ in its Article 1(k). For further reading, see Catherine Phuong, *The International Protection of Internally Displaced Persons* (Cambridge University Press 2004).

²⁰⁰ Roberta Cohen, ‘Humanitarian Imperatives are Transforming Sovereignty’, (2008) 9 *Northwestern Journal of International Affairs* 1, 3-4.

²⁰¹ Ibid 4-5, and Roberta Cohen & Francis Mading Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Brookings Institution Press 1998) 120.

²⁰² ‘Guiding Principles on Internal Displacement’ (11 February 1998) UN Doc E/CN.4/1998/53/Add.2 (n 198) Principle 18(3) and 19(2).

²⁰³ The International Law Association, founded in 1873 in Brussels is an NGO founded with the purpose to further the understanding and respect of (public and private) international law, as well as its study, clarification and development. For more information, see <<http://www.ila-hq.org/index.cfm>> accessed 5 January 2012.

²⁰⁴ ILA Declaration of International Law Principles on Internally Displaced Persons (29 July 2000) Article 3 (2). The possible right to receive humanitarian assistance will be discussed more in depth in Chapter 6.

of humanitarian assistance is aimed at such a stage in a crisis so as to prevent large-scale displacement and refugees, thereby not warranting an in depth discussion of many particular provisions of refugee law and other bodies of law specific to IDPs and refugees.

The ILC, in its study into the protection of persons in the event of disasters also studied the recipients of humanitarian assistance in order to assess which category of persons should fall within its scope of application. The ILC noted that being affected by natural disasters is not considered a criterion for the attribution of the status of refugee, although it is precisely such disasters that result in the generation of large numbers of refugees and IDPs.²⁰⁵ As the ILC notes, being affected by a disaster at this point in time does not represent a separate legal category in international law.²⁰⁶ With this consideration, the ILC concludes that the current study and the draft articles it is developing shall ‘apply to the protection of persons in the event of disasters’.²⁰⁷ Thereby the ILC chooses not to distinctly define which categories of persons fall within these ‘persons’ who may be protected through humanitarian assistance. Certainly, this broad approach will enable the widest array of persons to be eligible to fall under the ILC’s scope of protection.

Likewise, the European Community also makes reference to victims and vulnerable groups, declaring that assistance shall be provided to:

“people in third countries, particularly the most vulnerable among them, and as a priority those in developing countries, victims of natural disasters, man-made crises, such as wars and outbreaks of fighting, or exceptional situations or circumstances comparable to natural or man-made disasters”.²⁰⁸

Similar to the European Community before it, the EU stated in 2008 that civilians are the main victims of humanitarian crises, in particular the ‘most vulnerable among them’ as well as generating large numbers of refugees and IDPs.²⁰⁹

Furthermore with a view to soft law initiatives, like the early UN resolutions, the Institute of International Law, in its 2003 Bruges Resolution also refers to the notion of victims, as a group of persons ‘whose fundamental human rights or whose essential needs are endangered’.²¹⁰

²⁰⁵ ILC ‘Preliminary report on the protection of persons in the event of disasters’ UN Doc. A/CN.4/598 (n 76) § 27-28.

²⁰⁶ *Ibid* § 50.

²⁰⁷ ILC ‘Protection of persons in the event of disasters’ Draft Articles UN Doc. A/CN.4/L.831 (15 May 2014) Draft Article 1: “The present draft articles apply to the protection of persons in the event of disasters”.

²⁰⁸ European Council Regulation concerning humanitarian aid (EC) No. 1257/96 (20 June 1996) Article 1.

²⁰⁹ ‘Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission’ (European Consensus on Humanitarian Aid) (30 January 2008) EU Doc 2008/C/25/01, § 2.

²¹⁰ Bruges Resolution ‘Humanitarian Assistance’ (2 September 2003) (n 82) §3.

It can be concluded that the subjects and recipients of humanitarian assistance, regardless of the specific circumstances they may find themselves in (such as conflict or natural disaster) are civilians, including particularly vulnerable groups such as refugees and IDPs. Although the Guiding Principles on IDPs make a separate reference to groups with special needs, such as women and children, this is not common to the discussion of the subjects of humanitarian assistance.

2.3.2 Providers of Humanitarian Assistance

In previous Sections, various organisations involved in the provision of humanitarian assistance have already been touched upon, as well as the manner in which humanitarian assistance must be provided. At this stage, it is important to look into these organisations in more depth, including the particular roles they fulfill in the delivery of humanitarian assistance. In this Section a basic overview of the various relevant actors in the *provision* of humanitarian assistance will be provided in a more comprehensive manner, namely the ‘affected state’, international organisations and NGOs, and third states. As such, this Section shall commence by addressing the actor that is often considered the primary responsible provider of assistance: the ‘affected state’. The affected state holds a particularly special and delicate position and therefore a greater focus will be placed on its specific responsibilities and duties in the following Chapters as an in depth analysis of an affected states’ duties and rights will not be pursued at this stage.

2.3.2.1 The Affected State

Whether humanitarian assistance is provided or not, is often directly related to the possibilities and willingness of the affected state to do so itself. As the sovereign authority in the particular area where the assistance is needed, its role cannot be overlooked or surpassed. In fact, the affected state can be both a vehicle and an obstacle in the provision of assistance.²¹¹ The Geneva Conventions do not make use of the particular phrasing ‘affected state’, as it is mostly derived from situations of (natural) disaster, but by analogy it can be applicable to circumstances of conflict too, as the sovereign over a territory in which a conflict takes place shall be the primary ‘affected’ actor, for a variety of reasons amongst which simply the matter of vicinity and sovereign responsibility.²¹² Although no specific mention is made of the ‘affected state’, the Geneva Conventions did foresee a role for authorities in territories dealing with a situation of potential crisis, where assistance may be needed. Article 59 GC IV mentions for example that an ‘Occupying Power’ is to allow for assistance in the occupied territories, as well as facilitate such assistance.²¹³ Staying

²¹¹ See Chapter 4 State Sovereignty as a Contextual Concept regarding Humanitarian Assistance, for a discussion of sovereignty as such an obstacle or vehicle.

²¹² For considerations into primary responsibility, see Chapter 6.

²¹³ Article 59 GC IV states: “If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall

within the realm of occupation, the Geneva Conventions furthermore provide a role for the delivery of humanitarian assistance for many other actors:

“The distribution of the relief consignments referred to in the foregoing Articles shall be carried out with the cooperation and under the supervision of the Protecting Power. This duty may also be delegated, by agreement between the Occupying Power and the Protecting Power, to a neutral Power, to the International Committee of the Red Cross or to any other impartial humanitarian body [...]”.²¹⁴

As such, the Conventions acknowledge the possibility of the provision of assistance by third states, the ICRC or another neutral organisation.

Returning to the ‘affected state’, the Geneva Conventions’ Common Article 3 lays an obligation on all ‘parties to the conflict’ to take certain minimum requirements.²¹⁵ For the purpose of this Section, it is relevant to note that these parties include not only states, but also armed groups and other forces involved in a non-international armed conflict.²¹⁶ Additional Protocol I, relating to international armed conflicts, similarly mentions a role for ‘the Parties to the conflict’ as well as ‘each High Contracting Party’, wording also used by the Additional Protocol II in relation to non-international armed conflicts.²¹⁷ Although not hard law, but voicing international legal scholarship, the San Remo Principles formulated:

“The primary responsibility to protect and assist the victims of emergencies is that of the authorities of the territory in which the emergency causing urgent humanitarian needs occurs”.²¹⁸

Thus, like the Geneva Conventions, in particular their 1977 Protocols, the San Remo Principles envisaged that not only a state sovereign may function as the highest authority within a certain territory, but in certain territories this role may be taken by some other form of authority.

Outside the realm of international humanitarian law and focusing more on situations of (natural) disaster, the UN General Assembly has also reaffirmed the

facilitate them by all the means at its disposal. Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing. All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection. A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power”. See also Section 6.5.3 Duties of the Affected State (Occupying Power) in Times of Occupation for the particular duties of an occupier.

²¹⁴ Article 61 GC IV.

²¹⁵ For the full text of Common Article 3 of the Geneva Conventions see (n 119).

²¹⁶ See Section 3.2.1 Defining an Armed Conflict on the definition of a non-international armed conflict and actors involved therein.

²¹⁷ Article 70 AP I and Article 18 AP II.

²¹⁸ ‘Guiding Principles on the Right to Humanitarian Assistance’ (n 80) Principle 4.

primary role of the affected state in many of its resolutions, with a view to its tasks as a sovereign.²¹⁹ In more recent years, the ILC has also considered the ‘affected state’ as holding a primary position in the provision of humanitarian assistance in the event of disasters and as such has drafted:

“1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. 2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance”.²²⁰

Thereby the ILC, in line with the UN General Assembly, maintains this primary role for the affected state, as well as granting it a coordinating role, thus acknowledging the possibility of assistance from the exterior.²²¹ This viewpoint had already been adopted by the ILC at an earlier stage of its research, as it argued that ‘outside actors’ could play a considerable role in the provision of assistance.²²²

The IFRC has, unlike the UN General Assembly and the ILC, opted to provide a definition of such an affected state, and has declared it to be:

“The State upon whose territory persons or property are affected by a disaster”.²²³

As discussed, it may be assumed that the affected state undertakes its allotted role and task in the event of a (natural) disaster more willingly, as opposed perhaps to an unwilling attitude in a situation of armed conflict or occupation in which assistance may be necessary, but further Sections will show that such an assumption must not be made lightly.²²⁴ A well-known recent example is that of cyclone Nargis, where the authorities in Myanmar were unwilling to allow the provision of humanitarian assistance for a prolonged period of time.²²⁵

²¹⁹ Amongst others in UNGA Res 36/225 (17 December 1981) UN Doc A/RES/36/225 ‘Strengthening the Capacity of the United Nations system to respond to natural disasters and other disaster situations’ § 2; UNGA Res 45/100 (14 December 1990) UN Doc A/RES/45/100 (n 156) Preambular § 2 and Operative § 2; and UNGA Res 46/182 (19 December 1991) UN Doc. A/RES/46/182 (n 46) Guiding Principle 4. See for more specific duties Section 6.3.3 Duties of the Affected State under General Assembly Resolutions.

²²⁰ ILC ‘Protection of persons in the event of disasters’ Draft Articles UN Doc. A/CN.4/L.831 (15 May 2014) Draft Article 12.

²²¹ See for more specific duties Section 6.3.3 Duties of the Affected State under General Assembly Resolutions. In further Sections, an in depth discussion of the relationship between sovereignty and the provision of humanitarian assistance will take place, as well as a more in depth view of the responsibilities of the affected state.

²²² ILC ‘Protection of persons in the event of disasters, Memorandum by the Secretariat’ UN Doc A/CN.4/590 (11 December 2007) § 250.

²²³ IFRC ‘Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance’ (IDRL Guidelines) (30 November 2007), adopted at the 30th International Conference of the Movement, Section 2, § 8.

²²⁴ See in particular Chapter 4 State Sovereignty as a Contextual Concept regarding Humanitarian Assistance.

²²⁵ Reports of the Myanmar government refusing external delivery of aid can be found at: <<http://www.hrw.org/news/2010/04/29/burma-after-cyclone-repression-impedes-civil-society-and-aid>>

Most other institutions and actors have attempted to abstract the concept of the affected state from a particular situation such as conflict or natural disaster and rather apply the role of primary responsible actor to a range of situations. In doing so, these institutions attempt to provide more regulation for the practical circumstances on the ground, that have proven that humanitarian assistance is certainly not always provided when it is in fact needed. As such, the Institute for International Law declared in its 2003 Bruges Resolution that an affected state is ‘the State or the territorial entity where humanitarian assistance is needed’, without specifying the particular circumstance.²²⁶ The Bruges Resolution emphatically places a primary responsibility on the affected state in the provision of humanitarian assistance, or on another authority that may be exercising jurisdiction in a certain area.²²⁷ Similarly, the Mohonk Criteria envisage the task for the provision of humanitarian assistance to lie firstly with the authorities in the affected state, declaring also that ‘insurgent groups and militias’ should be held to equal standards.²²⁸ Furthermore, Macalister-Smith also noted the primary role as lying with the affected state, keeping in mind that the state may however be limited in its possibilities:

“Primary responsibility for providing humanitarian assistance within the limits of the resources available rests with the national authorities of the State where persons are in need”.²²⁹

In relation to the assistance of the specific category of IDPs, the recently effective 2009 Kampala Convention and the ILA Declaration on IDPs of 2000 both see a primary role for the national authorities of the affected territories, but also include a role for international organisations providing relief.²³⁰ This position can also be seen with the abovementioned Geneva Conventions and the Institute for Humanitarian

0>; <<http://reliefweb.int/report/myanmar/myanmar-cyclone-nargis-ocha-situation-report-no-6>> accessed 2 October 2013.

²²⁶ Bruges Resolution ‘Humanitarian Assistance’ (2 September 2003) (n 82) Section I.4.

²²⁷ Bruges Resolution ‘Humanitarian Assistance’ (2 September 2003) (n 82) Section III on the primary responsibility of the affected State declares “1. The affected State has the duty to take care of the victims of disaster in its territory and has therefore the primary responsibility in the organization, provision and distribution of humanitarian assistance. As a result, it has the duty to take the necessary measures to prevent the misappropriation of humanitarian assistance and other abuses. 2. Any other authority exercising jurisdiction or de facto control over the victims of a disaster (for example in case of disintegration of the governmental authority) has the duty to provide them with the necessary humanitarian assistance, and also has all the other duties and rights of the affected State provided for in this Resolution”.

²²⁸ ‘The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies’, (1995) (n 176) Section II ‘Responsibility to provide assistance during complex emergencies’: “1. Primary responsibility for the protection and wellbeing of civilian populations rests with the government of the state or the authorities in control of the territory in which the endangered persons are located. 2. Insurgent groups and militias should be held to the same standards of responsibility as governments”.

²²⁹ Macalister-Smith ‘International Guidelines for Humanitarian Assistance Operations (n 79) Principle 6(b).

²³⁰ African Union Kampala Convention Article 5(1) and 5(7); ILA Declaration of International Law Principles on Internally Displaced Persons (29 July 2000) Article 10.

Law. The latter envisaged with its San Remo Principles that national and international organisations mandated with the provision of humanitarian assistance should in fact be *able* to provide it.²³¹ Furthermore the Institute for International Law also envisages multiple actors involved in the provision of assistance, other than the affected state or another authority in that territory:

“Assistance may be sought on behalf of the victims, by the members of the group, by local and regional authorities, the government of the affected State, and national or international organizations”.²³²

Thus, most institutions realise that designating a primary role for the affected state in itself is not enough to *ensure* the provision of humanitarian assistance, thereby acknowledging important roles for other actors, such as international organisations and NGOs. This approach in itself hints at a need for *international* assistance in the provision of assistance as is addressed in Chapter 7. Indeed, whilst a primary role for the affected state remains crucial, the changing notion of state sovereignty in the 21st century addresses the difficulties faced in circumstances where an affected state does not provide assistance or provide for its citizens in a broader sense.²³³ The specific legal framework pertaining to the legal rights and duties of the affected state in the provision of humanitarian assistance will be discussed further in Chapter 6. Given the struggles and difficulties states face in times of conflict, as well as the fact that authorities in times of natural disaster are often either overwhelmed or occasionally unwilling to provide assistance, it is indeed logical to turn to providers of humanitarian assistance from either outside the territory that is affected, or national organisations without ties to the affected state.²³⁴ These institutions provide alternative manners for the provision of humanitarian assistance to those in need.

2.3.2.2 International Organisations

The previous Sections have already touched upon various organisations involved in the provision of humanitarian assistance. Furthermore, from the above it has become apparent that, although a primary role is envisaged for the affected states or other authorities acting as such, the ICRC, the UN and other organisations and institutions also play a large role in the provision of such assistance.²³⁵ A distinction must be made between international organisations such as the UN and EU, with both inter-governmental and supranational characteristics, as subjects of international law, and

²³¹ Guiding Principles on the Right to Humanitarian Assistance’ (n 80) Principle 5.

²³² Bruges Resolution ‘Humanitarian Assistance’ (2 September 2003) (n 82) Section II.2.

²³³ The following Chapters will provide an in depth discussion of the relationship between humanitarian assistance and sovereignty.

²³⁴ See UNGA Res 59/141 (25 February 2005) UN Doc A/RES/59/141 ‘Strengthening of the coordination of emergency humanitarian assistance of the United Nations’ § 11-12 referencing the central role played by civilian organisations.

²³⁵ This research will not provide an overview of all organisations involved in the provision of humanitarian assistance. It will merely portray that organisations are involved in humanitarian assistance, and in what manner their involvement is codified in treaties, resolutions or other relevant documents.

non-governmental organisations with a different standing in the international legal arena. Specifically in circumstances of (non-) international conflict, the Geneva Conventions consider a large role for the ICRC, an organisation with a very particular status, as it is neither intergovernmental nor non-governmental.²³⁶ Given the character of this research into the legal framework on the rights and duties under international law in the provision of humanitarian assistance, a focus will be placed upon those organisations with a particular standing or enforcement possibility in international law, in order to assess potential rights and duties that they might have. This is not to say that local NGOs do not play an important role on the ground in the factual distribution of food, water and medicine to those in need of assistance.

The Geneva Conventions and their Additional Protocols refer to the ICRC or another organisation that follows its principles of humanity and impartiality for the provision of humanitarian assistance.²³⁷ In its Articles, the Geneva Conventions and Protocols declare that the ICRC or a comparable humanitarian and impartial organisation may be involved in the provision of humanitarian assistance in times of conflict or occupation amounting to a crisis.²³⁸ Outside the realm of occupation and conflict, resort must be had to sources other than international treaties, to determine the roles laid out for international organisations.

A clear distinction has been made between the work of the ICRC and the IFRC,²³⁹ which also becomes apparent in determining the role of the latter as a provider of humanitarian assistance. The IFRC itself declares:

“The IFRC carries out relief operations to assist victims of disasters [...]. The IFRC's work focuses on four core areas: promoting humanitarian values, disaster response, disaster preparedness, and health and community care”.²⁴⁰

Although the IFRC is the largest humanitarian organisation in the world, with 187 national societies in countries around the globe,²⁴¹ a central role is also played by the UN in the coordination of humanitarian assistance for those in need in the international community. Such a leading and coordinating role was already envisaged by the UN General Assembly in its 1991 Resolution 46/182.²⁴² The Inter-Agency Standing Committee (IASC) was created in 1992, following a call thereto in this prominent Resolution on ‘Strengthening the coordination of humanitarian emergency

²³⁶ See Section 2.3.2.2 International Organisations.

²³⁷ Common Article 3, Articles 10, 59 61 and 63 GC IV; Article 70 AP I; Article 18(2) AP II.

²³⁸ *Ibid.* Further Chapters will discuss the exact status of the rights of such organisations in the provision of humanitarian assistance.

²³⁹ See (n 52) on the tasks and mandate of the ICRC and IFRC, as well as their mutual relationship.

²⁴⁰ For more information on the role and tasks of the IFRC: <<http://www.ifrc.org/en/who-we-are/vision-and-mission/>> accessed 3 January 2011.

²⁴¹ *Ibid.*

²⁴² UNGA Res 46/182 (19 December 1991) UN Doc. A/RES/46/182 (n 46) Annex I, Guiding Principles 5 and 12, and Section VI ‘Coordination, Cooperation and Leadership’.

assistance of the United Nations'.²⁴³ Its envisaged task of being primary coordinator for the UN and other organisations delivering international humanitarian assistance, was confirmed in a subsequent General Assembly Resolution.²⁴⁴ Following the structural changes within the UN in the 1990s, the IASC falls within the larger framework of the Office for the Coordination of Humanitarian Affairs created in 1998,²⁴⁵ and carries out OCHA's coordination task of providing effective humanitarian assistance through combined efforts of humanitarian organisations. OCHA is mandated as a whole to function as part of the UN Secretariat, and is responsible for the coordination of all humanitarian actors involved in the provision of assistance during and in the aftermath of humanitarian crises, including policy and advocacy work.²⁴⁶ Both the IASC and OCHA are headed by the Emergency Relief Coordinator.²⁴⁷ With OCHA and the IASC, the UN has created a large coordinating framework for the provision and delivery of humanitarian assistance, encompassing many organisations involved in the delivery of humanitarian assistance such as the ICRC and UNHCR.²⁴⁸ Within the European continent, the EU holds a central organisational role with regard to the provision of humanitarian assistance by European countries. The European 'counterpart' of OCHA is the European Community Humanitarian Office (ECHO), also created in 1992. In more recent years, ECHO has undergone changes; becoming first the Directorate-General for Humanitarian Aid and since 2010 also encompassing Civil Protection.²⁴⁹ Unlike the UN, which had initially focused its humanitarian assistance on situations of natural disaster, the European Civil Protection Mechanism does not distinguish between the

²⁴³ UNGA Res 46/182 (19 December 1991) UN Doc. A/RES/46/182 (n 46) Annex I Section VI 'Coordination, Cooperation and Leadership' § 38.

²⁴⁴ UNGA Res 48/57 (14 December 1993) UN Doc A/RES/48/57 (n 158). For more information on the IASC, see <<http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-about-default>> accessed 24 October 2011. Members and Invitees to the IASC include the Food and Agriculture Organization (FAO), OCHA, the United Nations Development Programme (UNDP), the United Nations Population Fund (UNFPA), the United Nations Human Settlements Programme (UNHABITAT), the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children's Fund (UNICEF), the World Food Programme (WFP), the World Health Organization (WHO), the ICRC, the International Council of Voluntary Agencies (ICVA), the IFRC, InterAction, the International Organization for Migration (IOM), the UN Office of the High Commissioner for Human Rights (OHCHR), the Steering Committee for Humanitarian Response (SCHR), the UN Office of the Special Rapporteur on the Human Rights of Internally Displaced Persons and the World Bank.

²⁴⁵ Section 2.2.1 Historical Development. See also <<http://ochanet.unocha.org/p/Documents/UNOCHA%20Organigramme%202011.pdf>> accessed 3 January 2012.

²⁴⁶ For more information on the work and mandate of OCHA: <<http://www.unocha.org/about-us/who-we-are>> accessed 3 January 2012.

²⁴⁷ For more information on the Emergency Relief Coordinator, Ms. Valerie Amos: <<http://www.unocha.org/about-us/headofOCHA>> accessed 3 January 2012.

²⁴⁸ Regarding the IASC's Members and Invitees see (n 244). Furthermore, although outside the scope of this research, it is relevant to mention that the UN is also active in the arena of disaster risk reduction, through its International Strategy for Disaster Reduction and the Hyogo Declaration and Hyogo Framework for Action of 2005.

²⁴⁹ For more information on ECHO, operating under the EU Commissioner for Humanitarian Aid and Crisis Management, see: <http://ec.europa.eu/echo/who/about-echo_en> accessed 21 May 2015.

circumstances in which it comes into action.²⁵⁰ The EU has furthermore instated a special commissioner for ‘International cooperation, humanitarian aid and crisis response’.²⁵¹ Efforts are underway for the development of a European Humanitarian Aid Voluntary Corps. In practice, all the above-mentioned organisations cooperate in the delivery of humanitarian assistance. Besides these three large institutions: the Red Cross, the UN and the EU, actors such as NGOs and private organisations play an extremely large role in the provision of humanitarian assistance. Given the fact that this research focuses on the international legal framework, and such organisations do not have a crystallised status within this body of law, they shall remain outside the scope of this research, which focuses more on the role of international organisations. Furthermore, it is beyond the scope of this research to address all these private organisations and NGOs, and suffice to mention that when in conformity with the principles of humanity, neutrality and impartiality, these organisations too are considered as part of the providers of humanitarian assistance.²⁵²

2.3.2.3 *Third States*

Lastly, it is relevant to mention the role of third states as providers of humanitarian assistance. In the event of a humanitarian crisis, not only the affected state, international organisations and NGOs have a large role in the provision of assistance. Individual third states, or sometimes coalitions of third states, may be needed or called upon to provide assistance to people in need. As seen above in Section 2.2.3, it is relevant that the manner of provision of assistance is neutral, and in accordance with the principles of humanity and impartiality. Thus, although states may not always be neutral, they are quite capable of providing humanitarian assistance in conformity with these principles and can therefore be considered providers of humanitarian assistance. As seen above, the Geneva Conventions also make reference to such a potential role for third states (in particular relation to circumstances of occupation), mentioning in Article 61 GC IV ‘Protecting Powers’ or ‘Neutral Powers’.²⁵³ The UN also counts on third states to participate in the provision of humanitarian assistance, calling upon them as early as 1970 to offer:

²⁵⁰ Ibid: “CPM interventions cover all types of major emergencies, including natural and man-made disasters, acts of terrorism and technological, radiological and environmental accidents, including accidental marine pollution”.

²⁵¹ The current Commissioner for ‘Humanitarian Aid & Crisis Management’ is Christos Stylianides: <http://ec.europa.eu/commission/2014-2019/stylianides_en> accessed 15 December 2014.

²⁵² The role of international organisations as well as NGOs in relation to the possible right to provide assistance, as well as the possible right to access for such provision will be addressed further in Chapters 6 and 7.

²⁵³ Article 61 GC IV states: “The distribution of the relief consignments referred to in the foregoing Articles shall be carried out with the cooperation and under the supervision of the Protecting Power. This duty may also be delegated, by agreement between the Occupying Power and the Protecting Power, to a neutral Power, to the International Committee of the Red Cross or to any other impartial humanitarian body. Such consignments shall be exempt in occupied territory from all charges, taxes or customs duties

“[...] emergency assistance to meet natural disasters, including stand-by relief units or the earmarking of similar units for the service in foreign countries”.²⁵⁴

This line of reasoning was continued by the UN, as the 1984 Draft Convention also envisaged the possibility of an ‘Assisting State’ for the provision of humanitarian assistance.²⁵⁵ Furthermore, the UN has called upon and urged ‘the international community’ on several occasions with regard to IDPs, refugees or other persons protected by international humanitarian law over the past decades to provide humanitarian assistance to those within affected states.²⁵⁶ From this choice in word use, it is also apparent that not only individual third states provide assistance, but that (ad hoc) coalitions of third states are also called upon to aid the affected state. The ILC for its part, in its study of the protection of persons in the event of disaster, has also considered the possibility of third states partaking in emergency assistance.²⁵⁷ Tasks for an assisting third state are also considered by Macalister-Smith in his International Guidelines for Humanitarian Assistance Operations,²⁵⁸ as well as seen in the San Remo Principles²⁵⁹ and the 2003 Bruges Resolution.²⁶⁰ The Mohonk Criteria on the other hand use the UN formulation of the ‘international community’ as a whole,²⁶¹ while the IFRC in its 2007 IDRL Guidelines considers that the assisting state may make use of civil or military components for its humanitarian assistance, although the military component is recommended to be limited in use.²⁶² Given the variety and proliferation of actors involved in the provision of humanitarian

unless these are necessary in the interests of the economy of the territory. The Occupying Power shall facilitate the rapid distribution of these consignments. All Contracting Parties shall endeavour to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories”.

²⁵⁴ ECOSOC ‘Assistance in cases of natural disaster’ Res 1546 (XLIX) (30 July 1970) § 6.

²⁵⁵ UNGA Res 39/367 ‘Draft Convention on Expediting the Delivery of Emergency Relief’ (n 38) Article 1(f).

²⁵⁶ See for instance UNGA Res 49/169 (23 December 1994) UN Doc A/RES/49/169 § 11; and UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 § 13. For the current rights and duties of third states in the provision of humanitarian assistance, see Chapter 7.

²⁵⁷ ILC Doc A/CN.4/590, Protection of persons in the event of disasters, Memorandum by the Secretariat, § 250, 11 December 2007.

²⁵⁸ Macalister-Smith ‘International Guidelines for Humanitarian Assistance Operations’ (n 79) Article 2(c): “‘Assisting State or organization’ means the State or organization providing humanitarian assistance at the request or with the consent of the receiving state”.

²⁵⁹ Guiding Principles on the Right to Humanitarian Assistance’ (n 80) Principle 5.

²⁶⁰ Bruges Resolution ‘Humanitarian Assistance’ (2 September 2003) (n 82) Article I(5): “‘Assisting State or organization’ means the State or intergovernmental organization, or impartial international or national non-governmental organization which organizes, provides or distributes humanitarian assistance”.

²⁶¹ ‘The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies’, (1995) (n 176) II.4: “Where the government or other authority is unable or manifestly unwilling to provide life-sustaining aid, the international community has the right and obligation to protect and provide relief to affected and threatened civilian populations in conformity with the principles of international law”.

²⁶² IFRC IDRL Guidelines (2007) (n 223) Article 2(9): “‘Assisting State’ means a State providing disaster relief or initial recovery assistance whether through civil or military components”. See also the Annotations to the IDRL Guidelines, 26 October 2007, comments to Article 2(9) at p. 11.

assistance, the IFRC also considers the quite effective formulation of ‘assisting actor’, in order to encompass all possible contributors to the provision of humanitarian assistance.²⁶³

Thus, from the above it is clear that amongst the providers of humanitarian assistance, several distinct actors can be discerned. First and foremost, the affected state has a large and primary role in the provision of assistance. Furthermore, international organisations amongst which primarily the ICRC and IFRC, the UN and the EU play a large role, as well as (national) NGOs. Lastly, third states either individually, through an (ad hoc) coalition or the international community as a whole can be considered, and are on occasion also called upon, for the provision of humanitarian assistance. The legal framework of the exact rights and duties of such third parties in the provision of humanitarian assistance will be discussed in Chapters 7 and 8.

2.4 Conclusion

This Chapter has served the purpose of providing the foundation upon which an analysis of the current legal framework regarding humanitarian assistance can be based. Before the analysis can take place, it has been relevant to look into the historical development of humanitarian assistance, from Henri Dunant’s efforts following the battle at Solferino, to the large-scale efforts today of many international organisations.²⁶⁴ From this historical overview, the original division and separation of the provision of assistance in times of conflict or occupation and the provision of assistance in times of natural disaster was put in perspective.²⁶⁵ Following the brief historical overview, a discussion of the notion of humanitarian assistance has taken place, taking into account the various definitions provided by a large variety of (legal) sources, primarily flowing from several institutions and soft law resolutions. A clear, legally binding definition is currently still lacking. For the purpose of this research, a definition of humanitarian assistance has been proposed, which will be used throughout. This definition determines that such assistance, in order to be categorised as humanitarian, must ‘consist 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’.²⁶⁶ Important elements of this definition of humanitarian assistance are the *urgency* of the need and the *indispensable* nature of the assistance.

Having defined humanitarian assistance, the manner in which it may be provided to be considered ‘humanitarian’ in nature has also been explored, upon which it has

²⁶³ Ibid Article 2(14): “‘Assisting actor’ means any assisting humanitarian organization, assisting State, foreign individual, foreign private company providing charitable relief or other foreign entity responding to a disaster on the territory of the affected State or sending in-kind or cash donations”. See also the Annotations to the IDRL Guidelines, 26 October 2007, comments to Article 2(14) at p. 13.

²⁶⁴ Section 2.2.1 Historical Development.

²⁶⁵ Ibid.

²⁶⁶ Section 2.2.2 Defining Humanitarian Assistance.

been concluded that such assistance must at least be in conformity with the principles of humanity, neutrality and impartiality.²⁶⁷ These three principles are embraced by not only the ICRC and the UN, but also various other relevant actors in the field. In particular the ICJ has contributed to the reinforcement of the notion of humanity, as well as the assertion that the provision of assistance must occur in a non-discriminatory manner. The principle of independence remains an important aspect of the deliverance of humanitarian assistance, yet its definition and content vary amongst actors in the field.²⁶⁸

With clearer picture of the notion of humanitarian assistance and the manner in which it should be provided set in place, this Chapter has proceeded to discuss the various actors involved in the provision and receipt of humanitarian assistance. The subjects, or recipients, of such assistance have been found to be civilians, including vulnerable groups such as refugees and IDPs.²⁶⁹ Providers of humanitarian assistance can be divided into several categories. Firstly, a primary role can be discerned for the ‘affected state’ or authorities in the affected territory. Other actors include international organisations such as the ICRC and IFRC, the UN and the EU. Furthermore, whilst NGOs are of great importance to the deliverance of assistance, they are too numerous to be discussed independently. Lastly, third states, be it individually or through an (ad hoc) coalition are recognised as providers of assistance to those in need.²⁷⁰ It remains relevant to note that although many of these actors (in particular NGOs) have developed instruments, such as guidelines and resolutions that have been used in this Chapter with regard to certain definitional issues, these instruments do not have independent legal standing.²⁷¹ Yet, as they are reflective of the perspective of the various actors in the field, they have proven relevant in the discussion of these actors and the manner in which these actors perceive humanitarian assistance and its provision. The legal framework to be discussed in this research will however not lean upon such instruments.

Having provided an overview of the history of the provision of humanitarian assistance and the development of the involvement of various actors, as well as having offered a new definition of humanitarian assistance and discussed the manner in which it must be provided, the subsequent Chapter will address the various circumstances in which humanitarian assistance may be needed. Following on from this, the assessment of the scope of application also warrants a discussion on the applicable law in these circumstances.

²⁶⁷ Section 2.2.3 The Principles for the Delivery of Assistance.

²⁶⁸ Section 2.2.3.5. Other Perspectives on the Principles for Providing Humanitarian Assistance.

²⁶⁹ Section 2.3.1 Recipients of Humanitarian Assistance.

²⁷⁰ Section 2.3.2 Providers of Humanitarian Assistance.

²⁷¹ See Section 1.4.2 Secondary Sources for a more in depth discussion of the concept of ‘soft law’ and legal scholarship, as well as their role as potential source of law.

