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

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CHAPTER VIII
LEGAL CONSEQUENCES OF THE DENIAL OF HUMANITARIAN ASSISTANCE: METHODS OF ENFORCEMENT

In March 2009, the Sudanese President Omar Al-Bashir reportedly expelled several humanitarian aid organisations from the country, upon his indictment before the International Criminal Court:

"Sudan ordered 10 leading international humanitarian organizations expelled from Darfur on Wednesday after the International Criminal Court issued an arrest warrant for the country's president for alleged atrocities in the conflict-ridden region. United Nations Secretary-General Ban Ki-moon said the action "represents a serious setback to lifesaving operations in Darfur" and urged Sudan to reverse its decision, U.N. deputy spokeswoman Marie Okabe said".

The denial of humanitarian assistance can lead to violations of international law. But in what way can humanitarian assistance be enforced? Through which legal mechanisms can the provision of aid to persons in need be ensured? This Chapter addresses the various methods of enforcement, as part of the larger framework on the provision of humanitarian assistance.[1]

8.1 Introduction

Enforcement as a manner in which a situation violating international law can be brought to an end must be addressed in this research, in the circumstance humanitarian aid cannot be delivered. Part II of this research has dealt with the current rights and obligations in the provision of humanitarian assistance. It has set out the current existing legal framework pertaining to the rights of persons to receive aid in a humanitarian crisis, as well as the duties of the affected state to provide such aid. Part III commenced with the legal framework concerning the delivery of assistance by external parties, in the event the affected state is unable or unwilling to fulfil its duties by itself. In this regard, Chapter 7 set forth the rights of third parties wishing to provide aid to persons in need should the affected state not do so, and the related obligations the affected state may have in allowing such parties access to the affected territories. This access is generally formulated as a duty of the affected state to allow entry to third parties and is important, as the normative basis for the potential

[1] <http://www.nbcnews.com/id/29492637/ns/world_news-africa/t/sudan-expels-aid-groups-response-warrant/#.VFETffmsWP4> accessed 29 October 2014. See in this regard also <http://www.theguardian.com/world/2009/mar/05/sudan-aid-agencies-expelled> accessed 29 October 2014.

enforcement of such access is found in the protection of the persons in need of assistance.

This Chapter addresses the existing enforcement mechanisms and methods through which the affected state may be held accountable for its potential violations of international law in a step-by-step manner, commencing with a discussion of the law of state responsibility. The substantive enforcement methods operate on a variety of levels and will be addressed subsequently and accordingly. At the interstate level, the *use of force* is relevant in the factual enforcement of access for the delivery of humanitarian assistance, through authorised international operations. Furthermore, *human rights law* and its mechanisms are addressed, reflecting the enforcement method available at a different level, namely that of the individual vis-à-vis the state. Lastly, *international criminal law* is relevant in addressing violations of international law by individuals reciprocally in the enforcement of humanitarian assistance. Indeed, the more substantive provisions dealing with enforcement that are found in these bodies of law may well be considered a consequence or result of establishing state responsibility for the denial of humanitarian at various levels. At all levels however, it is important to remain cognisant of the role of state sovereignty. As will be seen, in this Chapter state sovereignty plays a diminished role compared to previous Chapters. Whereas the affected state in certain instances has some discretion in the determination of whether or not humanitarian assistance is needed, the determination that an *unlawful denial of humanitarian aid* has taken place leads to a breach of international law. Such breaches may then be enforced through human rights law, international criminal law or through the use of force, but such enforcement comes through means in which the sovereignty of the affected state tends to be overridden by other aspects of international law. This overriding occurs either based on the character of the UN Security Council and UN member states' obligations under Article 25 of the UN Charter, or for example through the accession to certain human rights treaties or the ICC, resulting in the possibility of holding states or individuals accountable before these bodies. Indeed, the view that access for humanitarian assistance is necessary – a view that has increased in the past years as seen in Chapters 5, 6 and 7 – results in the simultaneous changing of the nature of state sovereignty, to the point where sovereignty must give way to the delivery of food, water, medicine and shelter in times of crisis.

In addressing the legal consequences of the denial of humanitarian assistance by the affected state through the various methods of enforcement existing in international law today, it is crucial to first and foremost establish which acts or omissions amount to an unlawful denial of humanitarian assistance. Chapters 6 and 7 have shown that on occasion, denial of humanitarian assistance may occur, such as for the purpose of military necessity. This Chapter however addresses the legal enforcement mechanisms that can be utilised when considering *unlawful denials* of such aid and to that end firstly addresses the law of state responsibility as related to the provision of humanitarian assistance, in order to establish when a sovereign may be held accountable under international law for such a denial.

8.2 The Law of State Responsibility and Enforcement of Humanitarian Assistance

Violations of substantive international law pertaining to the denial or obstruction of humanitarian assistance may give rise to state responsibility. Indeed, the failure of a state to fulfil its sovereign duties results in the rise of state responsibility. The law of state responsibility connects the violation of a specific duty to provide aid or allow access for third parties to a responsibility under international law.

The recognition of the law of state responsibility as a 'legal category' in which responsibility arises in the event of a breach of an international obligation did not fully develop until well after Grotius' time and into the nineteenth century.[2] When the UN International Law Commission was established in 1947, the law of state responsibility was marked as a field in need of attention, which prompted the development of the Draft Articles on State Responsibility in the ensuing decades, developing gradually into what is known as the law of state responsibility today.[3]

State responsibility is not a field of law containing substantive provisions in and of itself, but rather a field of law which becomes applicable upon the violation of another, primary, norm of international law. Thus by nature, it allows for an overarching, broader, approach to the obligations which may follow from the denial of the provision of humanitarian assistance. Such an overarching approach is in fact seen in the law on state responsibility, as set out today in the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), which allow for the determination of a state's responsibility not merely towards another state bilaterally, but also towards other actors in the international field.[4] Although not an independent international treaty, the ARSIWA currently hold international standing as completed work by the ILC and through their status as annexed document to a General Assembly resolution (pending the General Assembly's further action on the topic), as well as having been referred to on countless occasions as (largely) reflecting customary international law.[5] They will therefore be referenced throughout this Section.

As Crawford and Olleson argue, there is no 'uniform code of international law' which reflects the obligations of *all* states operating in the international spectrum.[6] Obligations resting upon states must be determined for each state independently, as these obligations are dependent upon the treaties such states have entered into. Only a limited number of general norms of international law are recognised internationally as universally applicable customary law. Both these norms and the widely accepted treaty provisions codified in humanitarian law and human rights laws are addressed

[2] James Crawford, *State Responsibility: the General Part* (Cambridge University Press 2013) 11-20.
[3] Ibid 35-36.
[4] UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83 Annex 'Responsibility of States for internationally wrongful acts' (ARSIWA) (corrected by UN Doc A/56/49 (Vol. I)/Corr.4). The ARSIWA specifically exclude matters pertaining to the responsibility of either international organisations or of other non-state actors.
[5] Crawford, *State Responsibility: the General Part* (n 2) 42-43.
[6] Ibid 446.

in this Chapter. Indeed, as the law of state responsibility is construed upon legal concepts such as a breach, attribution and consequences therefore, it allows for application in a general manner to the variety of obligations resting upon individual states.[7]

Given the fact that the affected state is the primary responsible actor in times of a humanitarian crisis in the provision of humanitarian assistance to persons in need,[8] the notion of state responsibility is of great relevance to this research and must be examined in more depth with a view to states' failures in meeting their obligations regarding the provision of humanitarian assistance.[9] The classical and purely bilateral view of state responsibility has been departed from with the development of the ARSIWA, by incorporating a responsibility *of states* towards not only other states, either individually or together, but also towards individuals, groups or the international community in general.[10] Therefore, the law of state responsibility is of importance to the legal framework regarding the provision of humanitarian assistance, in the event a state does not fulfil its legal obligations under that framework, perhaps raising international responsibility towards the persons in need, or perhaps the international community in general.

8.2.1 State Responsibility, the ARSIWA and Humanitarian Assistance

In order to invoke the international responsibility of a state, the law of state responsibility presupposes in Articles 2 and 3 ARSIWA an *act* or *omission* of that state, in the event such an act or omission is a *breach* of international law and *attributable* to the state. With regard to the provision of humanitarian assistance, in particular this possibility of an attributable 'omission' is of relevance. Specifically the aspects of state responsibility that fall outside the classical *bilateral* view must be considered, given the nature of the responsibility of the affected state in the event of a humanitarian crisis to provide assistance to persons in need of aid. This responsibility includes the duty under the ICESCR to request assistance from abroad and the rights of the international community to offer assistance. At the interstate level, third states may then choose to bring the state that has breached an obligation before the International Court of Justice.

When applying the law of state responsibility to humanitarian assistance, the non-provision of such assistance can be considered a breach of an international obligation. This obligation could according to the ARSIWA be owed to a group of states, should specific treaty provisions be considered, or in general to the international community as a whole, based on the concept of state sovereignty or certain norms of customary international law. The determination of state responsibility for such breaches of obligations held to the international community as a whole may then be sought before

[7] Ibid.
[8] Chapter 6.
[9] Ibid.
[10] Articles 42 and 48 ARISWA; and 'Report of the International Law Commission Fifty-third session (23 April-1 June and 2 July-10 August 2001)' UN Doc A/56/10 (2001) 62, 66, 293 and 319-320.

the ICJ. This approach by the ILC in the ARSIWA, diverging from the strict bilateral perspective, follows the ICJ in its judgment in the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain) case (Barcelona Traction case). The ICJ held that:

> "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State […]. By their very nature the former are the concern of all States".[11]

It becomes apparent that a distinction must be made between the bilateral notion of state responsibility, where not all states have a legal interest in the observance of certain duties, and legal obligations which can be considered to affect and interest the international community as a whole; the notion of *erga omnes* obligations, although the ILC does not refer to them as such.[12]

In particular, within the context of the ARSIWA, Articles 42 and 48 both specifically provide for state responsibility in the event a breach of an international obligation occurs that is indeed owed to the international community as a whole. As such, Article 42 stipulates that an injured state may invoke the law of state responsibility if an obligation that is owed to the international community as a whole is breached, and the *injured* state is specifically affected, or the character of the breach changes the position of all other states:

> "A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) that State individually; or (b) a group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation".

As a humanitarian crisis can affect the larger international community rather than merely one other state, state responsibility might therefore be invoked in the circumstance that a state does not fulfil its sovereign duty to provide assistance to its population, or persons in need within its jurisdiction. Article 42 ARSIWA thus enables an injured state to hold another state in breach of an obligation owed to the international community as a whole if it does not fulfil its responsibilities in the provision of humanitarian assistance, based on its duties under various treaty-law provisions in international humanitarian law and human rights law (as discussed in

[11] ICJ *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* case *ICJ Reports 19*70, at p.3, p. 32, § 33.

[12] The notion of potential 'erga omnes' obligations shall remain outside the scope of this research, given the current debate still held on the particular content of these obligations. The ILC has for this reason also decided to leave the concept outside of its ARSIWA. See in this regard 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 321-322. For a discussion of the notion of erga omnes, see Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford University Press 1997); Christian J Tams, Enforcing Obligations Erga Omnes in International Law (Cambridge University Press 2010).

Chapters 6 and 7), or other international law prescriptions. An injured state in this circumstance may well be a neighbouring state that is dealing with a large influx of refugees fleeing a state's territory affected by a humanitarian crisis of either man-made or natural origin. Such a state may also be dealing with the environmental consequences of disasters. Articles 28-33 ARSIWA provide for potential legal consequences upon invoking state responsibility, which include cessation, non-repetition and reparation.

Secondly, with a more progressive view, Article 48 ARSIWA provides that not only an *injured* state, but *any* state may invoke the international responsibility of a state should the breached obligation be owed to either a group of states that includes the state invoking the responsibility for the breach, or the international community as a whole:

> "Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (*b*) the obligation breached is owed to the international community as a whole. 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached. 3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1".

In stipulating this, Article 48 ARSIWA allows for a non-injured state to invoke state responsibility for the breach of an obligation which is owed to the international community as a whole. Humanitarian assistance in essence is owed to those persons in need of essential food, water, medicine and shelter. Yet, in the absence of the immediate provision of such assistance, humanitarian crises enlarge and spill over into greater areas. Indeed, should a state deny the provision of aid to persons in need, often the circumstances of such persons will escalate and expand the humanitarian crisis at hand. As such, humanitarian assistance is arguably owed to the international community as a whole, as large regions and even the entire world can be affected by the effects of a humanitarian crisis. Article 48 ARSIWA may allow states in the international community to claim that the violations of a state towards its citizens could amount to a breach of an obligation which is owed to the international community as a whole. In the event of non-provision of humanitarian assistance, including the refusal to allow external parties to provide aid and obtain access to a territory, such an argument may very well be made. A deteriorating crisis can amount to several breaches of obligations in international law that are *owed to the international community as a whole*, such as a threat to the peace, large-scale human rights violations, and potentially also one of the four core crimes for which the 'Responsibility to Protect' may be invoked, namely genocide, war crimes, ethnic cleansing and crimes against humanity. As Simma argues, every state may then

consider itself legally 'injured', entitling it to resort to certain (non-forceful) countermeasures.[13] As Articles 49 and 50 ARSIWA note, these countermeasures are indeed non-forceful, thus not allowing for the forceful access to a territory. Such a crisis furthermore potentially invokes duties through the provisions of Article 25 UN Charter for the Security Council (as seen in Chapter 7), which as supranational organ of the UN in a way is a reflection of the international community as a whole. In this manner, the ILC has addressed the findings of the ICJ in the Barcelona Traction case above, and incorporated this viewpoint into the ILC's ARSIWA.[14]

In particular concerning humanitarian assistance, such a provision would allow states that are not in the direct vicinity of the affected state to also call upon the affected state to abide by its obligations under international law, in providing humanitarian assistance to its people in a crisis, and even invoke its responsibility therefore under international law. As mentioned above, given the horizontal nature of the law of state responsibility, other states shall have the opportunity to bring the affected state that is in breach of its obligations (potentially Articles 42 and 48 ARSIWA) before the ICJ. It must be noted however that Article 48(2) ARSIWA includes 'progressive development' aspects of international law, which the ILC justifies arguing that the collective interests of the international community may be at stake in certain instances.[15] Such instances may be the case with certain large-scale human rights violations occurring in a humanitarian crisis where the affected state is not fulfilling its duties under the rights to life, food, health (and water), when no other 'injured state' exists due to the particular circumstances at hand.

International responsibility in the absence of another 'injured state' can indeed occur under the law of state responsibility. A state can be held responsible not only for obligations towards another state or the international community; a state may also be held directly responsible under the international law of state responsibility for obligations towards its own citizens. Articles 2 and 3 ARSIWA allow invocation in the event of an attributable breach of international law related to a responsibility of the state towards its citizens.[16] Such possibilities of invoking state responsibility will be of particular relevance in the event of human rights or humanitarian law breaches when humanitarian assistance is denied by the affected state in times of a humanitarian crisis, discussed in Section 8.3. Enforcement will then most likely have to occur through the specific judicial bodies of humanitarian and human rights law, as the individual bearing the consequences of such a breach of international law cannot directly base him/herself on state responsibility: this body of law distinctly operates on the horizontal plane between states, and breaches of the law may only be claimed by other states within the international community; see in this regard Articles 42-48 ARSIWA. Whilst the forum for breaches of the law of state responsibility is

[13] Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects', (1999) 10 *European Journal of International Law* 2.
[14] Crawford, *State Responsibility: the General Part* (n 2) 40-41.
[15] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 323 concerning Article 48(2)(b).
[16] Ibid 62. See also A L Vaurs-Chaumette 'Peoples and Minorities' in J Crawford et al (ed) *The Law of International Responsibility* (Oxford: Oxford University Press, 2010) 994.

the ICJ, individuals may turn to human rights bodies or the ICC, to be discussed below.

State responsibility may also be invoked through the attribution of certain acts to a state, when considering a breach of an obligation not directly incurred by the state itself. Articles 4-11 ARSIWA provide the various methods in which acts of individuals or groups might be attributed to the affected state.[17] In the circumstance of the provision of humanitarian assistance, attribution of conduct to the state may play a distinct role, as the provision of humanitarian assistance – or refusal thereof – is sometimes outsourced to various other actors, amongst which international organisations and NGOs, as well as other bodies that may operate within a set structure with the affected state. State responsibility may also incur in circumstances such as described in Articles 9 and 10 ARSIWA, if non-state actors violate human rights law and humanitarian law during a non-international armed conflict, should such non-state actors exercise a degree of control and subsequently gain sovereignty. Problematic for the determination of responsibility under the law of *state* responsibility as also relevant to the provision of humanitarian assistance remains the non-state actor that does not obtain such titles.

With regard to attribution, the ICJ has determined in the *Bosnian Genocide* case that a breach of international law (*in casu* genocide) may be attributable to a State:

> "if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility".[18]

The ICJ therefore determines that 'effective' control is necessary for such attribution. In doing so, it departs from both its own previous 'control' formula in the *Nicaragua* judgment and the ICTY with its *Tadić* 'overall control test', whilst, according to Cassese, failing to constructively reformulate them.[19] Indeed, 'effective' control as proposed by the ICJ differs from the approach taken by the ICTY that differentiated two degrees of control that vary depending on circumstances and subject; such as individuals versus organised groups that as a *whole* operate under the control of the

[17] Article 4 ARSIWA concerns the conduct of organs of a state, Article 5 ARSIWA the conduct of persons or entities exercising elements of governmental authority, Article 6 ARSIWA the conduct of organs placed at the disposal of a State by another State, Article 7 ARSIWA the excess of authority or contravention of instructions, Article 8 ARSIWA relates to the conduct directed or controlled by a state, Article 9 ARSIWA the conduct carried out in the absence or default of the official authorities, Article 10 ARSIWA pertains to the conduct of an insurrectional or other movement and lastly Article 11 ARSIWA concerns conduct acknowledged and adopted by a State as its own.

[18] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43 § 401.

[19] Antonio Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', (2007) 18 *European Journal of International Law* 4, 649-668.

state.[20] Without delving too deeply into the matter of types of 'control' in this aspect of attribution as part of the law of state responsibility, it remains therefore that the international tribunals dealing with such matters do as of yet not have one singular approach. From the ICJ's application in the *Bosnian Genocide* case it can be concluded that the Court sees 'effective control' as determinant in the assessment of state responsibility. With regard to the denial of the provision of assistance, such a denial *can* then be attributed to the affected state, should those responsible for the denial have been under the effective control of that state.

8.2.2 The ARSIWA, Peremptory Norms and the Denial of Humanitarian Assistance

With regard to the denial of the provision of humanitarian assistance, the ARSIWA's notion of 'circumstances precluding wrongfulness' as laid down in Articles 20-25 must be considered. These circumstances could function as potential factors in the prevention of the invocation of the law of state responsibility.[21] As argued above, state responsibility for the denial of the provision of humanitarian assistance could arise through violations of substantive provisions and duties found in human rights law or humanitarian law. In this regard, the ILC noted (in relation to Article 21 ARSIWA):

> "As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct".[22]

As such, self-defence cannot be invoked by the affected state as a reason to deny humanitarian assistance. Rightfully, Chapter 5 has established that the provision of such assistance is a means of fulfilling non-derogable rights. Indeed, Articles 20-22 and 24-25 ARSIWA relate to matters which the *affected state* in its potential denial of provision of humanitarian assistance cannot call upon, as seen in the following.[23] Specifically with regard to humanitarian assistance and access (with and without force) by third parties, the ARSIWA provision concerning consent in Article 20 is relevant:

> "Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent".

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[20] *Prosecutor v. Tadić a.k.a "Dule"* (Appeals Chamber Decision on the Defence motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) § 120.

[21] Article 20 ARSIWA pertains to consent of a second state, Article 21 ARSIWA concerns matters of self-defence, Article 22 ARSIWA concerns countermeasures in respect of an internationally wrongful act, Article 23 ARSIWA concerns force majeure, Article 24 ARSIWA relates to distress and Article 25 ARSIWA concerns the state of necessity.

[22] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 178.

[23] For a further discussion 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 173-183 and 189-194. See also Crawford, *State Responsibility: the General Part* (n 2) 283-295 and 301-305.

As discussed above in Chapter 7, in certain instances the provision of external humanitarian assistance is dependent on the consent of the affected state (in particular in times of natural disaster and non-international armed conflict). Despite having established that the *bona fide* offer of assistance; i.e. an offer in accordance with the principles of humanity, neutrality and impartiality, cannot be construed as an interference in the internal affairs of the affected state, it remains relevant to also note that the ARSIWA's provision in Article 20 can also be applied to the circumstance of the provision of assistance. As such, the giving of consent for access by third parties with a view to the provision of assistance would preclude the establishment of an unlawful interference with the affected state's internal affairs.

Furthermore relevant to this discussion is Article 25 ARSIWA concerning necessity which may – and has been – called in as an argument in *favour* of providing humanitarian assistance as opposed to obliging with another duty under international law.[24] International humanitarian law in essence merely allows for very distinct circumstances 'precluding wrongfulness' in consideration of the provision of humanitarian assistance, as Chapters 6 and 7 have addressed, mainly pertaining to the 'control rights' of states and the delaying of assistance for purposes of military necessity, but which specifically *exclude* the potential starvation of civilians.[25] Furthermore, human rights law as specifically related to humanitarian assistance (with regard to the rights to life, food and health) precludes the invocation of a state of emergency, as seen in Chapter 5. Thus, a state cannot circumvent its responsibility for breaches of international obligations under human rights law and humanitarian law in relation to the provision of humanitarian assistance by claiming certain circumstances precluding wrongfulness; specifically necessity, in its conduct based upon *those* fields of law. The ILC notes however that the question concerning the legality of humanitarian interventions (outside the scope of the collective use of force under the UN Charter) is not covered by Article 25 ARSIWA. Thus, the ILC merely considers the past claims towards this concept, whilst not discussing the potential breaches of international law that such claims in itself may amount to, given the fact that the use of force outside the context of Chapter VII or Chapter VIII of the UN Charter in itself is often a violation of a (peremptory) norm of international law. The need to invoke the state of necessity under Article 25 ARSIWA by a *third* state in the external provision of assistance is however somewhat overcome by the ILC's inclusion of Article 41 ARSIWA, which will be discussed in relation to the duty to cooperate.[26]

Potentially Article 23 ARSIWA allows for an invocation by the affected state with regard to a circumstance precluding wrongfulness. Indeed when considering the *denial* of humanitarian assistance 'force majeure' could be considered as a potential excuse by the affected state. Article 23 ARSIWA states:

[24] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 202,.
[25] Articles 23, 54 and 55 GC IV, as well as 70 and 71 AP I. Furthermore Section 8.3.
[26] Section 8.2.3 State Responsibility and the Potential Duty to Cooperate in the Event of a Breach.

> "1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation. 2. Paragraph 1 does not apply if: (a) The situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) The State has assumed the risk of that situation occurring".

Wrongfulness is precluded in the event of *force majeure* when three elements are cumulatively met: (1) an unforeseen event or irresistible force, (2) beyond control of the affected state, (3) making performance of the obligation materially impossible. Considering Article 23 ARSIWA relating to 'force majeure', the ILC has held in its *Commentary* that a state cannot claim 'force majeure' in the event it has itself 'caused or induced the situation in question'.[27] Thus, invoking 'force majeure' as a reason for the non-provision of humanitarian aid in times of conflict or occupation amounting to a humanitarian crisis that the affected state is to any extent partially responsible for, shall be quite difficult. The ILC has indeed focused rather on natural disasters, clarifying instances in which a state may appeal *force majeure* for its actions through circumstances such as 'earthquakes, floods or drought', but also in the event the affected state's territory should be lost due to an insurrection or military operations carried out by a third state.[28] While Crawford argues that a 'material impossibility' leading to a claim of *force majeure* might also arise in the event of a combination of factors such as the impossibility of a state to assist foreigners affected by a natural disaster because a particular area of a territory is under rebel control, responsibility does not necessarily disappear, as it shifts from one actor to another.[29] In the latter events, the responsibility to provide humanitarian assistance is transferred to either the armed groups,[30] or at a later stage to the newly occupying force; as the provisions pertaining to the delivery of humanitarian assistance may be invoked at a certain stage of occupation.[31] Also, the ILC *Commentary* argues that Article 23 ARSIWA may not be invoked as a circumstance precluding wrongfulness for situations in which the fulfilment of the obligation has merely become 'more difficult' rather than *impossible*, such as in the event of a political or economic crisis, nor may it be invoked should the situation be the result of neglect of the affected state.[32] Crawford also argues that *force majeure* differs from the circumstances precluding wrongfulness such as distress and necessity in the sense that it implies an essentially

[27] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 188. See in support of this also the Arbitral Tribunal *Libyan Arab Foreign Investment Company v. Republic of Burundi,* I.L.R., vol. 96 (1994), p. 279 and 318 § 55. The ILC argues that Article 23 follows by analogy Article 61 of the Vienna Convention on the Law of Treaties.
[28] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 184.
[29] Crawford, *State Responsibility: the General Part* (n 2) 298.
[30] Section 6.5.1.2 regarding the obligations of armed groups in the provision of humanitarian assistance as argued amongst others by the Security Council and AP II.
[31] Section 6.5.3 on the invocation of provisions pertaining to the delivery of aid at various stages of occupation.
[32] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 184.

involuntary act.[33] Natural disasters such as cyclones, tornadoes, droughts and tsunamis are clearly not voluntary acts by the affected state. Claiming *force majeure* as a circumstance precluding wrongfulness specifically *for the non-provision of humanitarian assistance* in the aftermath of a natural disaster shall however remain difficult due to a state's obligations under human rights law and in particular with a view to Article 2 ICESCR which provides for international assistance. As such, the ILC's *Commentary* in this respect does not provide a satisfactory explanation, as it alludes to the possibility of invoking Article 23 ARSIWA in circumstances of natural disaster, whilst the ICCPR does not allow for derogation of the right to life in times of emergency and the ICESCR in its entirety does not contain a derogation clause. If and when the affected state is not capable itself of performing this duty to provide assistance under human rights law, it continues to have obligations under said law to ensure the rights to life, food and health of persons within its jurisdiction, upon which according to Article 2 ICESCR it must resort to external parties that are offering their assistance. The state of emergency clauses in the various relevant treaties particular to the rights with regard to the provision of assistance cannot be invoked, as discussed in Chapter 5. Not requesting such assistance or not allowing external assistance by third parties into the affected territory shall not be considered *force majeure* and thereby an acceptable circumstance precluding the wrongfulness of the non-provision of assistance to persons in need. Whereas the natural disaster itself may be considered *force majeure*, the non-provision of assistance shall not be considered as such. State responsibility for the denial of humanitarian assistance may very well ensue. Indeed, as the ILC itself has argued, in practice many of the appeals to *force majeure* have failed, as the circumstance was not 'impossible' itself, but rather increasingly difficult to perform.[34] Allowing external help into a territory moreover is not difficult *per se*.

Furthermore Article 26 ARSIWA must be taken into account regardless of the specific circumstance precluding wrongfulness an affected state may attempt to claim as potential justification for its denial of humanitarian assistance. Article 26 ARSIWA stipulates with regard to the chapter in ARSIWA pertaining to circumstances precluding wrongfulness:

> "Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law".

Thus, conduct in breach of a peremptory norm is excluded from the scope of circumstances the ARSIWA recognises as precluding the wrongfulness of an act under international law. A 'circumstance precluding wrongfulness' as meant in Articles 20-25 ARSIWA may not be claimed as a waiver of responsibility for the violation of a norm of *jus cogens*. Although a discussion continues to exist as to those

[33] Crawford, *State Responsibility: the General Part* (n 2) 295.
[34] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 185.

norms which are currently accepted in international law as *jus cogens*,[35] the ICJ has determined that peremptory norms certainly include the prohibition of aggression, genocide, torture, slavery and racial discrimination.[36] In the above Chapters it has been discussed on numerous occasions that humanitarian assistance cannot be based upon racial discrimination, and moreover the non-provision of assistance may not lead to genocide. Through various cases before the ICTY, war crimes and crimes against humanity have also been recognised by this tribunal as peremptory norms of international law.[37] As will be discussed in more depth in further Sections, the denial of assistance may amount to such crimes. Furthermore, the ICJ has noted in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that certain principles of international humanitarian law constitute 'intransgressible principles of international customary law'.[38] In its 2006 Fragmentation of International Law Study, the ILC has reiterated these 'candidates' for the status *of jus cogens*.[39]

The ICJ places the well-known Martens Clause amongst such principles, and declares it to have found a modern codification in Article 1(2) AP I of the Geneva Conventions. This Article distinctly refers to the principle of humanity and thus the notion of peremptory norms becomes even more relevant to the discussion

[35] See for a discussion on the norms which amount to *jus cogens* amongst others: Rafael Nieto Navia, 'International Peremptory Norms (Jus Cogens) And International Humanitarian Law' in LC Vohrah, F Pocar et al, (eds) *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (Kluwer Law International 2003); Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006); and Malcolm Shaw, *International Law* (Cambridge University Press 2008) 303, 720-721.

[36] *Armed Activities on the Territory of the Congo* (New Application : 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, § 64 concerning the prohibition of genocide; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422 § 99 concerning the prohibition of torture; somewhat more generally concerning *erga omnes* obligations the ICJ Barcelona Traction, Light and Power Company Limited (Belgium v. Spain) case ICJ Reports 1970, § 33-34 regarding the prohibition of aggression and genocide, as well as 'basic human rights' such as the protection from slavery and racial discrimination.

[37] *Prosecutor v. Kupreškić et al. (IT-95-16) "Lašva Valley"*(Judgment Trial Chamber) IT-95-16-T (14 January 2000 § 520; *Prosecutor v. Furundzija* (Trial Judgment) IT-95-17/1-T (ICTY 10 December 1998) § 151-157; *Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landžo (aka "Zenga") (Celebici - Case)* (Appeals Chamber) IT-96-21-A (20 February 2001) § 172; *Prosecutor v. Krstic* (Trial Judgment) IT-98-33-T (2 August 2001) § 541.

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

[39] 'Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law', Report of the Study Group of the International Law Commission (13 April 2006) UN Doc A/CN.4/L.682 § 374: "Overall, the most frequently cited candidates for the status of jus cogens include: (a) the prohibition of aggressive use of force; (b) the right to self-defence; (c) the prohibition of genocide; (d) the prohibition of torture; (e) crimes against humanity; (f) the prohibition of slavery and slave trade; (g) the prohibition of piracy; (h) the prohibition of racial discrimination and apartheid, and (i) the prohibition of hostilities directed at civilian population ("basic rules of international humanitarian law")".

concerning responsibilities in the provision of humanitarian assistance.[40] By considering the Martens Clause as part of these 'intransgressible principles of international customary law', the ICJ thus places Article 1(2) AP I and thereby the principle of humanity, one of the core foundations and cornerstones upon which the legal framework concerning the provision of humanitarian assistance is set, within this context also. It stands to reason that if the text of Article 1(2) AP I which states that civilians remain 'under the protection and authority of the principles of international law derived from […] the principle of humanity' is considered by the ICJ to be the modern translation of the Martens Clause, which itself is an 'intransgressible principle' of customary international law, then the protection of civilians by the principle of humanity *itself* must also be considered as such. Indeed, the principle of humanity has in Chapter 2 been explicated as one of the guiding principles along which assistance is provided. Therefore, abiding by the principle of humanity – by way of the Martens Clause – is a manner of keeping in line with peremptory norms of international law.[41]

In relation to the provision of humanitarian assistance given the nature of the topic, namely the delivery of emergency aid in times of a humanitarian crisis, potential violations of *jus cogens* will most likely be related to the prohibition of war crimes, crimes against humanity and racial discrimination.[42] Violating the protection of persons in times of crisis by violating the principle of humanity would then potentially be considered as such also by the ICJ. The deprivation by the affected state of humanitarian assistance to persons in need may very well turn the 'affected' state into the 'inflicting' state, leading to state responsibility for the non-provision of humanitarian assistance. Such responsibility is specific to the circumstance and the related breach of international law. In times of conflict or occupation, depriving a population of food, water, shelter and medicine could lead to war crimes. At all times, and therefore also in times of conflict, occupation or a (natural) disaster, racial discrimination is prohibited and the (non)-provision of humanitarian assistance may not be based upon this.[43] It has furthermore been established by the ICJ, in referral to the ICERD, that access to humanitarian assistance is a right of persons under the ICERD and human rights law.[44] Crimes against humanity may also occur in either conflict, occupation or (natural) disaster as it has been established in international law that the nexus to an armed conflict is no longer required for crimes against

[40] Article 1(2) AP I states: "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".

[41] 2.2.3 The Principles for the Delivery of Assistance.

[42] 8.6.2 Enforcement through International Criminal Law.

[43] See in this regard Georgia's attempt to claim 'obstruction of access to humanitarian assistance' as potential racial discrimination in Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70 § 17.

[44] Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 353 § 149 B.

humanity and that such crimes may therefore occur also in circumstances which are not related to an armed conflict.[45] Meron notes that 'systematic gross violations of human rights directed at civilians' are also considered as crimes against humanity.[46] This above determination regarding war crimes, crimes against humanity and the prohibition of racial discrimination (the latter in particular respect to various human rights) provides for a broad range of potential violations of peremptory norms of international law that are related to the framework of the provision of humanitarian assistance and that may lead to incurring state responsibility. In particular, given their broad applicability, crimes against humanity or racial discrimination could be the peremptory norms through which state responsibility will most likely be claimed with regard to the denial of humanitarian assistance, in particular if the circumstance is lacking an armed conflict, but might be related to a (natural) disaster.

Article 23 ARSIWA concerning *force majeure*, which is the only Article in the ARSIWA's circumstances precluding wrongfulness that may potentially be invoked by the affected state as a reason it has denied humanitarian assistance, may therefore not be invoked in the event such a denial leads to a breach of the prohibition of genocide, crimes against humanity, war crimes, or racial discrimination. Thus, justifiably invoking Article 23 ARSIWA has another added threshold for the affected state: it may not include a breach of a norm of *jus cogens*, alongside the difficulties of arguing *force majeure* if it has not requested assistance from third parties to provide external emergency aid following Article 2 ICESCR and 55 and 56 UN Charter. Furthermore, although not immediately recognised as 'jus cogens', states must also ensure they do not violate the principle of humanity, as determined by the ICJ. By way of the Martens Clause, which the ICJ has argued forms part of what it coined 'intransgressible principles of international customary law', this principle is arguably part of the body of *jus cogens* norms. This is a new concept as such, given that this phrasing of 'intrangressible norms' was not previously part of international legal lingo. It appears, as argued by Vincent Chetail, that the Court has wanted to emphasise that such norms, within international humanitarian law as a legal field, hold particular importance compared to other norms of customary international legal nature.[47]

It must be noted that, given the fact that the ARSIWA have only recently been codified, they have to date not been used in the enforcement of a state's obligation in the provision of humanitarian assistance, nor have those pre-existing elements of customary status been invoked in this regard. Therefore, it may be too soon to tell whether in fact states will resort to the use of Articles 42 and 48 ARSIWA in their attempt to hold a state affected by a humanitarian crisis responsible for the denial of

[45] *Prosecutor v. Tadić a.k.a "Dule"* (Appeals Chamber Decision on the Defence motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) § 141; UN CHR Report of the Secretary General 'Promotion and Protection of Human Rights: Fundamental Standards of Humanity' (18 December 1998) UN Doc E/CN.4/1999/92 § 12; and ICC Statute Article 7. See also 8.6.2.

[46] Theodor Meron, 'The Humanization of Humanitarian Law', (2000) 94 *American Journal of International Law* 2, 265.

[47] Vincent Chetail, 'The contribution of the International Court of Justice to international humanitarian law', (2003) 85 *International Review of the Red Cross* 850, 250-251.

humanitarian assistance, or whether such a state will indeed claim a circumstance precluding the wrongfulness of its actions, such as that of Article 23 ARSIWA, despite difficulties concerning norms of *jus cogens* and obligations under existing human rights law.[48]

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

The law concerning the international responsibility of states lastly not only places responsibilities on the affected state, but also places a responsibility upon third states *to cooperate* to bring violations of international law to an end. Thus, not only the *affected* state could have a duty under the law of state responsibility to provide assistance to persons in need, but *third* states may have also certain responsibilities.[49] These responsibilities must be distinguished from the rights and duties discussed in Chapter 7 regarding the provision of assistance by third parties. Such rights of third parties are related *directly* to the provision of assistance under substantive bodies of law such as human rights or humanitarian law. Subsequently, the denial of this provision of assistance through external sources could indeed result in circumstances which might be construed as violations of international law that must be brought to an end. This is the subject-matter at hand: the duty to cooperate for third states under the law of state responsibility as an enforcement mechanism to bring violations of international law to an end. Such a duty is derived and results from the duties of the affected state not to violate international law through the unlawful denial of humanitarian assistance.

Article 1(3) of the UN Charter states that it is a purpose of the Organization to 'achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all'. In relation to the provision of humanitarian assistance, this principle is brought into practice through calls upon the international community by the General Assembly and especially the Security Council as discussed in Chapter 7 with regard to assisting in the provision emergency aid, to put an end to certain serious on-going crises.[50] The UN therefore recognises a responsibility of the international community at large to act in the face of large-scale crises and human rights violations. This responsibility was asserted very early on in the work of the UN in the well-known General Assembly's 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' of 1970, that

[48] The consequences of invoking a circumstance precluding the wrongfulness of an act under international law remain beyond the scope of this research. In that regard, see Article 27 ARSIWA and further.
[49] This research will not address the various rights and duties states may have under their national legislation, but will rather focus on the international legal aspects.
[50] Sections 7.4.2 Security Council Resolutions and the Right to Access and 7.4.4 General Assembly Resolutions and the Right to Access.

formulated the 'duty of States to co-operate with one another in accordance with the Charter'.[51]

Today, the ILC has codified more extensively the duties and responsibilities of the international community with regard to breaches of peremptory and other norms of international law. Article 41(1) ARSIWA distinctly calls upon third states to cooperate in bringing to an end any breach of peremptory norms that 'involves a gross or systematic failure by the responsible State'.[52] The obligation therefore only arises should there be a breach of a peremptory norm, *and* if the affected state was involved through a gross or systematic failure. This provision envisages a *positive* obligation, that may be executed either through an institution such as the UN, or in a non-institutionalised manner.[53] Thus, if the lack of provision of humanitarian assistance by the affected state results in the gross or systematic breach of a peremptory norm of international law, third states may have a responsibility to bring this breach to a halt. Given the current restricted number of norms that are recognised in the international community as *jus cogens*, such a situation may only in reality apply to the legal framework of humanitarian assistance in the event the deprivation of receipt of humanitarian assistance by a population amounts to crimes against humanity, war crimes, genocide or racial discrimination. Benvenisti concurs, arguing that indeed circumstances such as crimes against humanity and grave breaches of humanitarian law are 'recognized instances where sovereigns are required to invest resources in the effort to protect humanity's concerns'.[54] While Article 41(1) calls for 'lawful' measures, difficulties might arise when these serious breaches remain within the territorial jurisdiction of the affected state, and no particular third state may be inclined to initiate the ending of the breach.[55] Often resort shall be had to the UN Security Council and the collective use of force, whereas another international legal discussion might arise as to the lawfulness of the use of force in ending the breach according to Article 41(1) ARSIWA.[56]

Arguably the vicinity of a state to the crisis can be relevant in the provision of assistance and the related legal rights or duties. Naturally, such states may have a greater motivation concerning the upholding of political, economic and social stability in their particular area of the world. Legally however, if a state may have a responsibility in the creation of a crisis, such as can be the case with trans-boundary natural or man-made disasters, should such a state also bear active responsibility for the delivery of aid to its neighbouring state? According to Vukas, principal drafter of the Bruges Resolution of 2003, the state which 'bears some responsibility for a

[51] UNGA Res 2625 (XXV) (24 October 1970) 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations', Annex.
[52] Article 40 and 41 ARSIWA.
[53] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 286-287.
[54] Eyal Benvenisti 'Sovereigns as Trustees of humanity: The Concept and its Normative Implications', (2012) *SSRN* accessed 24 January 2012, 27.
[55] Crawford, *State Responsibility: the General Part* (n 2) 386-387.
[56] Ibid 386-387; see also 8.4 on the use of force.

disaster' that then affects another state, will also be obliged to provide assistance.[57] Furthermore, Vukas argues that in particular those states in the vicinity of the humanitarian crisis should offer aid to the victims to 'the maximum extent possible'.[58] A somewhat vague conclusion therefore remains concerning neighbouring states. Indeed, as assessed in Chapter 6, bearing responsibility as 'affected state' leads to the duty to provide assistance. The ARSIWA also address the issue of vicinity with regard to the duties of the international community according to Article 41 ARSIWA. The Article stipulates that the duty to cooperate for third states is applicable regardless of whether or not such states were affected by the serious breach themselves.[59] The ILC Commentary to the ARSIWA argues that while Article 41(1) might according to some be a reflection of 'progressive development', such cooperation, in particularly in an institutionalised manner, is in practice already being carried out in response to the gravest violations of international law.[60] Such arguments are supported by the UN Charter and practice, as seen above. As such, the ILC argues that Article 41(1) is an attempt to:

> "strengthen the existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40".[61]

Indeed, often such responses occur through the UN framework by means of the Security Council and the use of force, which is addressed in following Sections. Furthermore, Article 41(2) ARSIWA distinctly provides that states are prohibited from maintaining a circumstance which is 'opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law'.[62] Thus, not only do states have a positive duty to cooperate in ending a serious breach of a peremptory norm, the law of state responsibility will hold *third states* responsible should they assist in maintaining such breaches after the fact.[63] In line with this perspective, the General Assembly has held the viewpoint pertaining to the provision of humanitarian assistance that it is in fact also a 'collective responsibility' to uphold principles such as human dignity, and to ensure that the victims of humanitarian emergencies are given 'every assistance' possible.[64]

Moreover, this perspective of cooperation has also been asserted by the ICJ in its 2007 *Bosnia v Serbia* judgment, where the Court argued that 'an obligation of conduct' exists for state parties to the Genocide Convention to prevent the

[57] Budislav Vukas, 'Humanitarian Assistance in Cases of Emergency', (2007) *Max Planck Encyclopedia of Public International Law* § 22.
[58] Ibid.
[59] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 287.
[60] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 287.
[61] Ibid.
[62] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports (1971) p. 16, § 126.
[63] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 290.
[64] UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2 'United Nations Millennium Declaration' § 2, 26.

occurrence of genocide. Although the ICJ expressly asserts that it is merely reflecting the Genocide Convention's scope of the 'duty to prevent' and is not attempting a general jurisprudence on the matter, it *does* acknowledge that the Genocide Convention is certainly not the only international legal instrument that provides for a duty of states parties to take steps in the prevention of acts the instrument attempts to prohibit.[65] In its assessment of such an obligation under the Genocide Convention, the Court determines:

> "It is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce".[66]

The Court determines in the above that a 'manifest failing to take all measures' in the prevention of genocide might lead to the determination of state responsibility for third states, whilst it recognises several criteria that may influence whether indeed such a duty is fulfilled. The Court notes in this regard a capacity of third states to influence those committing genocide, which may depend on geographical distance, the strength of political or other ties and other factors. Interestingly, and in line with the ARSIWA's approach on the duty to cooperate, the ICJ notes the obligation of

[65] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43 § 429.
[66] Ibid § 430.

conduct is not waived in the event a state's efforts 'would not have sufficed', given the fact that the combined efforts of several states *could* have achieved the desired result. Thus, an obligation continues to lie on each individual state, whilst taking into account the criteria recognised by the Court. Drawing a parallel between the crime of genocide and the duty of the affected and third state to provide humanitarian assistance, in the latter instance an obligation of conduct can be discerned also, in particular when considering the provisions in human rights law and international humanitarian law. Both fields of law ascertain various duties of the affected state to provide humanitarian aid in times of crisis, varying from specific duties to *not obstruct* the assistance being provided to the duty in human rights law to *actively seek* assistance from third parties in the fulfilment of the rights as enshrined in the ICESCR.[67] The international community is called upon in both *corpora juris* to assist in the provision of aid or the fulfilment of certain rights, from which a duty can be deduced to refrain from performing an opposite act, namely reinforcing the crisis.[68]

Regarding the matter of vicinity, the joint findings of the ARSIWA Commentary and the ICJ conclude that indeed, while it may not be relevant that third states are individually affected by the breach in question, the duty of conduct (as formulated by the ICJ) and duty to cooperate (as formulated in Article 41 ARSIWA) might be found more easily and at a lower threshold for a neighbouring country. In particular in relation to a humanitarian crisis, with its risks of spilling over into neighbouring countries and thereby enhancing the instability in a particular region, proximity is a factor, albeit difficult to definitively ascertain legally. Such difficulties arise from the fact that the duty to prevent large-scale violations of human rights as currently laid down in international law rests upon the international community as a whole. Yet, the notion of proximity and geography cannot be swept aside. In particular, this is supported by the large amount of regional organisations taking responsibilities upon themselves in the face of crises.[69] This duty for third states to prevent the exacerbation of the crisis, as seen in the Court's analysis of the duty in the context of the Genocide Convention, must therefore not be seen in a vacuum, but in combination of this same duty of other states parties to the treaty at hand. An example is the regional Kampala Convention pertaining to the protection and assistance of IDPs, where this perspective is translated into a right of the African Union to intervene in the event of war crimes, crimes against humanity and genocide.[70] Together, a combined 'duty to prevent' of both neighbouring states and

[67] Annex to Chapter 6.
[68] Annex to Chapter 7.
[69] Amongst others ASEAN's initiative to launch a Humanitarian Assistance Centre for the purpose of collective responses to disasters and the African Union's Stand-by Force as created in Article 4(h) of its Constitutive Act in order to intervene in member states should war crimes, genocide or crimes against humanity take place. The tasks and mandate of the Stand-by Force are elaborated upon in the Protocol Relating To The Establishment Of The Peace And Security Council Of The African Union Adopted by the 1st Ordinary Session of the Assembly of the African Union Durban (9 July 2002) Article 3(f) and Article 15.
[70] Articles 8(1) and 9 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala 22 October 2009).

those further away but with potentially more financial means or resources at their disposal, might be positively formulated as a duty to cooperate; as done by Article 41(1) ARSIWA. However, a duty may not be imposed upon assisting states according to the ARSIWA unless non-provision results in the violation of peremptory norms, or such norms are violated and the affected state was involved through a gross or systematic failure.[71] Therefore, from the above it can be determined that states may have an obligation of conduct individually in the prevention of certain breaches of international law, which may amount to a combined duty of the larger international community to cooperate in such prevention or bringing to a halt of breaches of peremptory norms as determined by the ARSIWA. In particular in relation to humanitarian assistance, such duties would rest upon states in relation to crimes against humanity, war crimes and/or racial discrimination, and potentially genocide.

The ARSIWA's approach with regard to the duty to cooperate is echoed *verbatim* in Article 42 of the ILC Draft Articles on the responsibility of international organisations.[72] Thus, international organisations such as the UN, or other regional institutions would, under these Draft Articles, have a similar duty to that of states in the cooperation to end serious breaches of international law *by an international organisation*.[73] Interestingly therefore, international organisations according to these Draft Articles could be held responsible for failing to cooperate with states in ending such serious breaches. Considering the nature of the norms, the 'jurisdiction' of the UN Security Council would in particular be affected. Under Article 43 of the Draft Articles on the responsibility of international organisations, responsibility for breaches may be invoked by other international organisations or states, not individuals or other actors. For the purpose of this research however, it must be noted that the role of international organisations is considered that of *provider* of humanitarian assistance, rather than that of *denier*, which is also reflected in practice, where international organisations assume the role of provider in the event the affected state does not provide assistance. Should, however, an international organisation violate a peremptory norm of international law, Draft Article 42 might provide relief. But currently it remains to be seen whether the General Assembly will adopt the Articles as developed by the ILC.

A well-known manner in which international organisations have taken a duty to cooperate in the event of a breach (by a state) upon themselves in cooperation with states is the *collective use of force* to end certain violations of peremptory norms that have been addressed: violations of the prohibition of the use of force, genocide, crimes against humanity or war crimes. Often, serious breaches of international humanitarian law or human rights law also lead to the establishment of a need for the collective use of force. This has been distinctly reflected in Article 89 AP I of the Geneva Conventions, which declares:

[71] Articles 40 and 41 ARSIWA.
[72] Article 42 of the 'Draft articles on the responsibility of international organizations' of 2011.
[73] 'Draft articles on the responsibility of international organizations, with commentaries' adopted by the ILC at its sixty-third session UN Doc A/66/10 (2011) 66.

> "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter".

The Additional Protocol thereby clearly recognises a duty to cooperate through the call 'to act' in conformity with the UN Charter should 'serious violations' of international humanitarian law take place in times of an international armed conflict. AP I itself does not provide for the specific measures which are to be taken in such cooperation to bring the violations of the law to an end, but rather leaves these open according to the practices of the UN Charter. The Commentary, however, does explicate that such serious violations are not confined to the 'grave breaches' regime of the Conventions, and may therefore cover a wider scope.[74] As such, they may include amongst others violations pertaining to the duties concerning the provision of humanitarian assistance. In this sense, in particular the violation of the protection of civilians in accordance with the principle of humanity as codified in Article 1(2) AP I is of relevance. The circumstances in international law relating to (the denial of) the provision of assistance which may amount to the enforcement through the use of force is addressed in the following Sections. The wording of Article 89 AP I itself follows that of Article 56 UN Charter, calling upon member states to 'pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55', which in turn reflects the duty of states to promote human rights (development). These two Articles are a further explication of Article 1(3) UN Charter that was discussed at the beginning of this Section. Such a view is also held by Article 1 common to the four Geneva Conventions, declaring that all states have a duty to ensure respect for the Convention in all circumstances, implying a duty to ensure compliance even when that state party is not involved in a particular conflict.[75] Thus, when third states must uphold the provisions of this Convention, this naturally includes those provisions pertaining to the provision of humanitarian assistance.

It must therefore be noted that throughout various sources of international law; including the UN Charter, the ARSIWA, the Geneva Conventions and the jurisprudence of the ICJ, a duty to cooperate exists for the international community to bring serious breaches of international law that can be related to the denial of humanitarian assistance, to an end.

8.2.4 State Responsibility, Humanitarian Assistance and Legal Developments

Another legal development by the ILC – although not (yet) codified like the ARSIWA – is the work on the 'Protection of persons in the event of disasters'. These

[74] Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Protocol I and II (*International Committee of the Red Cross 1987*)* Protocol I Article 89, 1033-1034. See also Section 8.6 Methods of Enforcement through Individual (Criminal) Responsibility.

[75] This has also been reiterated by the ICJ in its Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, § 158.

Draft Articles are currently being developed and thereby do not amount to *lex lata*, compared to large parts of the ARSIWA, yet are relevant to consider as potential state responsibility may be invoked should they be developed into law. Thus, although they do not form part of the body of hard law, they *are* more specifically tailored towards the provision of assistance. Whereas the purpose of these Draft Articles is not to attempt the drafting of a new human rights convention, the Articles do incorporate a responsibility of the affected state to provide in humanitarian assistance and seek international assistance should the national capacities be overwhelmed, in a similar manner to Article 2 ICESCR.[76] Interestingly, Draft Article 12 notes a 'primary *role'* of the affected state in the coordination and direction of aid although not strongly formulating a 'responsibility', which leads to the inference of a 'secondary *role*' for potential third parties, for the provision of humanitarian assistance. In the absence of an actual legal 'responsibility', it would then also not be possible to assert state *responsibility* for such third parties in the event *they* fail to comply with such coordination or direction. Enforcement of such an Article, should it be codified, shall therefore remain difficult.

Currently, the Draft Articles are formulated generally from the perspective of the affected state, as opposed to drafting a potential (joint) responsibility for third parties in cooperation or assistance in the aftermath of a disaster. Draft Article 12 decisively states that the affected state has the 'duty to ensure the protection of persons and provision of disaster relief and assistance on its territory'. This formulation of a responsibility of 'result' shall thus allow the invocation of state responsibility in the event these Draft Articles are codified and in the event an affected state does not comply with said duty. Although the Draft Articles' outlook is that of the affected state, Draft Article 8 has a more encompassing view and clearly formulates that:

> "In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations".

Thus, through the wording 'shall', the ILC envisages a duty of states to 'cooperate', which has been elaborated upon in Draft Article 9 to include humanitarian assistance.[77] Such a duty can be read as a duty of conduct, as opposed to a duty of result such as enshrined in Article 41 ARSIWA (dealing with breaches of peremptory norms). In the absence of a duty of result with regard to international cooperation, arguing state responsibility for the violation of such a duty remains difficult, whilst potentially the failure to 'try' may be argued. The ILC Draft Articles, with a view to enforcement, appear to be taking the route therefore of creating international

[76] See Draft Articles 8, 12 and 13 as well as Sections 6.5.9, 6.5.10, 7.5.9 and 7.5.10.

[77] Draft Article 9 ILC protection of persons in the event of disasters declares: "For the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, equipment and goods, and scientific, medical and technical resources".

responsibility for the affected state, but such responsibility remains lacking for third states or other parties, should they fail to comply with the duty to cooperate in the provision of assistance. However, that being said, should such a failure to provide aid result in a breach of Articles 40 and 41 ARSIWA, the international community may still be held responsible. Naturally, the affected state shall also continue to be held responsible under the current regime of Articles 2, 3, 42 and, progressively, 48 ARSIWA.

8.3 Acts Constituting Denial or Obstruction of Humanitarian Assistance

Denial or obstruction of humanitarian assistance by the affected state can be twofold, as the affected state *itself* may deny the affected population the provision of aid, and/or alternatively the state may deny *third parties* access for the provision of assistance to the affected population. Given the potential dual nature of the denial of assistance, a state may indeed be in violation of international law on multiple accounts. Only upon the establishment of a violation of a norm of international law, is enforcement a possibility. Reality on the ground in times of a humanitarian crisis indeed often does not mirror the rights and duties reflected in the legal provisions at hand. This discrepancy results in both a need and a calling for enforcement methods in the event the affected state does not abide by the duties resting upon it according to international law, and does not allow persons in need or third parties to exercise their rights according to that same law in the provision of international humanitarian assistance. In certain instances, the 'affected' state may even become the 'inflicting' state. A well-known recent example in the field of natural disasters includes that of cyclone Nargis hitting Myanmar in 2008, upon which the government was not willing to allow certain rescue teams into the country.[78] In the context of armed conflict, the dire situation in Syria also comes to mind, as the Syrian government has repeatedly refused international aid to be allowed into the country, as well as refusing international providers of such aid.[79]

In such instances, the affected state may be violating international law, as it denies the provision of humanitarian assistance to its population, leading to a need for enforcement. Having asserted that persons in need of food, water, medical supplies and shelter should be enabled to receive such assistance, the legal consequences of the denial of there become relevant, with a view to potential enforcement methods. Legal consequences must specifically be addressed, as they enable persons in need of assistance to obtain such assistance through legal methods and mechanisms. Such legal, and in particular forceful, consequences as discussed in this Chapter must

[78] 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-0> accessed 2 October 2013; and <http://reliefweb.int/report/myanmar/myanmar-cyclone-nargis-ocha-situation-report-no-6> accessed 2 October 2013.

[79] Reports of the denial by Syria of access by the UN Emergency Relief Coordinator Valerie Amos can be found at <http://www.reuters.com/article/2012/02/29/us-syria-un-idUSTRE81S20Z20120229> accessed 2 October 2013; and by Ban Ki Moon at <http://in.reuters.com/article/2014/07/24/syria-crisis-un-aid-idINKBN0FT28A20140724> accessed 22 May 2015.

however be seen as a last resort. All other options, via diplomatic and humanitarian channels, must be sought after first.[80] The legal approach of enforcement is not necessarily the quickest or most viable solution in all situations, but it is important to establish which manners of redress are possible in the event of such flagrant violations of international law that amount to the denial of assistance, when other attempts (such as diplomatic methods) have failed.

8.3.1 Circumstances of Denial or Obstruction: Determining a Humanitarian Crisis

In the law pertaining to the provision of humanitarian assistance, one of the greatest problems is the determination of *what specifically* constitutes an act of 'denial of humanitarian assistance', or obstruction thereof. Indeed, as discussed in Chapters 6 and 7, in certain instances it is up to the discretion of the affected state and its sovereignty to determine whether or not it shall allow the external provision of humanitarian assistance. This discretion is, however, limited by the boundaries in international law that might lead to state responsibility or even individual responsibility. Chapters 5, 6 and 7 have indeed asserted that the current legal framework on the provision of humanitarian assistance demands far-reaching efforts from the affected state. In fact, it is not only the concept of state sovereignty as a 'responsibility' towards citizens that enforces this viewpoint, but also *vice versa*: the currently held perspective that the needs of those in times of a crisis must be met, through access for humanitarian assistance, is changing the nature of sovereignty. As Spieker has argued, although a right to offer or provide external assistance can be established, the problem lies in the enforceability of that title.[81] Several distinct and tiered questions are indeed crucial in this assertion and determination.

Firstly, the question whether a territory and population are in fact *dealing with a humanitarian crisis* needs to be addressed. In Section 3.3.3 it has been proposed that a humanitarian crisis is 'a situation deriving from a variety of origins, including natural or man-made disaster, armed conflict and occupation; causing grave damages of a personal or material nature to persons, where (national/external) assistance is needed as the local capacity is either overwhelmed, unable or sometimes unwilling to manage the circumstances'. Thus, a situation must exist in which a *need or necessity* for humanitarian assistance exists, either from within the state or from external sources.

Important in answering this initial question is a second related question: *Who* determines whether or not a local capacity is overwhelmed, unable or unwilling to provide assistance; leading to the term used in international humanitarian law of an 'inadequately supplied' territory? Based on the cornerstone notion in international

[80] 'Further Promotion And Encouragement Of Human Rights And Fundamental Freedoms, Including The Question Of The Programme And Methods Of Work Of The Commission Alternative Approaches And Ways And Means Within The United Nations System For Improving The Effective Enjoyment Of Human Rights And Fundamental Freedoms' Note by the Secretary-General UN Doc E/CN.4/1993/35 (21 January 1993) § 267.

[81] Heike Spieker, 'Humanitarian Assistance, Access in Armed Conflict and Occupation' (2013) *Max Planck Encyclopedia of Public International Law* § 38.

law of state sovereignty, a certain margin of appreciation is left to the affected state. Examples of this can be found in the law pertaining to non-international armed conflicts and which are based on the incorporation of *consent* of the affected state.[82] But today as established, state sovereignty entails not only an external shield but also an internal responsibility, and consent to offers by third parties may not always be withheld, which is directly related to this notion of 'adequacy of supply'.[83] Leaving the determination of the 'inadequacy of supply' solely in the hands of the affected state, would result in this state determining *itself* whether or not it is violating international law. As such, the determination in international law regarding the question of whether or not humanitarian assistance is *needed* in certain instances should by default be handed over to an authoritative body.[84] If the denial of (internal or external) humanitarian assistance is a violation of international law; namely when the denial cannot be justified according to the provisions discussed in Chapters 6 and 7, then the determination of what *constitutes* denial of the provision should not be left to the affected state. As will be seen in this Chapter, such a body can be a judiciary body like the ICJ, ICC and various human rights courts, or a supranational body such as the Security Council. Not one single body is, or can be authoritative, as the nature of the crisis may determine which body shall be the recipient of the question to answer. Also, whilst such bodies cannot be presumed infallible, in the absence of one single judiciary, this is the current system in international law which can be utilised and will be explored in this Chapter.

Based on the above, it is thus possible to establish that the initial assessment for enforcement options lies in the determination of whether or not a territory is suffering from a humanitarian crisis, and whether the affected territory is adequately supplied by the affected state. The determination of this lies initially with the affected state, given its sovereign duties, but may – considering potential violation of international norms – be extrapolated to the judgment of an international authoritative body.

8.3.2 The Refusal of Consent: Arbitrariness and Enforcement

Enforcement becomes relevant when the affected state is not fulfilling its duties under international law. This relevancy has a 'tiered' approach. Only upon establishing the first tier or criterion, namely that assistance is needed in a specific territory and that the affected state is not fulfilling its own duties under international law (Chapter 6), does the second tier become relevant, which is related to international assistance. In this subsequent tier the question is raised whether or not an offer of humanitarian assistance from external parties may be refused; in other words: whether or not the *consent* of the affected state may be withheld (Chapter 7) and when such withholding is in line with international law.

[82] Amongst others Article 18 AP II.
[83] 4.2.3 and 4.3 on the notion of state sovereignty today.
[84] UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 'World Summit Outcome Document' § 118, 138 and 139.

Again, a certain degree of autonomy in answering this question may be assumed from the notion of state sovereignty.[85] However, international law has developed certain criteria that can be applied to this question, to create narrower margin of appreciation for the affected state: withholding consent is limited to specific reasons in international law. Put differently, the discretion of the affected state for refusing consent is limited by norms in international law, which are explored below.[86]

At an early stage, the ICJ has asserted in its *Nicaragua* judgment that it is not 'an intervention in the internal affairs' of the affected state to provide indiscriminate assistance for the purpose of prevention and alleviation of human suffering, as well as to 'protect life and health and to ensure respect for the human being'.[87] This assertion has also been held by Vukas, arguing that an international offer of assistance cannot be construed as an unlawful interference in the 'domaine reservé', thereby reserving the protection of human rights exclusively to domestic jurisdiction.[88]

As such, 'humanitarian assistance' as defined in this research as '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', which abides by the principles of humanity, neutrality and impartiality, must be seen as a rightful offer in times of crisis.[89] Indeed, soft law documents such as the Bruges Resolution and the San Remo Principles have also elaborated on this notion of an 'offer' and reasoned that it should be 'bona fide' and not be regarded by the affected state as an interference in its internal affairs.[90] This notion can be as basic as a choice to deliver aid in non-military ships, to avoid doubt as to the intent of the external party. The notion of a *bona fide* offer can also be considered to be fulfilled when in accordance with the principles of humanity, neutrality and impartiality.[91] The Bruges Resolution furthermore elaborates that such an offer may not be 'arbitrarily and unjustifiably' rejected, and that the offering states should call upon the UN Security Council should they fear a 'humanitarian catastrophe'.[92] A similar approach can be seen in the ILC's Draft Articles on Protection of persons in the event of disasters that currently state a duty of the affected state to seek international assistance should local capacity be exceeded (Draft Article 13), a requirement of consent from the affected state which

[85] This has been argued also by Walter Kälin, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons in 'Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development' Report Of The Representative Of The Secretary-General On The Human Rights Of Internally Displaced Persons UN Doc A/HRC/10/13/Add.1 (5 March 2009) § 38; and Chapter 7.
[86] FAO Legislative Study 'Right to Adequate Food in Emergencies' (2002) 79; and Chapter 7.
[87] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment 27 June 1986 I.C.J. Reports 1986, p. 14 § 243.
[88] Vukas, 'Humanitarian Assistance in Cases of Emergency' (n 57) 5.
[89] 2.2.2 Defining Humanitarian Assistance and further.
[90] 'Guiding Principles on the Right to Humanitarian Assistance' (April 1993) The International Institute of Humanitarian Law in San Remo, Principle 5.
[91] 2.2.3 The Principles for the Delivery of Assistance.
[92] Resolution 'Humanitarian Assistance' (2 September 2003) Institute of International Law, Sixteenth Commission, Bruges Session § VIII.

may not be withheld 'arbitrarily' (Draft Article 14) and a duty for the affected state to facilitate external assistance (Draft Article 17).[93] Arguably, the wording of Draft Article 14 which uses 'shall' as opposed to 'should' in formulating the magnitude of the duty of the affected state to consent to external assistance goes beyond common practice today. However, the using of 'shall' is limited to the arbitrariness of a refusal (generally accepted in international law) as well as with regard to the communication of a decision concerning offers of aid. The wording is *not* specifically geared towards the content of that communication, and the affected state continues to have the opportunity to decide against accepting assistance, provided that it can prove such a denial of aid is not arbitrary.

Thus, in these legal development processes, the nature of the offer is related to the extent to which the affected state can refuse consent. Should a humanitarian crisis be in place and an offer be 'bona fide' and in line with the ICJ's assertions of non-discrimination, it shall be difficult for the affected state to argue reasons for withholding consent that shall not be construed as '*arbitrary'*. In this way, it becomes apparent that the sovereignty of the affected state is curbed by this notion of '*arbitrariness'*. Whereas no legal definition of the concept exists in relation to the provision of humanitarian assistance, it remains the concept utilised in the law today, and is commonly defined as random, lacking a specific reason, or without concern for what is fair.[94].

This assessment regarding arbitrariness and the need for consent furthermore aligns with existing international law. Firstly, it finds ground in the duties of the affected state to seek international assistance in the fulfilments of the rights to food and health as codified in Article 2 ICESCR.[95] It has been concluded that the provision of humanitarian assistance can be a vehicle in the fulfilment of these rights.[96] Thus, should assistance be denied or obstructed, a state may be in violation of its duties under these (and other) international conventions. It is not only at the level of complete 'inaction' that a violation of human rights law is incurred; indeed these rights entail *positive* duties from the affected state as the CESCR has argued that a violation of the right to food can occur through actions including the 'prevention of access to humanitarian food aid in internal conflicts or other emergency situations'.[97] As such Barber has argued that a state party to the ICESCR will be considered to be in violation of its obligations under the Convention when it fails to provide essential food and healthcare, 'unless it can demonstrate that it has made every effort to use all resources at its disposal – including international

[93] ILC 'Protection of persons in the event of disasters' Draft Articles UN Doc A/CN.4/L.831 (15 May 2014).
[94] See in this regard the definitions as provided by Merriam-Webster and Oxford.
[95] 7.3 The Provision of Humanitarian Assistance by Third Parties Under Human Rights Law; Article 2 ICESCR and CESCR General Comment 12 (Article 11 ICESCR) UN Doc E/C.12/1999/5 'The right to adequate food' (12 May 1999) § 17 and § 19. See also 'The right to food', Report of the Special Rapporteur, Note by the Secretary General UN Doc A/63/278 (21 October 2008) § 12.
[96] Section 5.4 Humanitarian Assistance Within the Context of Existing Human Rights.
[97] See Articles 2 and 11 ICESCR amongst others; see also CESCR General Comment 12 (n 95) § 19.

assistance – in an effort to satisfy its obligations'.[98] Minimum core obligations remain to be fulfilled within the scope of the ICESCR. Similarly, the fulfilment of the right to life entails to not 'arbitrarily deprive' persons of that right and their life.[99] Such provisions therefore place an active obligation upon the affected state to seek assistance in the fulfilment of these rights by indeed allowing access to its territory for the provision of emergency aid by third parties.

At the same time, a duty to seek or request assistance under human rights law does not imply an immediate related duty to accept or consent to the help offered: Such help must remain in line with the principles of international law related to the provision of humanitarian assistance: humanity, neutrality and impartiality. It is along these lines that for example the US and Cuba refused each other's assistance following natural disasters in the past decade for political reasons.[100] Similarly, although not humanitarian assistance *per se*, in the situation of the Former Yugoslavia, concerns were raised regarding the impartiality of certain (neighbouring) countries offering assistance to UNPROFOR.[101] Only when aid offered is categorised as 'humanitarian assistance' can it not be arbitrarily refused.

The notion of arbitrariness is furthermore widely incorporated in international humanitarian law. Although acquiescing in particular in circumstances of non-international conflict that access for third parties is subject to the consent of the affected state, international humanitarian law furthermore states that assistance may not be 'arbitrarily denied' nor that it may be viewed as 'interference in the armed conflict or as unfriendly acts', as codified in Articles 23 and 59 GC IV and 70 AP I. Such more explicit references to the need for consent from the affected state in humanitarian law also flow from the assumption often taken that a greater willingness will exist for the affected state to accept external assistance in the aftermath of a disaster as opposed to conflict. A recent example that however proves the contrary, remains the attitude of Myanmar in the aftermath of cyclone Nargis. The Security Council has held on various occasions that the 'intentional denial', 'impeding' or 'obstruction' of humanitarian assistance constitute violations of international law and state obligations under said law, for which consequences must be had.[102] Another norm in times of (non-) international armed conflict is the boundary formed by the prohibition of starvation in Articles 54 AP I and 14 AP II.

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[98] Rebecca Barber, 'Facilitating humanitarian assistance in international humanitarian and human rights law', (2009) 91 *International Review of the Red Cross* 874, 393.

[99] Amongst others Articles 6 UDHR, 6 ICCPR and 4 ACHR.

[100] Amongst others the US refusal of Cuban aid in the wake of hurricane Katrina <http://edition.cnn.com/2005/WORLD/americas/09/05/katrina.cuba/> accessed 6 July 2014 and the Cuban refusal following a hurricane in 2008 <http://edition.cnn.com/2008/WORLD/americas/09/15/cuba.us/> accessed 6 July 2014 as well as <http://www.reuters.com/article/2008/09/17/us-cuba-castro-usa-idUSN1740403120080917> accessed 6 July 2014. See also Carlo Focarelli, 'Duty to Protect in Cases of Natural Disasters', (2010) *Max Planck Encyclopedia of International Law* § 17.

[101] Christine Grey, 'Host-State Consent And United Nations Peacekeeping In Yugoslavia', (1996) 7 *Duke Journal of Comparative & International Law* 250-251.

[102] Amongst others UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 § 5; UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894 § 4; and UNSC Res 2093 (6 March 2013) UN Doc S/RES/2093

Thus, support can be found in international law at various levels and in various *corpora juris* to argue that a state must have legitimate reasons not to accept offers of assistance when facing a humanitarian crisis. Such legitimate reasons are, however, only elaborated upon in international humanitarian law, which explains examples like sieges and blockades as pertaining to 'military necessity', where a side-effect may be the refusal (or delaying) of external assistance.[103] Military necessity may be supplemented by certain 'control rights' of the affected state to check the content of the assistance, or determine the route it takes to the desired location as discussed in Chapter 7.[104] Such an argument for military necessity may not, however, lead to a complete denial of assistance for a prolonged period of time. In the absence of legitimate reasons to refuse an offer of assistance, international humanitarian law reflects that such a refusal amounts to an 'arbitrary denial' of assistance, which is a violation of humanitarian law. Furthermore, also relevant to circumstances of non-international armed conflict, the Guiding Principles on Internal Displacement also argue that consent shall not be 'arbitrarily withheld' by the affected state.[105] It has been suggested that in particular in times of conflict, weighing military necessity against humanitarian needs, in order to determine whether or not consent is required, is akin to the 'proportionality test' frequently applied in humanitarian law.[106] Such an analogy however should be considered with care, as the principle of proportionality in humanitarian law has a specific character of its own. The question is thus raised how *long* a sovereign might take to assess whether or not an offer of assistance is accepted. It is not possible to ascertain a specific timeframe as such issues will have to be addressed on a case-by-case basis. Yet, considering the intensity of the need of persons in a crisis to receive humanitarian assistance, such contemplation should not take a prolonged period of time.

It remains vital therefore to assess factual circumstances on the ground through these questions pertaining to the legal framework on the delivery of humanitarian assistance. Resulting from this assessment, it can be concluded that certain acts or omissions of the affected state or sovereign are obstructions or denials of humanitarian assistance. These have been dealt with in Chapters 6 and 7, as potential violations of the right to life, food, health (and water), or violations of specific provisions of international humanitarian law. These acts or omissions of 'obstruction or denial' of assistance are the *causal link* between the violations of certain rights and duties as discussed in Chapters 6 and 7, and the consequences of these under

§ 43. See in this regard also S Talmon, 'The Statements of the President of the Security Council', (2003) 2 *Chinese Journal of International Law*, 441.

[103] Articles 55 GC IV, 54, 70(3) and 71 AP I; Jean-Marie Henckaerts & Louise Doswald-Beck (eds), C*ustomary International Humanitarian Law (ICRC Study)* (Cambridge University Press 2006), Rules 53 (Starvation as a Method of Warfare) and 54 (Attacks against Objects Indispensable to the Survival of the Civilian Population).

[104] Section 7.5.2 and Articles 23 and 59(3) GC IV and 70 AP I.

[105] '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 25.

[106] Emanuela-Chiara Gilliard, 'The law regulating cross-border relief operations', (2013) 95 *International Review of the Red Cross* 890, 362.

international law, through the enforcement mechanisms that are discussed in the present Chapter.

When addressing the tiered approach in the determination of whether or not an act or omission amounts to a violation of international law, another 'tier' can be added to the existing questions pertaining to (1) the existence of a humanitarian crisis and (2 and 3) whether or not the affected state is complying with its own (twofold) duties under international law to provide aid or allow access for this. The fourth question then becomes whether or not the refusal of assistance is 'arbitrary'.

Several elements can be discerned concerning the notion of 'arbitrariness'. Refusal of a *bona fide* offer, in accordance with the principles of humanity, impartiality and neutrality could lead to the conclusion that such a decision is 'arbitrary'. Furthermore, a refusal resulting in circumstances that would amount to violations of the minimum core obligations of human rights law, and in times of conflict, also violations of those provisions of humanitarian law such as Articles 23 and 59 GC IV, 70 AP I and 18 AP II that oblige access (with due regard to control rights) could be considered arbitrary.

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

The determination of which acts or omissions precisely amount to violations of international law pertaining to the denial or obstruction of humanitarian assistance can and must only be done on a case-by-case basis. In every situation, an assessment must be made firstly whether a humanitarian crisis exists, secondly whether an offer of assistance is subject to consent, and whether such consent is arbitrarily denied. Related to this, the facilitation of access must be assessed. It is not possible to create an exhaustive list of those acts or omissions, although various suggestions have been proffered; a few of which will be named and elaborated upon in the following Sections. As in many instances pertaining to the legal framework on the delivery of humanitarian assistance, international humanitarian law is quite elaborate, suggesting amongst others as being potential acts constituting denial or obstruction of aid the destroying of foodstuffs or agricultural areas, drinking installations, denying access which might result in starvation, and attacking convoys or personnel involved in the delivery of aid.[107] Along these lines the duty to allow 'rapid and unimpeded' passage of goods as reflected in international humanitarian law and consistently reiterated by the Security Council may consist of avoiding putting up barriers such as customs, visa requirements and taxes for the aid shipments and providers.[108] Other examples proffered include the diversion of aid from civilians to the military, excessive searching of convoys, creating roadblocks, holding blockades or sieges with the purpose of starvation, expelling aid providers from the country,

[107] Articles 71AP I 14 and 18 AP II, and Articles 7 and 8 ICC Statute for corresponding crimes.
[108] Article 70 AP I and Section 7.4.2; and Henckaerts & Doswald-Beck, ICRC Customary International Humanitarian Law Study (n 103), Rule 55 (Access for Humanitarian Relief to Civilians in Need).

requesting travel permits, or even claiming that the security of those providing aid cannot be guaranteed.[109]

From the above Sections, however, general questions that must be addressed in each case have been derived, whilst the assessment is case-specific. A primary assessment must be made whether or not a humanitarian crisis exists. Secondly, an assessment must be made whether or not the affected state is capable of adequately supplying the affected territory itself and is in fact doing so. Should the latter question not be answered affirmatively, an assessment shall have to take place whether an offer to provide humanitarian assistance, abiding by the proper principles, was done, and whether or not consent was refused in an arbitrary manner. Denial of assistance and denial of access both lead to violations of international law, as both constitute norms that the affected state must abide by. This assessment leads to distinct questions to determine whether or not a violation of international law has occurred for which enforcement options are available:

1. *Is a population within a territory facing a humanitarian crisis?*
2. *Is the affected state fulfilling its own sovereign duties and providing an adequate supply of aid?*
3. *If this is not the case, is the affected state withholding consent to third parties offering assistance?*
4. *Is the refusal of consent legitimate or arbitrary under international law?*

In the assessment of these questions, the international legal world lacks one central authoritative body. As Ryngaert argues, one of the essential problems lies in the fact that 'no independent mechanism that weighs the evidence and checks whether the reasons invoked by states to deny assistance correspond to reality' and thus, a state may for example argue lack of impartiality when withholding access to providers of assistance whilst in reality punishing civilians it fears may sympathise with rebels within its territory.[110] The assessment of which acts or omissions amount to a violation of international law takes place by various bodies at various times. During or in the immediate aftermath of a humanitarian crisis, such an assessment may occur by the Security Council that determines whether or not to take action (enforcement through the use of force and targeted sanctions). A longer time after the crisis, the assessment may take place by the ICJ in its judgments (enforcement through

[109] Amongst others Henckaerts & Doswald-Beck, ibid Rule 53 (Starvation as a Method of Warfare); Stuart Ford, 'Is The Failure To Respond Appropriately To A Natural Disaster A Crime Against Humanity? The Responsibility To Protect And Individual Criminal Responsibility In The Aftermath Of Cyclone Nargis', (2009) 38 *Denver Journal of International Law & Policy* 2, 26; Christa Rottensteiner, 'The denial of humanitarian assistance as a crime under international law', (1999) 81 *International Review of the Red Cross* 835, 560; Barber, 'Facilitating humanitarian assistance in international humanitarian and human rights law' (n 98) 377-378. Specifically concerning the blocking of aid convoys *Prosecutor v. Krstic* (Appeal Judgment) IT-98-33-A (19 April 2004) § 89.

[110] Cedric Ryngaert, 'Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective', (2013) 5 *Amsterdam Law Forum* 2, 10. Ryngaert suggests revisiting the International Fact-Finding Commission as created pursuant to Article 90 AP I, although noting the lack of viability in this idea, as the Commission's jurisdiction is dependent on the consent of the affected state.

potential state responsibility), by the international human rights courts and committees (enforcement through human rights law) and the ICC or potential *ad hoc* tribunals (enforcement through international criminal law). These bodies have been given the authority in international law through state parties to treaties and member states of their organisations to (judicially) assess whether or not a violation of international law has taken place, and must therefore be considered as the authoritative institutions available for international legal enforcement, despite the lack of a central body.

As determined above, such a violation of international law can be of two distinct norms and duties: firstly, the unlawful denial of assistance by the affected state *itself* (as discussed in Chapter 6), and secondly, the unlawful denial of an offer of *external aid* from third parties and a related right to access, by the affected state (as discussed in Chapter 7). Yet, as the ICJ put forward in its Advisory Opinion on the 'Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)', qualifying a situation as illegal does not in itself end the situation; it is but the first step in an effort to put an end to such a situation.[111] *Enforcement* is indeed a manner in which a situation violating international law can be brought to an end. Enforcement of humanitarian assistance through international law can take place at various levels, and the following Sections in this Chapter address them at an interstate level through a discussion of the use of force by the Security Council, followed by the more vertical level as discussed through enforcement by various human rights bodies. Such bodies, however, also have the opportunity of a horizontal approach through the interstate complaint mechanism.[112] Lastly, this Chapter addresses enforcement through individual responsibility, either through targeted sanctions as imposed by the Security Council and through individual criminal responsibility; in particular for war crimes and crimes against humanity.

8.4 Enforcement through the Use of Force

The use of force is a consequence or aftereffect of the determination that a state is in violation of a breach of international law, and as a result may be held responsible under international law. It must be clear that the use of force shall always be an ultimate resort, in the event other methods of enforcing the provision of aid, such as through diplomatic means and non-military measures, are not successful.[113] The Mohonk Criteria for example refer to a variety of options besides diplomatic initiatives, such as the threat of economic sanctions under Article 41 UN Charter, or cross-border assistance operations initiated from the territory of a neighbouring

[111] 'Legal Consequences for States of the Continued Presence of South Africa in Namibia' ICJ Advisory Opinion (n 62) § 111.
[112] 8.5.1 Enforcement through Human Rights Treaty Mechanisms .
[113] Such a perspective is also reflected in the doctrine of the Responsibility to Protect as embraced by the United Nations.

state.[114] Such an approach is also addressed by Ryngaert who has argued that whilst the crossing of borders by NGOs to gain access may be clandestine, their contested status under international law may provide practical solutions.[115]

In this particular research, the use of force, authorised by the Security Council under Chapter VII, may be a consequence of the denial of humanitarian assistance when such denial leads to a breach of international law for which the affected state may be held responsible. The use of force in international law can be resorted to by way of self-defence and also by the Security Council under Chapter VII of the UN Charter.[116] Given the large number of member states in the UN, the provisions of Article 25 UN Charter obliging them to adhere to the Council's decisions and the otherwise strict prohibition of the use of force in Article 2(4) UN Charter outside of self-defence, the Security Council is the organ under current international law with the most means of enforcing aid through the use of force. It must be reiterated that a clear distinction must be upheld between those *providing* aid and abiding by the principles of humanity, neutrality and impartiality and those using force to *enable* the provision of such aid.

Furthermore, the use of force may *also* be considered as a manner to give effect to the determination in Article 41(1) ARSIWA that states have a duty to cooperate in bringing a breach of international law to an end.[117] In practice, ending such a breach may result in the access of a territory. However, the legal framework on the international responsibility of states does not explicitly provide for the right to access a territory for such purposes. As a result, the ARSIWA also does not indicate the manner in which such access could be obtained for the purposes of Article 41(1). Article 20 ARSIWA provides that if 'valid consent' is given by a state, the wrongfulness of an act is precluded. Thus, the consent must be given in accordance with proper authorisation and authority, but may occur at any time prior or even during the act.[118] As the *Commentary* explicates:

> "Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked".[119]

The *Commentary* has also provided for several examples of consent given by states, including 'humanitarian relief and rescue operations' within the list of possible actions that may fall within the scope of Article 20.[120] Should consent not have been

[114] 'The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies', (1995) reprinted in 17 *Human Rights Quarterly* 1, Criteria VII.1.
[115] Ryngaert, 'Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective' (n 110) 13.
[116] Both the delivery of humanitarian assistance and the use of force as an enforcement mechanism by peacekeeping operations under the auspices of the UN will not be addressed in detail within this research. Solely the Security Council as a primary actor in such decision-making will be considered.
[117] Section 8.2.3 State Responsibility and the Potential Duty to Cooperate in the Event of a Breach.
[118] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 174.
[119] Ibid 175.
[120] Ibid 176.

given, the state(s) gaining access to the territory of the affected state may in turn be in breach of the principle of non-intervention. Therefore, in the absence of consent, the state(s) obtaining access to the territory on which the humanitarian crisis is taking place must ensure that their action is not in violation of international law, as envisaged by Articles 2(4) and 2(7) UN Charter. The use of force authorised by the Security Council would indeed not amount to such a violation. In relation to this, Article 25 ARSIWA regarding 'necessity' has been claimed as a reason to breach a rule of international law (the principle of non-intervention), in favour of the enforcement of providing humanitarian assistance.[121] As seen above, the ILC does not address the matter concerning the *legality* of an intervention outside the umbrella of the UN Charter's collective use of force, stating:

> "The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25 *[ARSIWA]*".[122]

It stands to reason that the ILC does not deal with this legal issue in its *Commentary* on the ARSIWA, as it falls outside the scope of the matter at hand. Yet, should a state forego its primary obligation to protect its citizens and provide humanitarian assistance, a secondary duty under the law of state responsibility may be placed upon international actors to ensure that such assistance is provided.[123] Ensuring such provision can then be done through the use of force, provided that this use of force is in accordance with international law.

The use of force, authorised by the Security Council under Chapter VII of the UN Charter as an enforcement mechanism, is legitimised rather by the (potential) violation of peremptory norms such as genocide, racial discrimination, crimes against humanity and war crimes in the event a state denies humanitarian assistance, as opposed to by the independent violation of a right to receive humanitarian assistance from the international community. Such a latter right indeed cannot be definitively ascertained in positive international law.[124] Also, this approach can be seen in the perspective of the ARSIWA that addresses the duty of third states to cooperate in bringing to an end the violation of a peremptory norm of international law.[125] The use of force must furthermore be resorted to *in lieu* of political or economic enforcement measures should these not suffice, given the impact of the use of force on the international community, as well as primarily on the affected state. In the event 'inducing' the affected state to discontinue its denial of access or provision of assistance through softer mechanisms is ineffective, resort may in certain instances be had to the use of force.[126] Using force is never the 'quick' or 'easy' solution in international law, as evidenced amongst others by the recent

[121] Ibid 202.
[122] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 205.
[123] Focarelli, 'Duty to Protect in Cases of Natural Disasters' (n 100) § 27.
[124] 8.2.2 The ARSIWA, Peremptory Norms and the Denial of Humanitarian Assistance.
[125] Article 40 and 41 ARSIWA.
[126] Vukas, 'Humanitarian Assistance in Cases of Emergency' (n 57) 5.

international actions in Afghanistan and Iraq. Once force is used, an international coalition of states or individual states must be willing to commit themselves to the *potential* that their involvement shall go beyond the factual delivery of humanitarian assistance, which was the initial occasion or reason for the use of force. The absence of a distinct and legally delimited right to assistance furthermore makes enforceability difficult: the choice to resort to the use of force must be based not on the violation of *actions*, but rather on an assessment of what has 'not' been done, or not been done *sufficiently*: the provision of assistance.

8.4.1 Security Council Action: Enforcement through the UN system and the Responsibility to Protect

The role of the Security Council in this setting concerning the use of force is that of an enforcer, as opposed to its role in the previous Chapters, where its role has been discussed as related to distilling standard-setting and normative developments. Yet, this research specifically views the role of the Security Council within the UN framework as that of an authoritative body, given the powers bestowed upon it, with regard to the establishment of a threat to the international peace pursuant to Article 39 UN Charter. It is clear from the UN Charter that not just *any* breach of an international legal norm legitimises the use of force: only if and when such a breach of international law results in a 'threat to the international peace', does the use of force become an accepted option under Article 39 UN Charter. Such an approach falls in line with the perspective that the use of force is legitimised by a serious breach of a peremptory norm of international law. The circumstances that hence will be examined pertaining to the use of force shall therefore remain within the scope of the UN Charter and thus clearly within the scope of existing international law. This Charter will be the basis of their legality in international law. Furthermore, it must be noted that the UN Charter declares in Article 103 that precedence must be given to the Charter and consequentially the Security Council's decision to use force over conflicting obligations Member States may have. This supports furthermore the choice within this research to only consider the use of force within the context of the UN Charter and the authority of the Security Council as decision-making organ, considering that in the absence of the decision to use force by the Council, Article 2(4) of the UN Charter prohibiting the use of force must be given precedence over conflicting obligations. As Simma has argued, even 'the purest of humanitarian motives' might not be able to overcome the legal obstacles of straying outside of the Charter with the use of force.[127] For these reasons, an assessment must be made by an authoritative body in international law as to whether or not a humanitarian crisis exists, before proceeding to enforcement options through the use of force.

Chapter 7 of this research has addressed the Security Council's current perspective on the duty of the affected state to allow and ensure access to third parties

[127] Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (n 13) 5-6.

in the provision of assistance.[128] However, the Council has not asserted that a failure of the affected state to comply with such duties automatically translates into a right to access. As said before, a situation falling within the scope of Article 39 of the Charter must furthermore arise. This would correspond with the breach of law occurring through the non-provision of humanitarian assistance by the affected state, which would then result in a denial of aid that may amount to serious crimes. Such crimes include war crimes, crimes against humanity or racial discrimination (and potentially genocide), as peremptory norms of international law, or include the four core crimes as defined by the notion of the Responsibility to Protect in the World Summit Outcome Document of 2005. Such circumstances then warrant Security Council action. Furthermore, such a use of force may also, as seen above, be implemented in light of the duty to cooperate under Article 41(1) ARSIWA. This duty also acknowledges a potential need to use force to end the violation of a peremptory norm of international law. The ARSIWA asserts such a duty, but the Security Council, by way of Chapter VII, has the potential to *execute* it. Thus, the use of force may be resorted to in the insurance of the delivery of assistance based on both Article 39 of the UN Charter in connection to the threat to the peace, as well as Article 41(1) ARSIWA. In both instances however, although the ARSIWA itself does not mention the Security Council, the monopoly in the determination to in fact resort to force remains with one central body, namely the Security Council, given the abovementioned provisions of 2(4) UN Charter and the fact that members of regional organisations also form part of the UN.[129]

In one of its first thematic resolutions on the protection of civilians (Resolution 1265), the Council has formulated its perspective and role regarding the delivery of humanitarian aid, potentially alluding to the use of force, as the Council declared that it:

> "Expresses its willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures at the Council's disposal in accordance with the Charter of the United Nations".[130]

Indeed, the Council does not use its common phrasing of 'all necessary means' and asserted the use of force outright. However, the Council speaks of 'appropriate measures' at the *Council's* disposal. As the primary task of the Security Council is the maintenance of peace, the allusion to the use of force is arguably implied. The Security Council has addressed that it shall seemingly not condone the 'deliberate' obstruction of humanitarian assistance in the event of an armed conflict. This statement falls in line with the earlier discussed perspective of the Council that indeed impeding the provision of humanitarian aid constitutes a violation of

[128] Sections 7.4.1 and 7.4.2.
[129] 4.2.2.2 Humanitarian Interventions and Humanitarian Assistance. Theoretically, the UN General Assembly may also resort to the use of force under the 1950 'Uniting for Peace' Resolution. The General Assembly has however never invoked this rather controversial aspect of the Resolution.
[130] UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 § 10.

international humanitarian law.[131] Indeed, this approach also corresponds with the Council's take, as discussed in Chapter 7 of this research, of the role of third parties in the provision of aid. Although the Council does not affirmatively assert a right to access or an external duty to provide *per se*, it often presupposes an offer of assistance and cooperation of its member states in the provision of emergency assistance.[132] The manner in which the Council came to this formulation will be subsequently addressed.

From the start, once again a very clear distinction must be made between those actors *providing aid*, and those *using force* for the purpose of the enforcement of aid delivery. The provision of assistance must be done according to the principles of humanity, neutrality and impartiality, in order to qualify as provision of *humanitarian assistance*.[133] To distinguish between those providing such assistance and those using force in order to ensure that the assistance reaches the affected persons, is of paramount importance given the circumstances in which such enforcers operate. The use of force to *enforce aid* is only necessary if and when the authorities in the affected territory do not look favourably upon the external provision of aid, and deny consent arbitrarily. Should the affected state or others exercising authority in the affected territory be advocates or proponents of the provision of assistance, the use of force would not be necessary as such. Thus, those using force shall likely be met with opposition. Such opposition will raise issues concerning the upholding of the principle of neutrality or potentially even the principle of impartiality. As Dungel argued, these problems arise when the actors enforcing assistance have to take action *against* those opposing the provision of aid; at this point the enforcement mission is 'flawed with an inherent lack of neutrality' as the involved parties have engaged with each other.[134] Maintaining a clear distinction between those exercising force and those actors providing the actual assistance is therefore paramount, as even the slightest appearance of bias may influence the acceptance of humanitarian initiatives and diminishes its legitimacy. It is along these lines that the ICRC has suggested that military forces should themselves not be directly involved in the provision of aid, especially during an on-going conflict.[135] Equally, the EU has argued that circumstances in which the military 'supports' humanitarian aid workers – such as in complex emergencies – must be seen as a last resort, so as to not result in a blurring

[131] UNSC Res 771 (13 August 1992) S/RES/771 preamble; UNSC Res 819 (16 April 1993) UN Doc S/RES/819 § 8; UNSC Res 824 (6 May 1993) UN Doc S/RES/824 preamble. For a more in depth discussion see Section 7.4.2.

[132] Ibid 7.4.2.

[133] See for a discussion of these principles Sections 2.2.3 and further.

[134] 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*, 4 <http://sites.tufts.edu/jha/archives/838> accessed 24 November 2014.

[135] Jean-Daniel Tauxe (Director of Operations, ICRC Geneva) stated at the 45th Rose-Ross Seminar (Montreux, Switzerland 2 March 2000): "Military operations should be clearly distinct from humanitarian activities. Particularly at the height of hostilities, military forces should not be directly involved in humanitarian action, as this would or could, in the minds of the authorities and the population, associate humanitarian organizations with political or military objectives that go beyond humanitarian concerns".

of the lines between the two.[136] An ensuing risk of such a blurring of the lines would be a situation in which the *providers* of aid will be targeted themselves, as part of the conflict. Whereas the safety and security of humanitarian personnel is essential for the provision of humanitarian assistance, this aspect of the delivery of assistance shall remain largely outside the scope of this research (with the exception of their discussion as part of facilitating access), as such issues become relevant *upon* providing aid.[137]

The use of force by definition presupposes choosing 'sides' – be it the side of the affected persons in need of assistance which is denied by the authorities in place, or a side to a conflict in itself; a challenge in particular in the case of a non-international armed conflict. Therefore, the 'enforcers' run the risk of being (or being perceived) as either a party to the conflict at hand, or, should this be a situation of a natural or man-made disaster, the creator of a 'conflictual' situation.[138] Ensuring the separation of the providers of aid from its enforcers, to maintain the principles of humanity, neutrality and impartiality in the provision of assistance is therefore required, as well as the realisation that the use of force must also adhere to the standards laid down in international law. For this reason, the use of force, as an ultimate and last resort in the enforcement of humanitarian aid, is still considered solely within the context of the Security Council.

In the previous Chapters, the dilemma concerning the 'adequate supply' of a territory has been addressed on several occasions.[139] One of the greatest challenges of the provision of assistance is the determination of whether assistance is in fact needed. Upon this assertion, the particular responsibilities of the affected state in relation to the provision of aid are 'activated', as well as potential roles of the international community. In the previous Chapters, it has been discussed that a margin of appreciation in the determination of the adequacy of supply remained with the affected state. However, a determination by the Security Council that the use of force is warranted to ensure the provision of assistance to persons in the event of a crisis, is *simultaneously* also a determination that indeed a territory is *inadequately* supplied and that the affected state is not properly attending to its citizens: *that in fact a humanitarian crisis is taking place*. In doing so, the Council in essence determines that the affected state is not providing for persons in need within its jurisdiction. Thus, answering the question of whether a territory is indeed 'adequately supplied' becomes a matter for the Security Council to determine when

[136] '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 § 60-63.
[137] Amongst others various UN thematic resolutions, such as UNGA Res 56/217 (19 February 2002) UN Doc A/RES/56/217; 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' § 3 and 4; UNGA Res 65/132 (1 March 2011) UN Doc A/RES/65/132 §3; UNGA Res 62/95 (29 January 2008) UN Doc A/RES/62/95 § 9.
[138] Dungel, 'A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems' (n 134), 17.
[139] Chapters 6 and 7 and Section 8.3.

it is contemplating the use of force, as argued above in Section 8.3.3. This body may decide whether or not the situation at hand is becoming so topical and severe – a *humanitarian crisis* – that it must interfere to 'enforce' the provision of assistance. Within the current legal framework pertaining to the provision of assistance therefore, the Security Council is the one actor, besides the affected state, that has the opportunity in a circumstance it deems a threat to the peace, to determine whether or not a humanitarian crisis is taking place and the (external) provision of humanitarian assistance is warranted.

8.4.2 The Beginning of Security Council Action

The analysis of Security Council action over the past decades has played a role in the establishment in Chapters 6 and 7 of this research that a legal obligation may exist for states to allow access for the provision of assistance if and when the Council adopts a resolution under Chapter VII using specific wording in that regard. Equally, third states and/or regional organisations are called upon to resort to the use of force in specific instances through the wording of the Council. Determined by Article 25 UN Charter stating that 'the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter', third parties are then obliged to assist in achieving this.

The Security Council's mechanism for the use of force, the system of collective security on the basis of Articles 39 and 41/42 UN Charter, has only been implemented for the enforcement of the provision of humanitarian assistance in recent decades, following certain enforcement issues relating to peacekeeping missions upon the end of the Cold War. In the early decades of the Security Council's action, in part due to the Cold War, the authorisation of the use of force was an exception rather than the rule.[140] The Security Council's and the UN's general inaction in the face of the Biafran crisis in the late 1960's today still stands as an example held by many of a failure to 'enforce' humanitarian assistance. The Biafran airlift was instigated and operated by humanitarian organisations, without the use of force, and is reported to have saved the lives of approximately one million civilians. It was argued by some states, such as England, that the role of the Security Council was to be concerned with 'the maintenance of international peace and security, not with the relief of suffering'.[141] Subsequently in the late 1980's to early 1990s', the Security Council remained motionless in another well-known situation: the dire famine during the protracted civil war in the Sudan.

However, despite the immovability of the Security Council, the UN as an organisation *did* come into action, creating 'Operation Lifeline', an airlift into the

[140] Niels Blokker, 'The Security Council and the Use of Force: On Recent Practice', in Niels Blokker & Nico Schrijver (eds) *The Security Council and the Use of Force: Theory and Reality – A Need for Change?* (Martinus Nijhoff Publishers 2005) 12.

[141] This was the position voiced by the then British minister of foreign affairs, Lord Chalfont. Transcripts of the meeting in the House of Lords (15 July 1968): <http://hansard.millbanksystems.com/lords/1968/jul/15/biafra-united-nations-and-international> accessed 13 November 2013.

Sudan following a General Assembly resolution.[142] This airlift was developed and carried out by humanitarian agencies in cooperation with the UN, through agencies such as the World Food Programme and UNICEF, supported by the UN General Assembly, as well as in cooperation with the authorities in Sudan itself.[143] As such, it was the first humanitarian operation, lasting from 1989-2005, in which civilians were assisted within a sovereign country during an on-going conflict. The division of tasks within the UN follows the development of the UN Security Council's stance on the concept of 'humanitarian assistance' and its own role as an organ of the UN therein. As discussed in Section 7.4.1, the UN Security Council did not commence addressing a potential role for external parties in the provision of assistance until well into the 1980's. In doing so, the Council adopted resolutions calling for the UN and its agencies to provide aid, but does not mention the use of force, nor is Chapter VII of the UN Charter involved.[144]

Human rights law, in particular Article 2 ICESCR, together with Articles 55 and 56 of the UN Charter, also envisages a duty to cooperate in the fulfilment of various human rights. It has been discussed that both the ARSIWA (in Article 41) and international humanitarian law (in the form of Article 89 AP I) recognise a duty to cooperate in the event of breaches of peremptory norms or of serious violations of humanitarian law respectively. The manner in which such cooperation, when amounting to force, takes place has with time been set within the Security Council's framework of action, as this action falls within the UN Charter and international law's general perspective on the non-prohibited use of force.

Prior to the thematic Resolution 1265 of 1999 which was addressed in the previous Section, the Security Council had the opportunity to consider its stance with regard to the internal conflict in Somalia and with regard to the conflict in the Former Yugoslavia, both in the early 1990's, followed by the well-known dramatic turn of events in Rwanda in the mid-1990's. Somalia requested such a consideration from the Council itself on several occasions, whereas also the then Republic of Yugoslavia 'welcomed' the Security Council's consideration of the situation.[145] Both country-situations unfolded somewhat simultaneously, and the Council addressed the use of force in both situations, through the implementation in first instance of peacekeeping missions. These missions were based upon the consent of the affected states and parties involved.[146] Therefore, they functioned on the basis of certain agreed principles, such as impartiality, the non-use of force unless in self-defence and the

[142] UNGA Res 44/12 (24 October 1989) UN Doc A/RES/44/12, 'Operation Lifeline Sudan'.
[143] UNGA Res 43/8 (18 October 1988) UN Doc A/RES/43/8; UNGA Res 43/52 (6 December 1988) UN Doc A/RES/43/52; UNGA Res 45/226 (21 December 1990) UN Doc A/RES/45/226; UNGA Res 46/178 (9 December 1991) UN Doc A/RES/46/178.
[144] UNSC Res 513 (19 June 1982) UN Doc S/RES/513 'Lebanon'.
[145] Amongst others with regard to Somalia: UNSC Res 733 (23 January 1992) UN Doc S/RES/733 preamble; UNSC Res 764 (17 March 1992) UN Doc S/RES/764; UNSC Res 751 (24 April 1992) UN Doc S/RES/751; and with regard to Yugoslavia: UNSC Res 713 (25 September 1991) UN Doc S/RES/713 preamble.
[146] See with regard to the intricacies Grey, 'Host-State Consent And United Nations Peacekeeping In Yugoslavia' (n 101).

absence of participation of forces of the permanent members of the Security Council.[147] However, as Grey rightly notes, once the Security Council operates under Chapter VII of the UN Charter and the original peacekeeping missions are altered, the matter of the necessity of consent of the affected state alters also.[148]

The changing nature of conflicts in the 1990's has increasingly impacted the Security Council's approach to the mandate of peacekeeping missions, as well as the particular UN Charter basis upon which it operates and also its perspective on the enforcement of humanitarian assistance. Indeed, it is then the role of the Security Council as enforcer rather than in a more regulatory or normative capacity as was discussed in Chapter 6 and 7 of this research, that comes to the forefront. The Security Council noted concerning Somalia that the delivery of humanitarian assistance was an 'important element in the effort of the Council to restore international peace and security in the area' and as such, authorised an 'urgent airlift operation' to indeed deliver such aid.[149] The Security Council then, in calling upon the parties to the conflict to cooperate with the UN and its security personnel and assist in the stabilisation of the situation, asserted that:

> "In the absence of such cooperation, the Security Council does not exclude other measures to deliver humanitarian assistance to Somalia".[150]

The Council thus appears to indirectly open the door to the potential future *use of force for the provision of assistance* but does not actually formulate it as such. As seen above, this formulation by the Council is echoed in its subsequent thematic Resolution 1265 'Protection of Civilians in Armed Conflict' of 1999, but can be seen also as merely referring to non-forceful measures. In this present Resolution, the Council more distinctly interlinks the 'other measures' to the delivery of emergency aid. Although the Council does not reiterate this stance in its subsequent dealing with the situation in Somalia, it does reaffirm its approval of the initiatives that have been undertaken through the airlift operations.[151] It must be noted that the Somalian government itself *requested* the UN's involvement in the delivery of aid, as continuously stressed by the Security Council.[152] As months progressed and the humanitarian situation deteriorated, not in the least due to the continued impediment of the delivery of aid, UN member states offered to assist in the establishment of a safe environment in which to provide humanitarian assistance, upon which the Security Council determined that, acting under Chapter VII of the UN Charter, it:

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[147] Ibid 282.
[148] Ibid 255. Discussing the development of peacekeeping missions falls beyond the scope of this research. This research will restrict itself to a brief discussion in light of the current trends in the use of force for the purpose of delivering humanitarian assistance.
[149] UNSC Res 767 (27 July 1992) UN Doc S/RES/767 preamble and § 2. See also UNSC Res 775 (28 August 1992) UN Doc S/RES/775 preamble.
[150] Ibid S/RES/767 § 4.
[151] UNSC Res 775 (28 August 1992) UN Doc S/RES/775 preamble and § 4.
[152] UNSC Res 794 (3 December 1992) UN Doc S/RES/794 preamble.

> "authorizes the Secretary General and Member States cooperating to implement the offer referred to in paragraph 8 above to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia".[153]

Thus, the Council called upon the use of force by member states, through its well-known phrase to 'use all necessary means', unequivocally *for the purpose of the delivery of humanitarian assistance*. This was in fact the first time the Council authorised the use of force for the purpose of the delivery of emergency assistance in a humanitarian crisis.[154] As such, it has opened the door to a major change in the enforcement of the provision of humanitarian assistance: Over the past decades Security Council action has consistently been a contributing factor in the enforcement of aid provision. In general, the intervention in Somalia is considered a success, as the international force UNITAF was able to create safer areas on the ground, and enabled the provision of assistance to the Somalians in need.[155] This mission was succeeded by UNOSOM II, one of the most ambitious peace operations of the UN at that time, as the use of force beyond self-defence was mandated, amongst other matters for the delivery of humanitarian assistance.[156]

Yet, a clear line was not to be distinguished in the work of the Council at this stage. As mentioned, the conflict in the Former Yugoslavia unfolded at approximately the same time as the conflict in Somalia which led to the determination of the use of force by the Security Council. Although both situations are clearly distinct, given that the assertion to use force was not done in the case of the Former Yugoslavia, the common denominator is that the provision of humanitarian assistance played an important role in the Council's decision-making. The Council asserted in a similar fashion to it resolutions concerning Somalia the importance of the provision of emergency aid in the restoration of international peace and security and acknowledged the rapid deterioration of the situation on the ground, as well as the need for delivery of assistance.[157] The Security Council commenced by instating an arms embargo, prior to asserting the need for a peacekeeping operation, followed by a Chapter VII decision for all parties to create conditions for the unimpeded passage of humanitarian assistance, including the 'establishment of a security zone encompassing Sarajevo and its airport'.[158] In the subsequent resolution, the reopening

[153] Ibid § 8 and 10.
[154] The subsequent use of force was then carried out by the Unified Task Force (UNITAF).
[155] Trevor Findlay, *The Use of Force in UN Peace Operations* (SIPRI/Oxford University Press 2002) 181.
[156] UNSC Res 814 (26 March 1993) UN Doc S/RES/814 and UNSC Res 837 (6 June 1993) UN Doc S/RES/837.
[157] UNSC Res 770 (13 August 1992) UN Doc S/RES/770 preamble; UNSC Res 752 (15 May 1992) UN Doc S/RES/752 preamble.
[158] Concerning the arms embargo: UNSC Res 713 (25 September 1991) UN Doc S/RES/713; UNSC Res 721 (27 November 1991) UN Doc S/RES/721; UNSC Res 724 (15 December 1991) UN Doc S/RES/724; UNSC Res 727 (8 January 1992) UN Doc S/RES/727; UNSC Res 740 (8 February 1992) UN Doc S/RES/740; and with regard to the peacekeeping mission UNSC Res 743 (21 February 1992) UN Doc S/RES/743; UNSC Res 749 (7 April 1992) UN Doc S/RES/749; UNSC Res 752 (15 May 1992) UN Doc

of the airport was acknowledged as a first step in the establishment of such a security zone.[159] Whilst the Council addressed the provision of humanitarian assistance through the established peacekeeping operation, it appeared to lean towards the use of force by member states as an enforcement mechanism similarly to the circumstances in Somalia, given that the Council considered 'other measures' to deliver humanitarian aid as it had done in Somalia in July of 1992.[160] The Council called upon its member states in August of that year:

> "to take nationally or through regional agencies or arrangements all measures necessary to facilitate in coordination with the United Nations the delivery by relevant United Nations humanitarian organizations and others of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina".[161]

Explicitly in this Resolution however, the Council takes note of the sovereignty of Bosnia and Herzegovina.[162] Also, the politics of the permanent five members of the Council must be taken into consideration, as not all members were in favour of intervention. Furthermore, in the case of the Former Yugoslavia as compared to Somalia, this *potential* use of force is specifically related to the provision of aid *by the UN itself*. Grey has argued that this phrasing is an appeal to 'use force for humanitarian purposes', but falling under Article 53 of the UN Charter for the purposes of regional organisations.[163] Findlay has argued it to be a 'threat' by the Council of the use of force by member states or the North Atlantic Treaty Organization (NATO).[164] Whether or not this call may indeed, or could have been construed as an authorisation to use force by member states is however a question the Council took care of. In a subsequent resolution, the Council, while thanking member states for offering military personnel, decided to enlarge the mandate of UNPROFOR, the peacekeeping mission on the ground.[165] Although this Resolution 776 itself was not taken under Chapter VII, it referred back to Resolution 770, thereby allowing the UNPROFOR peacekeeping mission to use force in self-defence as meant under Chapter VII *for the purpose of delivering humanitarian aid*, although this was not the mission's original mandate to which the parties involved had consented.[166] As such, the facilitation and protection of the delivery of humanitarian assistance by UNPROFOR was enforced upon the parties by the Security Council. Despite having acted under Chapter VII, the Council determined that consent of the

S/RES/752. With regard to the Chapter VII decision of the Council, see UNSC Res 757 (30 May 1992) UN Doc S/RES/757 § 17.

[159] UNSC Res 758 (8 June 1992) UN Doc S/RES/758 § preamble.

[160] UNSC Res 761 (29 June 1992) UN Doc S/RES/761 § 1 and 4.

[161] UNSC Res 770 (13 August 1992) UN Doc S/RES/770 § 2.

[162] Ibid preamble.

[163] Christine Grey, *International Law and the Use of Force* (Oxford University Press 2008) 424.

[164] Findlay, *The Use of Force in UN Peace Operations* (n 155) 137.

[165] UNSC Res 776 (14 September 1992) UN Doc S/RES/776 preamble and § 2.

[166] Grey, 'Host-State Consent And United Nations Peacekeeping In Yugoslavia' (n 101) 259.

host state remained a necessary component for the peacekeeping mission to operate, and replaced UNPROFOR by UNCRO.[167]

Thus, in such early instances of peacekeeping missions, even where the potential use of force was mandated, the mandate of the Council relating to the peacekeeping mission did not necessarily supersede the need to obtain *and hold* the consent of the affected state. Interestingly however, in Resolution 781 pertaining to the situation in Bosnia and Herzegovina, the Security Council installed a flight ban on military flights over the airspace of Bosnia and Herzegovina, *for the purpose of securing the safety of the delivery of humanitarian assistance*.[168] Reaffirming this ban in a following resolution, the Council did not reiterate its earlier statements pertaining to the sovereignty of Bosnia and Herzegovina, and thereby appeared to be distinguishing such actions of a more autonomous character from the peacekeeping mandate where the use of force was intrinsically linked to self-defence.[169] Imposing a flight ban for the purpose of the delivery of assistance, whilst acting under Chapter VII and with a peacekeeping mission on the ground that is authorised to use (a limited amount) of force, certainly gives an outward impression that, whether or not this was intentional, the sovereignty of Bosnia and Herzegovina was compromised through such acting on the part of the Security Council. Yet, in ensuing resolutions, the Council does revert back to reiterating the sovereignty of Bosnia and Herzegovina.[170] From these examples of Somalia and the Former Yugoslavia, it becomes apparent that the Council is open to the use of force *for the purpose of the delivery of aid*, as well as exploring the boundaries of the affected states' sovereignty.

With much of the focus on the conflict, it appears almost as if the Council's initial consideration of the use of force by member states to 'enforce' the delivery of aid goes by unnoticed, as the body continued to grapple with the mandate of the peacekeeping mission and with the protracted conflict over the next few years.[171] The mission appears to remain within the realm of Article 40 UN Charter, also designated by the UN itself as a means to ensure the creation of a situation that allows for unimpeded delivery of humanitarian assistance.[172]

In relation to the provision of humanitarian assistance, the Security Council however asserted a need for 'safe areas' in Bosnia and Herzegovina (such as the well-

[167] UNSC Res 947 (30 September 1994) UN Doc S/RES/947 and UNSC Res 981 (, 31 March 1995) UN Doc S/RES/981 preamble and § 2. See also ibid Grey 266-267 and H J Langholtz and C E Stout (eds) *The Psychology of Diplomacy* (Praeger Publishers 2004) 56-57.
[168] UNSC Res 781 (9 October 1992) UN Doc S/RES/781 § 1.
[169] UNSC Res 786 (10 November 1992) UN Doc S/RES/786 § 2.
[170] For example UNSC Res 819 (16 April 1993) UN Doc S/RES/819 preamble.
[171] Amongst others subsequent resolutions: UNSC Res 787 (16 November 1992) UN Doc S/RES/787; UNSC Res 807 (19 February 1993) UN Doc S/RES/807; UNSC Res 816 (31 March 1993) UN Doc S/RES/816; UNSC Res 819 (16 April 1993) UN Doc S/RES/819; UNSC Res 824 (6 May 1993) UN Doc S/RES/824; UNSC Res 836 (4 June 1993) UN Doc S/RES 836; UNSC Res 908 (31 March 1994) UN Doc S/RES/908; UNSC res 958 (19 November 1994) UN Doc S/RES/958.
[172] Article 40 UN Charter. See also H Nasu, *International Law on Peacekeeping: A Study of Article 40 of the UN Charter* (Brill Martinus Nijhoff 2009) 189-192; and Repertoire of the Practice of the Security Council (1996-1999), Chapter XI 'Consideration of the provisions of Chapter VII of the Charter', Part II Provisional measures to prevent the aggravation of a situation under Article 40 of the Charter 1127.

known enclave pertaining to Srebrenica) to which humanitarian aid providers would have full access.[173] Yet, the extent to which UNPROFOR was allowed to use force, also in particular concerning the facilitation of the delivery of humanitarian assistance, cannot be considered of the same magnitude and depth as the call by the Security Council to its *member states* to use force for the purpose of aid delivery in Somalia, which had subsequently been strengthened by Resolutions 814 and 837, also allowing the ensuing peacekeeping mission UNOSOM II to use force to ensure the delivery of aid to civilians.[174] The latter appeal was indeed the authorisation of the use of force, *for the purpose of the delivery of humanitarian assistance*. With the benefit of hindsight, knowing the circumstances as occurred in Srebrenica, it is of course regrettable that the Council did not apply the Somalian model as a viable option in the Former Yugoslavia. As discussed however, other factors aside from the delivery of humanitarian assistance played a role in that particular conflict.[175] Nonetheless, despite the differences in both situations, the Council asserted the powers of UNPROFOR to use force, albeit on a somewhat flimsy legal basis. As such, from the above, it is possible to derive that in the early stages of the enforcement of the delivery of humanitarian assistance through the use of force, the Security Council was at least willing and able to acknowledge and call upon the need for the *use of force in the provision of humanitarian assistance* upon the request or acknowledgment of the affected state, whilst considering this states' sovereignty. Such a possibility of the use of force was recognised strongly in the case of Somalia through an appeal to member states. In the case of the Former Yugoslavia, it came into being through an enlargement of the mandate of the peacekeepers on the ground.

The above situations illustrate the difficulties the Council faced in adapting the traditional peacekeeping missions to the situations developing in the 1990's where the use of force could have been necessary, and the ensuing blurring of the lines of the mandates. Assessing the technicalities in these mandates is relevant to the determination of *to what extent the Council envisages the potential to use force for the provision of humanitarian assistance*. While it is not possible to examine all peacekeeping operations or subsequent situations in which the Security Council authorised the use of force in relation to the provision of humanitarian assistance, several instances may be highlighted. Through these brief highlights, a line in the practice of the Council can be discerned.

The struggles the Council faced in the Former Yugoslavia were magnified in Rwanda, as the UN's mission UNAMIR had similar problems with its mandate, which did not allow for the use of force, but was a traditional Chapter VI

[173] Amongst others UNSC Res 819 (16 April 1993) UN Doc S/RES/819 § 1; UNSC Res 824 (6 May 1993) UN Doc S/RES/824 § 4.
[174] UNSC Res 814 (26 March 1993) UN Doc S/RES/814 § 5 and 6; UNSC Res 837 (6 June 1993) UN Doc S/RES/837 § 7 and 8.
[175] The detailed particularities of the conflict in the Former Yugoslavia, as well as the detailed mandate of UNPROFOR and subsequent missions remain beyond the scope of this research. For a discussion of the Rules of Engagement and mandate (under Article 40 of the UN Charter) see amongst others Nasu, *International Law on Peacekeeping: A Study of Article 40 of the UN Charter* (n 172) 189-192.

peacekeeping operation and could therefore not 'enforce' humanitarian assistance.[176] As Findlay put it, UNAMIR had the 'misfortune to be established in the wake of the Somalia debacle and during the continuing traumas of Bosnia'.[177] The mission is notoriously known as a failure in the protection of the people in Rwanda, as it lacked the proper backing of the UN and the international community. Finally, after continuous resolutions not allowing for the use of force,[178] an international mission was mandated under Chapter VII 'for humanitarian purposes'.[179] The devastating tragedy in Rwanda, which followed the already tragic events that occurred in Bosnia, lay bare the difficulties the UN faced in the 'enforcement' of humanitarian assistance or otherwise using force in missions that originally set out as peacekeeping operations.

Following these three missions, which are often considered as the early source of more robust operations, the Council asserted on several occasions the possibility of the enforcement of the delivery of humanitarian assistance by both peacekeeping forces and UN member states in the late 1990's. Whilst UNPROFOR and UNOSOM II in the Former Yugoslavia and Somalia respectively were potentially operating beyond a traditional peacekeeping mandate and actually providing peace-enforcement without a proper corresponding mandate, the Council had the opportunity to provide different tools to ensuing operations, in particular *relevant to the enforcement of humanitarian assistance*.[180] As such, these later assertions by the Security Council were often under the umbrella of Chapter VII of the UN Charter and on occasion allowed for a more robust use of force with a view to the delivery of assistance. An example includes the multinational force INTERFET that supported the UN's mission UNAMET in East-Timor with a Chapter VII mandate to 'use all necessary force', with the purpose of facilitating the humanitarian assistance operations.[181] Also in 1999, the UN mission in Sierra Leone UNAMSIL was deployed which, although not given the permission to use all necessary force, was mandated under Chapter VII with amongst others the purpose of facilitating humanitarian assistance.[182] Similarly, the UN mission in the Congo, MONUC, was mandated under Chapter VII to use force to 'protect civilians under imminent threat of physical violence'. Whereas the protection of civilians in immediate physical danger is not equal to the protection of civilians through the provision of humanitarian assistance, it is exemplary of the Council's inclination to expand peacekeeping mandates and use Chapter VII as the authorisation of the use of force for broader purposes. Over the years however, as the Council saw more and more

[176] UNSC Res 872 (5 October 1993) UN Doc S/RES/872.
[177] Findlay, *The Use of Force in UN Peace Operations* (n 155) 277.
[178] UNSC Res 918 (17 May 1994) UN Doc S/RES/918.
[179] UNSC Res 929 (22 June 1994) UN Doc S/RES/929.
[180] For the mandate of UNPROFOR: UNSC Res 770 (13 August 1992) UN Doc S/RES/770 and onwards; for the mandate of UNOSOM II: UNSC Res 814 (26 March 1993) UN Doc S/RES/814 and UNSC Res 837 (6 June 1993) UN Doc S/RES/837 onwards.
[181] UNSC Res 1264 (15 September 1999) UN Doc S/RES/1264 § 3.
[182] UNSC Res 1270 (22 October 1999) UN Doc S/RES/1270 § 13-14, expansion of the mandate to also protect civilians; UNSC Res 1289 (7 February 2000) UN Doc S/RES/1289.

reason to authorise the use of force; it called upon military coalitions of the 'able and willing' to use 'all necessary measures', rather than expanding the traditional peacekeeping mandates of existing UN missions.[183] Indeed, it is in this sense important to distinguish between traditional peacekeeping, peace-enforcement and such coalitions that use force to establish peace.[184] Ascertaining the proper (legal) foundations in the Charter, such as Chapter VII, and in the Security Council action, is relevant to distilling the approach of the Security Council regarding the use of force for the purpose of the delivery of humanitarian aid. The Security Council's practice itself however is somewhat blurred in these early stages, as the above discussion has shown. As argued by Blokker, over the years, although the 'peacekeeping operations' and the 'authorization operations' are fundamentally different, they have increasingly come to resemble each other.[185]

The Security Council commenced adding humanitarian issues as thematic topics to its agenda due to the country-situations that came before it, providing more clarity to the determination of the use of force for the provision of assistance. As of May 1997, the Council added the topic 'Protection for humanitarian assistance to refugees and others in conflict situations' to its agenda, upon which many member states addressed the fact that when necessary, peacekeeping missions needed a clear mandate under Chapter VII, in order to protect and enable the provision of humanitarian assistance.[186] The Deputy Secretary General argued that it was indeed the responsibility of the Council to be 'bold committed and determined' in confronting today's crises and in ending conflicts and securing peace, as such actions would support humanitarian actors in their delivery of aid.[187] More generally furthermore, starting in January 1999, the Council included the item of 'Promoting peace and security: humanitarian activities relevant to the Security Council' in its agenda, upon which the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator suggested that the Security Council should consider specific action that might aid humanitarian actors, including 'ensuring access to populations in need'.[188] The Under-Secretary-General asserted that both

[183] Blokker, 'The Security Council and the Use of Force: On Recent Practice' (n 140) 14. See in this regard for example the situation in Cote d'Ivoire where the Council provided, acting under Chapter VII, the French troops with the mandate 'to use all necessary means' to support the UNOCI mission that was in place: UNSC Res 1528 (27 February 2004) UN Doc S/RES/1528 and reiterated in UN Doc S/RES/1975. Also Niels Blokker, 'Is the Authorization Authorized? Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing', (2000) 11 *European Journal of International Law* 3, 541-568.

[184] A discussion of these notions falls beyond the scope of this research as a focus is maintained on the delivery of humanitarian assistance.

[185] Blokker, 'The Security Council and the Use of Force: On Recent Practice' (n 140) 28.

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

[187] Ibid 1026.

[188] Repertoire of the Practice of the Security Council (1996-1999), Chapter VIII, 'Consideration of questions under the responsibility of the Security Council for the maintenance of international peace and security', Section 42 Items relating to promoting peace and security; A. Promoting peace and security:

peacekeeping operations and political actions, as well as well-targeted sanctions may assist in averting and reducing humanitarian crises.[189] Most Council members concurred the following year, as they highlighted the importance the Council may have in ensuring access of humanitarian assistance to civilians in need. However, discrepancies existed among the members as to whether or not the determination of massive human rights violations or humanitarian difficulties – although a threat to the peace – would warrant the use of force.[190]

Somewhat simultaneously, the Council addressed the potential capacity to use force in its thematic resolutions pertaining to the protection of civilians in times of armed conflict. The use of force in the protection of civilians – amongst others including for the provision of aid – can therefore be seen as an expanding thread in the work of the Council. In a primary statement, the Council 'expressed its willingness to respond' to such situations in which 'humanitarian assistance to civilians has been deliberately obstructed'.[191] The Secretary General then recommended that the Council stress the need for civilian populations 'to have unimpeded access to humanitarian assistance' in its resolutions.[192] From the above deliberations ensued thematic resolutions such as Resolution 1296, pertaining to the Protection of Civilians in Armed Conflict that has been discussed several times in this research. Most relevant to the aspect of enforcement by the Security Council is the paragraph cited above in which the Council expressed its willingness to address those situations in which 'humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures at the disposal of the Council'.[193] The Secretary General has continued to emphasise the pressing need of the Council to deliberate this issue, given the millions of people that continue to be denied assistance.[194] The deliberations of the Council led to the adoption of a subsequent thematic resolution, also pertaining to the protection of

humanitarian activities relevant to the Security Council, Initial proceedings Deliberations of 21 January 1999 (3968th meeting) 1047.

[189] Ibid.

[190] Repertoire of the Practice of the Security Council (1996-1999), Chapter VIII, 'Consideration of questions under the responsibility of the Security Council for the maintenance of international peace and security' Section 42 Items relating to promoting peace and security; C. Maintaining peace and security: humanitarian aspects of issues before the Security Council, Initial proceedings, Decision of 9 March 2000 (4110th meeting) 712-713.

[191] Statement by the President of the Security Council (12 February 1999) UN Doc S/PRST/1999/6.

[192] 'Protection of civilians in armed conflicts' Report of the Secretary General (8 September 1999) UN Doc S/1999/957; also found in Repertoire of the Practice of the Security Council (1996-1999), Chapter VIII, 'Consideration of questions under the responsibility of the Security Council for the maintenance of international peace and security' Section 43, Protection of civilians in armed conflict, Initial proceedings 1054.

[193] UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 § 10.

[194] 'Protection of civilians in armed conflicts' Report of the Secretary General (26 November 2002) UN Doc S/2002/1300; also in Repertoire of the Practice of the Security Council (2000-2003), Chapter VIII, 'Consideration of questions under the responsibility of the Security Council for the maintenance of international peace and security', Section 41 Protection of civilians in armed conflict, Decision of 20 December 2002 (4679th meeting): statement by the President 776.

civilians in armed conflict in which the Council addressed that the *deliberate denial* of access for humanitarian personnel to civilians:

> "may constitute a threat to international peace and security, and, in this regard, expresses its willingness to consider such information and, when necessary, to adopt appropriate steps".[195]

In this regard the Council also addressed its willingness to:

> "consider the appropriateness and feasibility of temporary security zones and safe corridors for the protection of civilians and the delivery of assistance in situations characterized by the threat of genocide, crimes against humanity and war crimes against the civilian population".[196]

As such, the Council addressed the potential consequences it attaches to the denial of assistance, and to the protection of those civilians facing serious violations and crimes. To that end, the Council would take 'appropriate steps' and consider creating security zones. Although the Council does not reference the use of force, in reality in such circumstances safe zones may only be feasible if indeed protected by those mandated to use force (at least in self-defence). Indeed, ascertaining that a situation is a threat to the peace allows the Council to invoke action under Articles 41 and 42 of the Charter. Thus, the Council asserts that a deliberate denial of assistance, which as seen above in Section 8.3.2 violates international law if done arbitrarily, opens the door to the use of force with a view of *enforcing the provision of aid*.

For the purpose of this research, it is relevant to be able to establish from the above that the Council is comfortable asserting a need to act under Chapter VII to ensure the provision of humanitarian assistance. Yet as the Security Council itself puts it in its *Repertoire*, creating 'conditions necessary for unimpeded delivery of humanitarian assistance' would rather fall under the scope of Article 40 of the UN Charter, pertaining to provisional measures under Chapter VII to prevent the aggravation of a situation, as opposed to Article 42.[197] The Council also on occasion names concrete examples of how this should be done, such as through safe corridors or security zones.[198] Although the mandates may vary, from the early 1990's onwards, the *option* to use force has been viable according to the practice of the Council. However, the manner of operating of the Council is case-specific and *ad hoc*; one cannot easily discern a line of precedence in its work. Whether the Council remains with a mandate under Article 40 of the UN Charter or proceeds to use force as directed by Article 42 is not clear from the outset. Furthermore, as O'Connell

[195] UNSC Res 1296 (19 April 2000) UN Doc S/RES/1296 § 8.
[196] Ibid § 15.
[197] Article 40 UN Charter. See also Repertoire of the Practice of the Security Council (1996-1999), Chapter XI 'Consideration of the provisions of Chapter VII of the Charter, Part II Provisional measures to prevent the aggravation of a situation under Article 40 of the Charter' 1127.
[198] For example UNSC Res 1078 (9 November 1996) UN Doc S/RES/1078 pertaining to the situation in the Great Lakes Region §10.

rightly notes, in its authorisation of the use of force, the Council itself remains bound by international law, specifically the UN Charter and customary international law such as the principles of necessity and proportionality.[199] As such, international law mandates that the Council take other options into consideration *prior* to the actual use of force. With regard to the provision of humanitarian assistance, such options would potentially include the delivery of emergency aid with 'heightened security'.[200]

Indeed, the practice of the Security Council is growing, and as such would benefit from a more streamlined approach. Today, the doctrine of the 'responsibility to protect' has permeated the peacekeeping, peace-enforcement and other 'use of force' mandates. The UN General Assembly has adopted this concept as a notion through which the use force in the protection of civilians in need may be called for.[201] This concept, embedded with a clear humanitarian perspective, is able to provide more guidance as to the manner in which the use of force is authorised for the purpose of the delivery of humanitarian assistance. In the face of war crimes and crimes against humanity, both potential results from the non-provision of assistance, the doctrine can be put into practice.

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

Should the Security Council decide to use force in a specific circumstance, the doctrine of Responsibility to Protect is of relevance. Although RtoP is not a legal doctrine, nor does the notion hold specific legal standing in and of itself, it may have the potential to add to the manner in which the Security Council approaches the use of force. Despite the embracement of the notion of RtoP, seen by many as the more viable alternative to the contested concept of a 'humanitarian intervention' the Security Council did not immediately implement it into its resolutions.[202] Furthermore, despite the UN-wide embracement of the doctrine in 2005, as well as subsequent implementation by the Security Council, the following Section will show that certainly not every call for the use of force (in relation to the provision of humanitarian assistance) can be qualified or classified as an implementation of the doctrine.

In its thematic resolution pertaining to the protection of civilians in armed conflict, the Council addressed in further detail the circumstances in which it would consider its readiness 'to adopt appropriate steps' as:

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[199] Mary Ellen O'Connell, 'The United Nations Security Council and the Authorization of Force: Renewing the Council Through Law Reform', in Niels Blokker & Nico Schrijver (eds) *The Security Council and the Use of Force: Theory and Reality – A Need for Change?* (Martinus Nijhoff Publishers 2005) 58.

[200] Ibid 62.

[201] Section 4.2.3 and UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 'World Summit Outcome Document'.

[202] Section 4.2.2 Reconceptualising Sovereignty?. As noted above, this research shall be restricted to forceful action within the context of the UN Security Council.

> "the deliberate targeting of civilians and other protected persons, and the commission of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict, may constitute a threat to international peace and security".[203]

It has already been established that the (arbitrary) denial of humanitarian assistance constitutes a violation of both international human rights law and humanitarian law, as well as potentially certain norms of *jus cogens*, should the denial of assistance amount to for example war crimes, crimes against humanity, racial discrimination or genocide.[204] With the formulation in the above Resolution, the Council recognises therefore that it will indeed consider taking action in the face of such violations of the law. In a subsequent resolution in 2006 the Council reiterated its stance, declaring once more the readiness to take action in the face of flagrant violations of humanitarian law and human rights law.[205] Throughout the following years, the Council continued to embrace the theme of humanitarian assistance in its work, as well as discussing the need for methods to strengthen humanitarian access to civilians.[206]

On various occasions the Council continued to envisage *enforcement of humanitarian assistance* through enhancement of the mandates of UN missions in countries. The Council did so both referring to the use of force *and* under Chapter VII. As such, it has called upon UN missions such as UNOCI, deployed in Côte d'Ivoire upon the conclusion of the 2003 peace agreement, to help 'establishing the necessary security conditions' for the 'free flow' and provision of assistance.[207] Similarly, MINURCAT which was established in 2009 in consultation with the government of Chad, was authorised to use all necessary measures 'to facilitate the delivery of humanitarian assistance'.[208] These examples illustrate the fact that through such wording the Council positively affirms the possibility to use force *for the sole purpose* of ensuring the delivery of humanitarian assistance. Yet, the wording itself falls short of actually calling upon either a mission or member states to indeed *use* force, although Resolution 1975 allows UNOCI this possibility in the protection of civilians. This indeed relates back to the earlier discussion pertaining to Article 40 of the UN Charter as opposed to the use of force under Article 42. As can be seen, the Council furthermore adopts these resolutions outside the framework of RtoP.

The Council has also authorised regional missions, such as the hybrid mission 'UNAMID' of the African Union and the UN in Darfur, to 'ensure the freedom of

[203] UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 § 26.
[204] Chapters 6 and 7 and Section 8.3.3.
[205] UNSC Res 1738 (23 December 2006) UN Doc S/RES/1738 § 9.
[206] Repertoire of the Practice of the Security Council (2004-2007), Chapter VIII, 'Protection of Civilians in armed conflict', 15; Repertoire of the Practice of the Security Council 16th Supplement (2008 – 2009) 'Protection of Civilians in armed conflict'. See also UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 'Protection of civilians in armed conflict'; UNSC Res 1738 (23 December 2006) UN Doc S/RES/1738.
[207] UNSC Res 1739 (10 January 2007) UN Doc S/RES/1739 § 2 (h).
[208] UNSC Res 1861 (14 January 2009) UN Doc S/RES/1861 § 7.

movement of humanitarian workers' and 'ensuring humanitarian access'.[209] The African Union in particular as a regional organisation has embraced the Security Council's tendency to exercise its collective use of force through its member states and has established a 'Peace and Security Council' in 2002 that is mandated, *inter alia*, to provide humanitarian assistance.[210] Such a development further extends the Security Council's approach to the enforcement of the provision of aid, as it actively pursues the security of those actors providing aid.

In affirmation of the UNAMID mission in Darfur the Council also asserted that it would be ready to take action against any party *impeding* humanitarian assistance in Darfur.[211] This approach aligns with the above establishment in Section 8.3 that *impeding* humanitarian assistance amounts to a violation of international law, warranting enforcement of such assistance. In the protracted situation of Somalia for example, the Council has again authorised the African Union to act, although rather than the hybrid form of UNAMID, as a singular mission. With regard to the provision of aid, the Council declared under Chapter VII that the member states of the African Union would be authorised, taking all necessary measures, to contribute 'to the creation of the necessary security conditions for the provision of humanitarian assistance'.[212] The Council also encouraged such member states participating in the AMISOM mission to 'take appropriate action to protect merchant shipping, in particular the transportation of humanitarian aid' against acts of piracy.[213] This cannot be but seen as an unambiguous call of the Council to enforce and ensure the provision of aid through the use of force.

Thus, not only in peacekeeping missions does the Council note the possibility to use force explicitly *for the purpose of* the enforcement of humanitarian assistance, such options even more so become available for *hybrid constructions and regional organisations* fulfilling the mandate of the Security Council. Whilst acting under Chapter VII of the UN Charter, most of these missions were, however, in cooperation with the affected state and government. As such, although the use of force was mandated, the sovereignty of the affected state was not seriously impaired, and international legal standards not overly stretched.

Sovereignty continues to remain one of the paramount considerations in the provision of humanitarian aid. In particular due to the explicit responsibilities of the affected states to provide in humanitarian aid themselves, risks of violations of sovereign duties and a larger permeability of the shield of sovereignty ensues should

[209] UNSC Res 1769 (31 July 2007 UN) Doc S/RES/1769 § 15; UNSC Res 1828 (31 July 2008) UN Doc S/RES/1828 § 7.
[210] See in this regard the Protocol Relating To The Establishment Of The Peace And Security Council Of The African Union Adopted by the 1st Ordinary Session of the Assembly of the African Union Durban (9 July 2002) Mandate § 3(f); and Article 15.
[211] UNSC Res 1828 (31 July 2008) UN Doc S/RES/1828 § 18: "Reiterates its readiness to take action against any party that impedes the peace process, humanitarian assistance or the deployment of UNAMID; and recognizes that due process must take its course".
[212] UNSC Res 1744 (21 February 2007) UN Doc S/RES/1744 § 4 (d); UNSC Res 1772 (20 August 2007) UN Doc S/RES/1772 § 9(d); UNSC Res 1801 (20 February 2008) UN Doc S/RES/1801 § 1; UNSC Res 1863 (9 July 2009) UN Doc S/RES/1863 § 2.
[213] UNSC Res 1801 (20 February 2008) UN Doc S/RES/1801 § 12.

they not do so.[214] Yet the Security Council did become more explicit concerning the enforcement of the delivery of aid, as it expressed in reiteration of its earlier thematic resolution on the protection of civilians in 2009, its willingness to *also* respond to those circumstances of armed conflict in which:

> "civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures at the Security Council's disposal in accordance with the Charter of the United Nations".[215]

Hence, not only in country-specific circumstances does the Security Council address the potential to use force for the enforcement of the provision of humanitarian assistance: through its thematic resolution, the Council opens the door to the use of force as a mechanism to ensure the provision of humanitarian assistance in instances where its provision is 'deliberately obstructed'. Such phrasing is in fact in line with the discussed arbitrary refusal of a bona fide offer, as noted in Section 8.3.2, and forms part of the developments in international law. For example, should a country specifically use starvation as a method of warfare, the Security Council can assert the need to use force in the enforcement of humanitarian assistance.[216] This line of action by the Council also aligns with the crimes as codified in the Rome Statute of the International Criminal Court, which entered into force in 2002, and that are addressed in more detail in Section 8.6.2.[217] In more recent years, the Council has furthermore considered such an approach in practice, whilst embracing the notion of the Responsibility to Protect.

In due course, RtoP *in relation to the enforcement* of the provision of humanitarian assistance has seeped into the wording of the Council in its resolutions. The Council has in fact on various occasions called upon member states to use force with a view to the protection of civilians and the provision of humanitarian assistance. In the situation concerning Libya in 2011, the Council, through the by now familiar phrase, first asserted its 'readiness to consider taking additional appropriate measures' to achieve the provision of humanitarian assistance.[218] Subsequently, in its well-known Resolution 1973 of 2011, the Council acted upon this 'readiness' through the use of force, recalling this specific paragraph of resolution 1970. The Council considered that a flight ban would constitute an important element in this regard (with the exception of flights for humanitarian purposes), as well as authorising member states

[214] Chapter 6.
[215] UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894 § 4. § 3 reiterates the wording of the Council's resolution on the matter in 2006: "Notes that the deliberate targeting of civilians as such and other protected persons, and the commission of systematic, flagrant and widespread violations of applicable international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security, and reaffirms in this regard its readiness to consider such situations and, where necessary, to adopt appropriate steps".
[216] See more explicitly Articles 70 AP I and 14 AP II.
[217] See Article 8 ICC: Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.
[218] UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970 § 26.

to take all necessary measures 'to protect civilians'.[219] This well-known Resolution has been credited with being the first practical application of the use of force within the framework of the Responsibility to Protect. It is therefore striking that such a call has been made *in connection to the enforcement of the provision of humanitarian assistance*. Such an outspoken call by the Security Council has, however, subsequently not been seen.

The Council has amongst others successively acted under Chapter VII with regard to the on-going situation in Somalia and also concerning South Sudan, but has failed to do so with regard to Syria, as well as for example in Mali in 2013. The conflict in Somalia has been on-going for decades, as has the Security Council's involvement in this situation. Its particular circumstance, being often classified as a 'failed state', has added to the difficulties of the Council in finding a solution.[220] Concerning the South Sudan, the Council authorised its mission UNMISS to contribute to 'the creation of security conditions conducive to safe, timely, and unimpeded humanitarian assistance'.[221] Such phrasing is recognised from the above peacekeeping missions that have been discussed, in which the Council acts under Chapter VII but maintains cooperation with the affected governments, and therefore does not assert the use of force as such, rather phrasing it in a somewhat 'softer' manner, most likely remaining within the scope of Article 40.

Equally, the approach taken through RtoP in the situation in Libya is not echoed unambiguously by the Council in its resolutions concerning Syria, but a novel approach is taken. The Council did not commence with a forward approach, merely calling upon parties to implement the 'Six-Point Proposal of the Joint Special Envoy of the United Nations and the League of Arab States' that in relation to the provision of humanitarian assistance calls for the implementation of a 'daily two hour humanitarian pause to ensure the timely provision of humanitarian aid'.[222] In 2014, the Council arguably somewhat referenced to the Responsibility to Protect, mentioning in Resolutions 2139 and 2165 that Syria holds the primary responsibility to protect its population, and 'demanding' that all parties allow access for assistance.[223] Also in Resolution 2165 the Council, although not referring to Chapter VII, but instead 'underscoring that Member States are obligated under Article 25 of the Charter of the United Nations to accept and carry out the Council's decisions' decides:

[219] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 'The situation in Libya' preamble and § 4 and 7.
[220] Issues concerning the absence of a sovereign are addressed in more detail in Section 8.7.
[221] UNSC Res 1996 (8 July 2011) UN Doc S/RES/1996 § 3(b)(vi).
[222] UNSC Res 2042 (14 April 2012) UN Doc S/RES/2042 'The situation in the Middle East' § 1 and similarly UNSC Res 2043 (21 April 2012) UN Doc S/RES/2043 § 1. The 'Six-Point Proposal of the Joint Special Envoy of the United Nations and the League of Arab States' calls under point 3 to: "ensure timely provision of humanitarian assistance to all areas affected by the fighting, and to this end, as immediate steps, to accept and implement a daily two hour humanitarian pause and to coordinate exact time and modalities of the daily pause through an efficient mechanism, including at local level".
[223] UNSC Res 2139 (22 February 2014) UN Doc S/RES/2139 § 5 and 12; see also UNSC 2165 (14 July 2014) UN Doc S/RES/2165, preamble.

> "[…] that the United Nations humanitarian agencies and their implementing partners are authorized to use routes across conflict lines and the border crossings of Bab al-Salam, Bab al-Hawa, Al Yarubiyah and Al-Ramtha, in addition to those already in use, in order to ensure that humanitarian assistance, including medical and surgical supplies, reaches people in need throughout Syria through the most direct routes, with notification to the Syrian authorities, and to this end stresses the need for all border crossings to be used efficiently for United Nations humanitarian operations, […] that all Syrian parties to the conflict shall enable the immediate and unhindered delivery of humanitarian assistance directly to people throughout Syria, by the United Nations humanitarian agencies and their implementing partners, on the basis of United Nations assessments of need and devoid of any political prejudices and aims, including by immediately removing all impediments to the provision of humanitarian assistance; […] notes in this regard the role that ceasefire agreements that are consistent with humanitarian principles and international humanitarian law could play to facilitate the delivery of humanitarian assistance in order to help save civilian lives, and further underscores the need for the parties to agree on humanitarian pauses, days of tranquility, localized ceasefires and truces to allow humanitarian agencies safe and unhindered access to all affected areas in Syria in accordance with international humanitarian law".[224]

Whilst the Security Council here certainly does not assert a right to use force by member states, it does address the option of *entering* into a territory without the sovereigns' specific consent, and very distinctly addresses the actions that should be taken by parties to the conflict, to enable the provision of humanitarian assistance. It has been the first time that the Council refers to such assistance 'across conflict lines'. As such, a novel approach is taken, although it currently remains to be seen how the Council will proceed.

Furthermore in the situation in Mali, the Council acted under Chapter VII, yet refrained from the active use of force by member states, merely providing through familiar wording the 'African-led International Support Mission in Mali (AFISMA)' with the mandate to:

> "support the Malian authorities to create a secure environment for the civilian-led delivery of humanitarian assistance and the voluntary return of internally displaced persons and refugees, as requested, within its capabilities and in close coordination with humanitarian actors".[225]

Interestingly, the Council specifically refers to the *civilian-led* provision of aid. In such a manner, the Council appears to attempt to distinguish clearly between those *providing* aid, and those *enforcing* the provision. Such a distinction is also often seen in the General Assembly's resolutions pertaining to the delivery of humanitarian assistance, as that body often 'emphasizes the fundamentally civilian character of humanitarian assistance', whilst affirming the potential for military support in the

[224] UNSC 2165 (14 July 2014) UN Doc S/RES/2165, § 2, 6 and 7.
[225] UNSC Res 2085 (20 December 2012) UN Doc S/RES/2085 § 9(e).

implementation of such aid. [226] This has also been asserted by the ICRC in its proclamation that neutrality in the provision of aid is paramount, as a result of which military forces should according to the ICRC not directly be providing aid in an ongoing conflict.[227] Yet, the General Assembly has also maintained as recently as 2013 that the use of the military for the purpose of the provision of assistance should be 'with the consent of the affected State', thereby taking a different stance than the way the practice of the Security Council has developed.[228] It is of course possible for the General Assembly to take a different path than the Security Council, although in situations involving the use of force, the Security Council has the leading role. As such, and also given the fact that the resolutions of the latter are of binding legal value when taken under Chapter VII, they shall have more impact on the developments in the field.

Some examples from the Council's practice illustrate the gradual specificity the Security Council has reached over the past years, in particular in relation to the use of force for the purpose of enforcing the delivery of assistance. Increasingly, the Council has asserted the potential to use force in order to specifically carry out the task of securing the provision of aid. As such, in its discussion of the transition from AFISMA to the peacekeeping mission MINUSMA following the French intervention in support of the government in Mali in January of 2013, similar to earlier resolutions the Council has asserted under Chapter VII that this missions mandate shall include the support for humanitarian assistance and as such shall 'contribute to the creation of a secure environment for the safe, civilian-led delivery of humanitarian assistance', thereby echoing its earlier phrasing.[229] Subsequently, in March of 2013, the African Union's Member States were authorised by the Council to:

> "take all necessary measures, in full compliance with its obligations under international humanitarian law and human rights law, and in full respect of the sovereignty, territorial integrity, political independence and unity of Somalia, to carry out the following tasks:

[226] See amongst others for example UNGA Res 60/124 (8 March 2006) UN Doc A/RES/60/124 'Strengthening the coordination of humanitarian emergency assistance of the United Nations' § 7; UNGA Res 61/134 (1 March 2007) UN Doc A/RES/61/134 § 5; UNGA Res 65/133 (3 March 2011) UN Doc A/RES/65/133 preamble. See also other affirmations hereof, such as for example '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) § 64: "Where both humanitarian and military efforts to broaden protection of civilians coincide, the Representative has emphasized that the fundamental distinction between humanitarian action and military action be upheld at all times so as not to call into question the impartiality of humanitarian activities. Fostering a mutual understanding of each other's role will certainly contribute to better coordination. The political and military arms of an integrated mission should reach out to non-United Nations humanitarian actors to promote this understanding".

[227] Statement by Tauxe (n 135).

[228] UNGA Res 65/133 (3 March 2011) UN Doc A/RES/65/133 preamble; UNGA Res 66/119 (7 March 2012) UN Doc A/RES/66/119 preamble; and UNGA Res 67/87 (26 March 2013) UN Doc A/RES/67/87 preamble.

[229] UNSC Res 2100 (25 April 2013) UN Doc S/RES/2100 § 16(e).

> […] To contribute, as may be requested and within capabilities, to the creation of the necessary security conditions for the provision of humanitarian assistance".[230]

Thus, the Council envisioned AMISOM to *create* the secure environment which would enable the provision of aid. Similarly, with regard to the situation in the Cote d'Ivoire, the Council has noted in July of 2013 that, in extending the mission of UNOCI under Chapter VII the mission shall:

> "facilitate, as necessary, unhindered humanitarian access and to help strengthen the delivery of humanitarian assistance to conflict-affected and vulnerable populations, notably by contributing to enhancing security for its delivery".[231]

This phrasing by the Security Council focuses on certain *specific elements in the delivery of assistance*. The Council in fact integrates its earlier lingo from previous resolutions into one singular phrasing. A similar tendency towards such specificities can be seen in the Council's resolution pertaining to MISCA, the mission to the Central African Republic where the Council adopted a lengthy resolution containing many new considerations (amongst others also pertaining to the exploitation of natural resources in times of conflict). It has been argued that such a breakdown of the concepts through emphasis on the various issues relevant to the provision of assistance would indeed be beneficial.[232] Such an argument certainly is valid, as emphasis is placed on a variety of relevant issues within the specific situation under the Council's attention. With regard to the provision of humanitarian assistance the Council echoed its approach used concerning UNMISS in the South Sudan, where it had called upon the mission to contribute to 'the creation of security conditions conducive to safe, timely, and unimpeded humanitarian assistance'. Yet MISCA is authorised to 'take all necessary measures', wording of the Council which often implies a more forceful approach under Article 42 of the UN Charter.[233] In 2014, MISCA transitioned into the UN peacekeeping force MINUSCA, with a mandate under Chapter VII to 'facilitate the immediate, full, safe and unhindered delivery of humanitarian assistance'.[234]

Whilst the use of force by peacekeeping missions is not explicitly mentioned by the Council, it has mentioned this with regard to hybrid missions, those undertaken by regional operations or coalitions of member states, such as for example the missions discussed above in East Timor (INTERFET) and AMISOM.[235] In a new initiative, the Security Council has in 2013 created an 'Intervention Brigade' as part

[230] UNSC Res 2093 (6 March 2013) UN Doc S/RES/2093 § 1(e).
[231] UNSC Res 2112 (30 July 2013) UN Doc S/RES/2112 § 1 and 6(g).
[232] 'Security Council, Internal Displacement And Protection: Recommendations For Strengthening Action Through Resolutions', *Brookings Institute* (September 2011) 21.
[233] UNSC Res 2127 (5 December 2013) UN Doc S/RES/2127 § 28 and 51-52.
[234] UNSC Res 2149 (10 April 2014) UN Doc S/RES/2149 § 30(c).
[235] See for a discussion also Repertoire of the Practice of the Security Council (1996-1999), Chapter XI 'Consideration of the provisions of Chapter VII of the Charter, Part IV Other measures to maintain or restore international peace and security in accordance with Article 42 of the Charter' 1147.

of its MONUSCO mission in the DRC.[236] Although it is the first time a UN peacekeeping mission is enhanced with the task to in fact 'carry out targeted offensive operations' to neutralise armed groups in the protection of civilians, as well as ensure the protection of civilians and humanitarian personnel, this Resolution can be placed in the context of the evolving Security Council action.[237]

Indeed, in many circumstances over the past years where a threat to the peace has existed and a strong authority was absent, such as the circumstances discussed in Somalia, Mali and the Sudan, the Security Council has opted to be increasingly specific in ensuring that the mandate of its peacekeeping missions or that the assisting member states are functioning under Chapter VII, with the potential to stabilise the territory for the purpose of protecting civilians and enforcing the provision of humanitarian assistance.[238] The door to the use of force for the purpose of the enforcement of the provision of humanitarian assistance has therefore indeed been opened by the Council. The Council, through using the well-known phrasing related to the use of force, as well as increased specificities in its resolutions, thereby clearly considering the provision of humanitarian assistance as an object of the use of force, is identifying the importance of the enforcement of the provision of emergency aid.

Yet, the *willingness* to act on the one hand, and the *existing legal rights or duties* on the other hand relating to state sovereignty do not always coincide. The sovereignty of the affected state in the provision of assistance, in practice, continues to be an obstacle that the Security Council faces, although Chapters 5, 6 and 7 have addressed the fact that indeed the viewpoint that access for humanitarian aid is needed, has resulted in more permeability of the notion of sovereignty today, next to the independent evolution of this concept within the 21st century. Equally, the political composition of the Council is a determining factor in its possibility to act. This is also apparent from the singularity of the Libyan action by the Security Council. Only a few times previously has the Council authorised the use of force specifically for the purpose of the provision of humanitarian assistance and the protection of civilians, *against the wishes of the sovereign.* Such was the case in the discussed Resolution 794 pertaining to the situation in Somalia in 1992 where the humanitarian crisis existed in the absence of a central government. Specific to the situation in Libya, however, was that the use of force in Libya was directly *against* the wishes of the government.[239] The operation has to a certain extent reopened the debate on the notion of the use of force for 'humanitarian purposes' under the auspices of the Council, following the humanitarian 'intervention' in Kosovo by

[236] UNSC Res 2098 (28 March 2013) UN Doc S/RES/2098 § 9.
[237] Ibid § 12.
[238] Aurelie Ponthieu, Christoph Vogel, Katharine Derderian, 'Without Precedent or Prejudice? UNSC Resolution 2098 and its potential implications for humanitarian space in Eastern Congo and beyond', (2014) *The Journal of Humanitarian Assistance* <http://sites.tufts.edu/jha/archives/2032> accessed 3 March 2015 (online publication).
[239] A J Bellamy & P D Williams, 'The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect', (2011) 87 *International Affairs* 4, 825–850.

NATO in 1999, outside the scope of the Council.[240] Some members of the Security Council have expressed negative responses to the use of force for humanitarian purposes, also in the context of the notion of the responsibility to protect, with a view to the political consequences of the use of force in Libya.[241] Such responses may explain the reason for the lack of political will in the Council to respond through the use of force to ensuing circumstances that may otherwise have warranted a forceful action to aid persons in need of emergency assistance, such as in Syria.

Certainly, if one attempts to use force in the protection of civilians and the provision of humanitarian assistance to that end against the will of the sovereign state, an outcome most often will be the use of force *against* that sovereign. Yet, distinguishing between the enforcement of humanitarian assistance and a 'humanitarian intervention' which by definition touches upon the sphere of state sovereignty, remains necessary. The use of force as authorised by the Security Council is furthermore not in violation as such of international law. Hence, this research has focused on the use of force within the context of the Council. The use of force outside the Security Council, even for the strict purpose of (the enforcement of) the provision of humanitarian assistance, risks lacking the legality and legitimacy of that use by the Council and would therefore be open to a debate.[242] Such a debate must remain outside the scope of this research, as the focus lies on the enforcement options that are *currently* legally viable *and recognised as such* for the provision of humanitarian assistance.

The Security Council has to date only decided to resort to the use of force with regard to circumstances that may prove to be a threat to the peace, whereas it does not touch upon instances following natural disasters or other crises that may not amount to a threat to the peace. Indeed, within international law, no consensus exists regarding the establishment of such a 'right to use force' in situations that do not amount to a threat to the peace.[243] The IDRL Guidelines for relief in the aftermath of a natural disaster do open the door to potential 'military assets' to be deployed, but envision such relief to be 'only at the request or with the express consent of the affected State', and only upon exhaustion of civilian alternatives.[244] As such, the Guidelines do not attempt to open the door to a potential enforcement of assistance. Similarly, the 'Guidelines on the Use of Foreign Military and Civil Defence Assets

[240] 4.2.2 Reconceptualising Sovereignty?.
[241] Bruno Pommier, 'The use of force to protect civilians and humanitarian action: the case of Libya and beyond', (2011) 93 *International Review of the Red Cross* 884, 1081-1082; Carsten Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment On 'Red Lines' and 'Blurred Lines', (2013) 11 *Journal of International Criminal Justice* 961.
[242] See amongst others Yoram Dinstein, 'The Right to Humanitarian Assistance' (2000) LIII *Naval War College Review* 4, 87-89; Dungel, 'A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems' (n 134), 9; Stahn ibid 962.
[243] UN Charter Article 2(4) and 39. See also Vukas, 'Humanitarian Assistance in Cases of Emergency' (n 57) 6.
[244] 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, Guideline 11.

in Disaster Relief' (Oslo Guidelines) used by OCHA and the IASC do not break new ground.[245] Vukas (drafter of the Bruges Resolution) argues that despite the *lex lata* not having developed in this direction, the use of force under the auspices of the Security Council should be considered also in cases of 'extreme danger for the survival of the victims' of disasters whilst there should be no risk that the resistance of the affected state to the 'imposed humanitarian assistance' would cause more harm and suffering than its *sec* denial.[246] Vukas has argued that such a perspective would not be contrary to the terms of the UN Charter, as the Council would be asserting its duty to protect persons from gross human rights violations.[247] Equally, the Bruges Resolution itself concurs with such action by the Security Council, although declaring more conservatively in line with current international law in Principle VII(3) that when the refusal of a *bona fide* offer of assistance leads to a 'threat to international peace and security', the Council indeed should be able to take Chapter VII measures.[248] The Bruges Resolution thereby remains in line with international law when it comes to the consideration of the use of force for the purposes of the provision of assistance. At an earlier stage in the 1990's, when the Council itself was even so more than today still struggling to determine the extent of the potential use of force in the averting of a humanitarian crisis, the San Remo Principles of 1993 stated that *should a state already have agreed upon assistance*, yet regress into refusal, 'all necessary steps to ensure such access' would be warranted, in conformity with international law.[249] The San Remo Principles went on to formulate that the UN would be competent to undertake 'coercion measures' in the event of prolonged and severe suffering of a population, should an offer of assistance be refused or encounter serious difficulties.[250]

Indeed, finding a formulation that would entice the Council to take more firm action does appear necessary, as consistency continues to remain lacking in the Council's approach to dealing with situations that *are* a threat to the international peace and security. This can be seen through its *in*action concerning the situation in Syria after having taken action through the authorisation of the use of force in Libya, as well as for example expanding UNOCI's mandate in Cote d'Ivoire. In practice however, such a 'standard' formulation does not appear viable, also considering the political composition of the Council. Although consistency in the Council's work is lacking, the determination that the use of force is not *viable* in *all* circumstances has not become an argument that its use should be *prohibited* everywhere. The above discussion has demonstrated that *the Council is in fact ready to assert the need to use force for the purpose of the delivery of humanitarian assistance when facing a humanitarian crisis.* The willingness of the Council has been brought into practice both in circumstances in which the affected state has cooperated (somewhat) and in

[245]<https://docs.unocha.org/sites/dms/Documents/ENGLISH%20VERSION%20Guidelines%20for%20Complex%20Emergencies.pdf> accessed 1 November 2014.
[246] Vukas, 'Humanitarian Assistance in Cases of Emergency' (n 57) 6.
[247] Ibid.
[248] Bruges Resolution 'Humanitarian Assistance' (2 September 2003) (n 92) Principle VII(3).
[249] 'Guiding Principles on the Right to Humanitarian Assistance' (n 90) Principle 6(2).
[250] Ibid Principle 7(1).

circumstances in which the sovereign has not been willing to cooperate. Such forceful action through the Chapter VII framework of Security Council resolutions and action furthermore contributes to lessening the international legal debate with regard to issues pertaining to state sovereignty when considering a potential forceful intervention. Arguments in favour of such developments in the Council's action have been made, on the one hand, towards an already existing erosion of state sovereignty due to the changing nature of conflicts today and the contribution of viewpoints concerning the provision of humanitarian assistance to this erosion, as well as with regard to the use of force as a means to prevent a worsening crisis that may destabilise an entire region as opposed to one country.[251] Tomuschat has along this line argued that sovereignty is a 'distinction' conferred upon an entity 'as a recognition of its ability and willingness to take care of law and order and to administer justice' as opposed to an 'inherent quality' of that entity, and thus when a sovereign commits gross violations of international law such as genocide, it must be recognised as an abuse of that state's sovereign rights and as a forfeit of the protection that sovereignty grants under international law, leading to certain consequences.[252] On the other hand the more conservative argument has been made that RtoP has not yet developed fully enough as a concept to be used in foregoing consent in the delivery of assistance in and of itself.[253] Indeed, the International Commission on Intervention and State Sovereignty (ICISS) , as developer of what has been embraced as the notion of RtoP, has argued that whilst sovereignty issues 'necessarily arise' when discussing a forcible intervention, such a potential suspension of sovereignty must be *de facto* rather than *de jure*, as the objective is not to undermine sovereignty but to rather sustain and protect the constitutional arrangements in a country that protect the population in need of assistance.[254] Even so, this argument would still allow for a forceful intervention that would be determined on a case-by-case basis. Whilst the Security Council has embraced the notion of RtoP, it has obviously chosen not to implement it in certain resolutions following the action taken in Libya. Whether or not it shall continue to do so it not yet clear at this time, and remains to be seen. What can however be distilled from the above, is the fact that where the Security Council has the legal means to use force, it has also shown the willingness to assert these means *for the enforcement purpose of the delivery of aid (against the will of a sovereign)*. When and how the Council will choose to do so next shall, in the absence of a clear line in the work of the Council, remain to be determined on an *ad hoc* basis.

[251] See respectively J Maogoto & K Kindiki, 'A People Betrayed – the Darfur Crisis and International Law: Rethinking Westphalian Sovereignty in the 21st Century', (2007) 19 *Bond Law Review* 2, 114; Roberta Cohen, 'Humanitarian Imperatives are Transforming Sovereignty', (2008) 9 *Northwestern Journal of International Affairs* 1, 5.

[252] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2008) 277.

[253] Spieker, 'Humanitarian Assistance, Access in Armed Conflict and Occupation' (n 81) § 36.

[254] 'The Responsibility to Protect', Report of the International Commission on Intervention and State Sovereignty (ICISS 2001) 44.

8.5 Enforcement through Human Rights Law

The enforcement of human rights law, in the face of gross violations, may not only occur through the use of force on a state vis-à-vis state level as discussed above. Such enforcement may also occur at the interstate level without the use of force and alternatively, human rights enforcement mechanisms exist where human rights violations can be claimed directly by individuals. These mechanisms are open to the enforcement of the provision of humanitarian assistance, as its provision functions as a vehicle in the fulfilment of existing human rights. Two distinct sets of enforcement mechanisms exist: through the UN Charter-based system with public 'naming and shaming' functions as well as through UN treaty body mechanisms such as courts and supervisory expert committees. The treaty bodies and courts would be requested to determine whether or not the non-provision of humanitarian assistance would be a violation of *human rights law*. In this regard, Section 7.3.2 has addressed the fact that the ICJ has determined that an obligation to allow access can exist on the basis of the ICERD and other human rights obligations, also in times of conflict. Thus, whilst many human rights treaty bodies refrain from referring to international humanitarian law, considering whether the affected state has fulfilled its duties in the provision of humanitarian assistance would not be a reference to humanitarian law, despite potentially judging violations occurring in times of conflict.

Traditionally, human rights law operates at the level between the affected state and an individual.[255] Prior discussion in Chapter 5 has ascertained a lack of an existing independent human right to humanitarian assistance and determined that its *provision* marks a state's fulfilment of duties that exist under the established rights to life, food, health (and water). Therefore, what remains is the determination in which manners individuals or other states may hold the affected state accountable for violations of *these* existing human rights, in order to enforce the provision of the delivery of humanitarian assistance, in the fulfilment of the rights to life, food, health (and water). This Section addresses enforcement through treaty body mechanisms first, as such mechanisms amount to more legal enforcement mechanisms, compared to the political regime of the UN system. The UN system, however, has the potential of ensuring the enforcement of the delivery of humanitarian assistance whilst a crisis may still be on-going. Given the amount of time that passes in the assessment of a potential human rights violation, as well as the fact that such claims are brought well *after* an occurrence, the human rights treaty bodies and courts shall be the institutions determining *ex post facto* whether or not such delivery of humanitarian assistance should in fact have taken place and whether or not the affected state is or was in violation of its duties under the rights to life, food, health (and water).

[255] Section 5.2.

8.5.1 Enforcement through Human Rights Treaty Mechanisms

Chapter 6 has determined that the major treaties dealing with the rights to life, food and health as related to the provision of assistance are the ICCPR, the ICESCR and the ICERD, as well as regional treaties such as the ECHR, the European Social Charter, the ACHR and its Additional Protocol in the Area of Economic, Social and Cultural Rights, the ACHPR and its Additional Protocol on the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child. Also, more specific treaties such as the CRC, the CEDAW and the CRPD, as well as the Kampala Convention which is both regional and specific to IDPs deal with the subject matter in relation to the rights incorporated in their conventions. Focarelli has asserted that states parties to human rights treaties that do not (sufficiently) provide humanitarian assistance may indeed incur responsibility for the violation of certain rights.[256] This has also been concluded in Chapters 5 and 6, based on the various provisions in these treaties. Such treaties provide for monitoring bodies that allow for various complaint mechanisms, varying from procedures in which those that did not receive humanitarian assistance may appeal that the contracting affected state has not provided (sufficient) humanitarian assistance in the face of a humanitarian crisis, to appeals from other contracting states.[257]

Several courts today have a very broad jurisdiction *ratione materiae*, such as the ICJ, the International Tribunal for the Law of the Sea and the International Criminal Court, the latter of which shall be dealt with further on. Human rights treaty bodies are limited to the scope allotted to them by their respective treaties, thereby focusing on the rights within their scope that might relate to states parties and the provision of assistance. As most of the current relevant human rights treaties do not contain references to international humanitarian law, with the exception of for example the CRC (in Article 38(1)) and the Protocol to the ACHPR (in Article 11), their enforcement bodies have been hesitant to incorporate it in their decision-making process. As discussed in Section 3.4.2.1, various treaty bodies and the ICJ have asserted the continued applicability of human rights treaties in times where international humanitarian law is also applicable.[258] Explicit references to or application of humanitarian law can indeed be found in certain decisions, although they are not distinctly necessary for the enforcement of the provision of humanitarian

[256] Focarelli, 'Duty to Protect in Cases of Natural Disasters' (n 100) § 18.

[257] This research will focus on international complaint mechanisms, as opposed to national enforceability. It is however recognised that the enforcement of rights such as in the ICESCR face more challenges in national courts; often such economic, social and cultural rights are not self-executing and face the additional hurdle of a requirement of national implementation legislation for insurance of domestic legal effects. The enforceability issues however remain separate from the assessment that such rights exist, and as such individuals claiming fulfilment of their (economic social and cultural) rights through the provision of humanitarian assistance must find a platform.

[258] Section 3.4.2; *Isayeva, Yusupova and Bazayeva v.* Russia (App nos 57947/00, 57948/00 and 57949/00) ECHR 24 February 2005; Inter-American Court on Human Rights, *Case of Bámaca-Velasquez v. Guatemala* (November 25 2000) (Merits), Series C No. 70 § 207; and *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168, § 216.

assistance, which may also be reached through human rights law enforcement. Indeed, the judgment of these bodies may be based on the determination of a possible violation of the rights to life, food, health (and water), should humanitarian assistance not be provided in the event of a humanitarian crisis – be it a natural disaster, or a circumstance in which humanitarian law is applicable.

The ICCPR, with its wide status of ratification, can provide various methods through which the right to life might be enforced for the purpose of enforcement of humanitarian assistance, although the findings of the Human Rights Committee are not binding in themselves. The HRC has however assessed that the non-compliance with its interim measures is 'incompatible with the obligation to respect in good faith the procedure of individual communication', thereby alluding to the duty of states parties to the ICCPR to abide by the findings of the Committee on the principle of good faith.[259] States parties have the opportunity to address potential human rights violations of other states parties through the complaint procedure of Article 41 ICCPR. To date, such allegations have not been made with regard to the provision of humanitarian assistance, nor can they be expected anytime soon, given the diplomatic and political implications of the state complaint procedure. The HRC however also investigates the human rights situations of its state parties on its own merits.[260] An example includes the recent request of the HRC to Sudan, asking in relation to Article 6 ICCPR to:

> "Please comment on allegations indicating that the State party has restricted or denied the delivery of humanitarian assistance to conflict-affected areas, especially those controlled by rebel groups. Please also provide information on the measures taken to ensure that people affected by the conflicts in Darfur, South Kordofan and Blue Nile states, even if living in rebel controlled areas, receive humanitarian assistance".[261]

Thus, the HRC indeed *in practice* addresses the potential violation of the right to life through the denial or obstruction of the provision of humanitarian assistance. The outcome of such reports is however also not binding, and clearly such addresses take place *after* the immediate need for assistance is recognised. Such public addresses however do contribute to the pressure upon a state to comply with the human rights regime of the treaty it is a state party to. More specific and potentially more intrusive for the state furthermore is the individual complaint procedure open to individuals of states parties to the Additional Protocol of the ICCPR.[262] Equally, such procedures are limited in the enforcement of actual provision of assistance as the path an individual must travel to reach the HRC is long, and should be considered an enforcement of a right by means of *reparation*, rather than the actual provision of food or medicine. A finding by the Committee of a violation of Article 6 can also be

[259] HRC General Comment 33 (5 November 2008) UN Doc CCPR/C/GC/33 § 19.
[260] Article 40 ICCPR.
[261] Human Rights Committee 'List of issues in relation to the fourth periodic report of the Sudan' (22 November 2013) UN Doc CCPR/C/SDN/Q/4 § 14.
[262] Article 1 Additional Protocol ICCPR. For the specificities of this complaint mechanism, see Articles 2-5 Additional Protocol.

considered an international (political) 'slap on the wrist', even though the ruling is not legally binding.

Since 2013, the CESCR, pursuant to the ICESCR, also considers individual complaints through its Optional Protocol.[263] Given the short timespan since this development, only few individual complaints have been brought to the CESCR to date. The CESCR can however bring forward issues regarding Articles 11, pertaining to an adequate standard of living, and 12 concerning the highest attainable standard of health, should it consider these rights to be infringed when humanitarian assistance is not provided in certain circumstances. Similar to enforcement via the ICCPR, the CESCR has noted in a General Comment that reparation may be sought, taking the form of 'restitution, compensation, satisfaction or guarantees of non-repetition'.[264] It has been addressed previously in Chapter 7 that the CESCR indeed considers the possibility of a violation of these Articles when food is not provided or access for this is denied in emergencies, or if the affected state does not seek international assistance.[265] According to the CESCR, non-compliance with the duty to provide access to basic shelter, water and sanitation furthermore results in a violation or Article 12 ICESCR.[266] Such findings however are published in the CESCR's General Comments, which – although of relevance – are not binding in nature, nor do they hold a particular state responsible for its actions. It has been argued by Dennis that due to the 'obligation of conduct'-nature of the rights enshrined in the convention, the ICESCR is lacking 'sufficiently clear and precise substantive legal standards' to allow for an adjudicative individual complaints procedure.[267] Indeed the nature of most (albeit not all) of these rights can be seen as an impediment to enforcement procedures, as opposed to the more result-oriented nature of civil and political rights. The fact that such rights are often not self-executing furthermore warrants national implementation for domestic legal effect, in the event an individual wants to lodge a complaint against its sovereign to ensure enforcement. This may in practice make the enforcement of humanitarian assistance through human rights law somewhat more challenging.

Although Article 2 ICESCR incorporates 'progressive development', certain minimum core obligations remain relevant at all times, amongst which those concerning the provision of humanitarian assistance. Furthermore, examples exist of accountability with regard to progressive development also, as the European Committee of Social Rights for example held Greece in violation of Article 11 ESC concerning the right to health, considering it had not demonstrated to have

[263] Articles 1-4 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (10 December 2008, entry into force 5 May 2013).
[264] CESCR General Comment 12 (n 101) § 32.
[265] Ibid § 17 and § 19.
[266] CESCR General Comment 14 (11 August 2000) UN Doc E/C.12/2000/4 'The right to the highest attainable standard of health', § 43.
[267] Michael J Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', (2005) 99 *American Journal of International Law* 1, 139.

implemented enough measures to improve the right to health in a particular area.[268] Indeed, both the treaty bodies of the ICCPR and ICESCR are also capable of 'naming and shaming' and formulating general concerns for the violation of certain human rights within their respective treaties, but they are both not able to *enforce* the provision of humanitarian assistance through their decisions. Despite the non-binding nature of the mechanisms, both bodies clearly view the non-provision of humanitarian assistance as a potential violation of the rights within their treaties, and as such speak out on the need for non-violation of these rights through the provision of humanitarian aid.

Although it is beyond the scope of this research to address all regional and specialised bodies, several well-known bodies that *do* take legally binding decisions concerning human rights law violations can be highlighted. Arguably, the European Court of Human Rights is the most important of the regional specialised courts due to its extensive case law and effective implementation mechanism throughout its large membership, as well as its age.[269] Article 34 ECHR provides for an individual complaint procedure, whilst Article 33 ECHR provides for an interstate complaint mechanism as also seen in the ICCPR, although binding in nature on both accounts.[270] Similarly to the previously discussed treaty bodies, the ECtHR procedures are lengthy, and the Court is known to be reactive rather than proactive.[271] The ECtHR however does indeed consider the need for humanitarian assistance, for example in *Benzer And Others V. Turkey,* where it states:

> "The Court is further struck by the national authorities' failure to offer even the minimum humanitarian assistance to the applicants in the aftermath of the bombing".[272]

However, the Court has of yet not established a clear direct or causal link between the denial or non-provision of assistance and the violation of a particular human right in its Convention. In its mentioning of humanitarian assistance, to date the Court has done so in relation to potential violations of Article 3 ECHR, pertaining to cruel or inhuman treatment, rather than the right to life (the ECHR does not contain other provisions relating to humanitarian assistance such as the right to food or water).[273] The Court furthermore however cites 'the obstruction of humanitarian assistance' as a 'serious abuse' in its jurisprudence, rather than as a human rights abuse.[274] Such a distinction by the Court is unfortunate for the enforcement of humanitarian assistance

[268] European Committee of Social Rights 'Conclusions 2009' Greece: 2009/def/GRC/ (1 December 2010).
[269] Tomuschat, *Human Rights: Between Idealism and Realism* (n 252) 239.
[270] Admissibility criteria can be found in Article 35 ECHR.
[271] Ruth Abril Stoffels, 'Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps', (2004) 86 *International Review of the Red Cross* 855, 526.
[272] *Benzer And Others v. Turkey* (App No 23502/06) ECHR 12 November 2013, Final 24 March 2014, § 211.
[273] Ibid; *Sufi And Elmi v. The United Kingdom* (App nos 8319/07 and 11449/07) ECHR 28 June 2011, Final 28 November 2011, § 292; *Popov v. France* (App nos 39472/07 and 39474/07) ECHR 19 January 2012 § 91.
[274] *Mohammed v. Austria* (App no 2283/12) ECHR 6 June 2013, Final 6 September 2013 § 52.

through human rights law as in doing so, the Court foregoes the opportunity to make the potential claim immediately viable that obstructing humanitarian assistance might result in a Court decision that a *human rights violation* has taken place. It therefore remains to be seen which potential route the ECtHR shall take with regard to the enforcement of humanitarian assistance within the context of the ECHR, but such an approach via direct assertion of human rights violations currently does not appear imminent.

The Inter-American Court of Human Rights, like the previously discussed bodies, recognises the individual complaint procedure in Article 44 ACHR, which includes the possibility of complaints by groups of persons or NGOs and also recognises an interstate communication in Article 45 ACHR. Moreover, individuals and NGOs may also bring a complaint before the African Court on Human and Peoples' Rights under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights *if* the ratifying state has so declared.[275] As with the other regional courts and the international complaint mechanisms, the Protocol to the African Charter also provides for the possibility of a state complaint to the African Court.[276] Although the interstate complaint mechanism that exists throughout these enforcement bodies has been used concerning the situation in Libya in March 2011, it is not often used in practice but as a mechanism reflects a broader principle in international law, clarifying that human rights violations within the treaty regime are not solely between the state and its population. The interstate mechanism reflects a shared responsibility of all states parties for the common goal they have chosen to pursue through the creation of the human rights convention.[277] Indeed, whilst within the human rights regime this role for third states is formulated as a 'right', such a perspective falls in line with the route taken by the ICJ in its Barcelona Traction case as discussed above.[278] The approach is somewhat similar, as a possibility is left open for third states to assert the responsibility of the affected state for certain violations of international law, whilst these third states are not directly affected themselves. Indeed this notion, as incorporated by various human rights treaties has been subsequently embraced by the ARSIWA in its Article 48. The ILC has argued, referencing such human rights mechanisms, that a justification for such progressive development in the Articles lies in the protection of the international community as a whole.[279] Similarly, the provision of humanitarian assistance contributes to preventing exacerbations of humanitarian crises and their effect on the international community.

With regard to the potential of enforcement of the provision of humanitarian assistance, the treaty bodies and courts will face the difficult task, as does the Security

[275] As of October 2012, only 5 states had provided such a declaration: Tanzania, kina Faso, Ghana, Mali and Malawi.
[276] Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.
[277] Tomuschat, *Human Rights: Between Idealism and Realism* (n 252) 272. See also ECtHr Ireland v UK 18 January 1978 (A 25) para 239.
[278] Section 8.2.3.
[279] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 323.

Council when contemplating the use of force, of ascertaining whether indeed *enough* has been done by the affected state to *fulfil* the basic requirements of the right to life, the right to food, the right to health (and the right to water) so as to not violate these rights. Questions such as whether or not blankets were provided, safe drinking water and food rations sent out, all in an indiscriminate manner, will have to be addressed by these institutions when considering whether a right has been potentially violated. Whilst the Security Council considers a potential threat to the international peace and observes from a more overall approach whether a humanitarian crisis takes place, treaty-based monitoring bodies have the opportunity to rather assess individual violations. Also of course, a different approach is possible as they are operating in the aftermath of the crisis rather than at its peak, although most mechanisms can apply 'interim measures' should there be some urgency still remaining.[280] To date, the main treaty enforcement bodies have shied away from such a formal assessment; not using human rights standards to measure indeed whether enough food and water has been provided in certain specific instances, or whether it has been provided fast enough. In theory however, the existing human rights courts and treaty bodies can be an enforcement mechanism for the provision and delivery of aid, should they choose to determine in cases before them that the non-provision of aid has resulted in a violation of the right to life, food, health (or water). To date however, such an establishment has not taken place although the possibility continues to be available to them. As established in Chapter 5, the provision of humanitarian assistance at a time of crisis can function as the fulfilment of the affected state's obligations under the right to life, food, health (and water). With wording such as 'arbitrary refusal' that has been developed in humanitarian law in relation to the denial of humanitarian assistance, as well as notions pertaining to state responsibility, human rights mechanisms should be able to assess the human rights in their respective treaties fully when it comes to the matter of providing humanitarian assistance. In fact these rights to life, food, health (and water) are not so vaguely formulated that the enforcement bodies should not be able to assess in a particular circumstance whether or not a violation took place because humanitarian assistance was not provided sufficiently, or lacking entirely. The willingness of various bodies to indeed address humanitarian assistance within their case law or comments is proof that such assistance is well placed within the realm of existing human rights law. As a manner of enforcement however, given the duration of procedures, these bodies are often not tailored to ensure the timely provision of assistance when a crisis is still on-going. As such, these bodies provide a different enforcement perspective than of course the Security Council may provide.

[280] Rules of Procedure of the African Court of Human and Peoples' Rights, Rule 51; Inter-American Court of Human Rights, rule 25; ECtHR, Rule 39. See also Rules of Procedure of the Human Rights Committee, Rule 86 and OP-ICESCR, Article 5.

8.5.2 Human Rights Enforcement through the UN Charter System

Whilst treaty bodies exist for the monitoring, supervision and control of the various human rights conventions, states parties to such treaties have been quite reluctant to enter into institutionalised forms of human rights enforcement.[281] Indeed, within the UN Charter system, human rights enforcement initially remained outside of the realm of the Security Council, as the task was originally left to the General Assembly, based on Articles 13(1)(b) and 68 of the Charter. In the above Sections, the potential use of force by the Security Council has been addressed, in times when flagrant human rights violations or serious humanitarian crises become a threat to the international peace and security. Yet, what recourse can be sought outside the realm of the Security Council, within the UN system, for the 'enforcement' of humanitarian assistance through human rights law should states be in violation of their duties to fulfil the right to life, food, health (and water)? After all, Article 1(3) of the UN Charter proclaims that one of the purposes of the UN is to promote and encourage 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. Furthermore, articles 55 and 56 of the UN Charter lay an obligation upon all UN member states to ensure the universal respect for human rights. As such, states have instated human rights enforcement mechanisms via the UN Human Rights Council, operating directly under the UN General Assembly. The Charter-based organs and bodies of the UN are not restricted by the provisions in various conventions like the treaty-based bodies discussed above are. These bodies have a broader, political mandate and derive their mandates from the human rights provisions in the UN Charter.[282]

The UN Human Rights Council, established in 2006, operates with the older and well-known mechanism of Special Rapporteurs, as well as the new concept of Universal Periodic Review in order to determine the *status quo* of various human rights situations in member states.[283] Much like the Human Rights Committee of the ICCPR and the Committee for Economic Social and Cultural Rights, the UN Special Rapporteurs, Universal Periodic Review (UPR) documentation and Human Rights Council resolutions are not binding by nature.

Several UN Special Rapporteurs have been quite vocal in their assertion that the lack of provision of humanitarian assistance results in human rights violations.[284] Yet, they have also on occasion gone so far as to condemn certain states specifically for their (in)actions. Whilst the Special Rapporteur on the right to life mostly calls

[281] Tomuschat, *Human Rights: Between Idealism and Realism* (n 263) 265.
[282] H Steiner, P Alston & R Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press 2007) 74-741.
[283] For more information on the UPR system <http://www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx> accessed 2 November 2014.
[284] Section 5.3.2.

for the allowance of humanitarian assistance and an ending to human rights violations in broader terms,[285] the Rapporteur has, for example, also more explicitly announced:

> "According to reports forwarded by non-governmental sources, the government forces and rival factions of the SPLA had created a humanitarian disaster by waging war on villagers and herders. The displacement of millions of people and the killing of thousands of civilians have not been by-products of the conflict but a tactic integral to it. The flagrant violations of human rights standards and of the principles protecting civilians in times of conflict have created famine and dependency on food relief in many areas affected by war. Hundreds of thousands of people have lost their lives through illness, food shortage or deliberate assault (…) The Special Rapporteur calls on all parties to conflicts, international or internal, to respect the norms and standards of international human rights and humanitarian law which protect the lives of the civilian population and those combatants who are captured or lay down their arms. He also appeals to all those involved in armed conflicts to allow convoys of humanitarian aid to reach their destinations as well as to allow the evacuation of the wounded, elderly persons and children. All those responsible for violations of the right to life in situations of armed conflicts must be held accountable".[286]

Indeed while the Special Rapporteur himself cannot enforce human rights law, the mechanism and reports do function as public awareness and an incentive to alter a state's behaviour. In other instances, the Rapporteur has linked the 'deprivation of food' to 'large-scale and widespread violations of human rights' which have resulted in the death of many civilians.[287] More explicitly, the Rapporteur has held concerning the conflict in the Former Yugoslavia that:

> "the policy of deliberately depriving the population of the food, heating, shelter and other essentials necessary for survival, practised by Bosnian Serbs against the population of besieged cities and areas, should also be viewed as extrajudicial, summary or arbitrary execution (…) These deaths are not unavoidable collateral consequences of the conflict but are due to the deliberate refusal to allow delivery of sufficient humanitarian relief".[288]

In doing so, the Rapporteur clearly attempts to phrase the denial of humanitarian assistance in the context of a violation of the right to life. Equally, the Special Rapporteur on the right to the highest attainable standard of health has been known to make recommendations to the Administrator of the Coalition Provisional Authority in Iraq as occupying power, that it establish an inquiry into the health situation of Falluja's civilian population following allegations including:

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[285] Report of the Special Rapporteur on the Right to Life (23 December 1996) UN Doc E/CN.4/1997/60/Add.1 § 303 regarding Liberia; § 403 concerning Russia and §466 concerning Tajikistan.

[286] Report of the Special Rapporteur on the Right to Life (7 December 1993) UN Doc E/CN.4/1994/7 § 560 and 707.

[287] Report of the Special Rapporteur on the Right to Life (14 December 1994) UN Doc E/CN.4/1995/61 § 53.

[288] Report of the Special Rapporteur on the Right to Life (23 December 1992) UN Doc E/CN.4/1993/46 § 666.

> "the use of indiscriminate force resulting in civilian deaths and casualties; blocking civilians from entering Falluja's main hospital; preventing medical staff from either working at the hospital or redeploying medical supplies to an improvised health facility; occupying the hospital; and firing upon ambulances. According to reports, Falluja was experiencing a severe shortage of medicines and other essential supplies".[289]

The Special Rapporteur recommended looking into the role of both state and non-state actors, thereby indicating the possibility of multiple parties violating certain provisions of international law.[290] Unfortunately, like the Human Rights Council itself, Special Rapporteurs themselves have on occasion been criticised for having political inclinations and motivations, which of course places their respective resolutions and statements within a certain political context and lessens their value.[291]

Secondly, the UPR system as a public 'naming and shaming' mechanism of the UN Human Rights Council has also functioned as a platform in bringing the provision of humanitarian assistance to the human rights arena. Although the system is not binding, on approximately a dozen occasions states have been recommended in various wordings to 'allow for humanitarian access' to a certain region or to IDPs within their borders,[292] or to allow the ICRC or other organisations to provide humanitarian assistance,[293] as well as to enhance or continue existing mechanisms

[289] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health 'Addendum: Summary of cases transmitted to Governments and replies received' (2 February 2005) UN Doc E/CN.4/2005/51/Add.1 § 73.

[290] Ibid.

[291] In particular the former Special Rapporteur on the right to food, Jean Ziegler, has been subject of such criticism. The Human Rights Council has, amongst other instances, received criticism for example in the context of the Libyan conflict.

[292] With regard to Syria 'Report of the Working Group on the UPR' (24 January 2012) UN Doc A/HRC/19/11 § 100 recommendation 26 and 27 by Malaysia and Thailand, § 101 recommendation 5 by Poland, § 104 recommendations 26-28 by Norway, the United States and Australia which were rejected by Syria; concerning the Sudan 'Report of the Working Group on the UPR' (11 July 2011) UN Doc A/HRC/18/16 § 83 recommendation 57, 131 and 160 by Canada, Ireland and Thailand; concerning Sri Lanka 'Report of the Working Group on the UPR' (5 June 2008) UN Doc A/HRC/8/46 § 82 recommendation 14 by Canada and Ireland; concerning Somalia 'Report of the Working Group on the UPR' (11 July 2011) UN Doc A/HRC/18/6 § 98 recommendations 96, 97 and 141 by Sweden, Australia and Slovakia; regarding Israel 'Report of the Working Group on the UPR' (8 January 2009) UN Doc A/HRC/10/76 § 100 recommendation 38 by Jordan; regarding Myanmar 'Report of the Working Group on the UPR' (24 March 2011) UN Doc A/HRC/17/9 § 107 recommendation 15 and 28 by the Republic of Korea and France and rejected by Myanmar; and concerning Ethiopia 'Report of the Working Group on the UPR' (4 January 2010) UN Doc A/HRC/13/17 § 99, recommendation 13 by the United States and rejected by Ethiopia.

[293] Ibid A/HRC/17/9 § 107 recommendation 16 and 34 by New Zealand and Uruguay and rejected by Myanmar; concerning Bangladesh: 'Report of the Working Group on the UPR' (8 July 2013) UN Doc A/HRC/24/12 § 129 recommendation 157 by Canada and para 130 recommendation 26 by the United States; regarding DPR Korea: 'Report of the Working Group on the UPR' (4 January 2010) UN Doc A/HRC/13/13 § 90 recommendation 97, 104, 107 and 108 by Switzerland, the Netherlands, Belgium and Canada.

for the provision[294] and to 'facilitate humanitarian assistance'.[295] It must be noted that all such recommendations have come from other states or regional organisations participating within the UPR. Thus, the system *can*, and in fact *is* being used for certain inter-state 'condemnations', although they are framed and formulated as *recommendations*.

Unlike the interstate complaint mechanisms of human rights treaty bodies which have remained virtually unused, the UPR thus does appear to bring some third states to recommend issues pertaining to humanitarian assistance in other countries. Given the phrasing as recommendations, such calls in the UPR system have only on a few occasions been outright rejected by the affected state.[296] Indeed, framing such calls as recommendations allows the affected state to be more receptive, as well as allowing a more active role of third states. Human rights enforcement in practice has, however, shown a rather politicised perspective on the part of states, as research has shown states to often act in condemnation of political adversaries, whilst protecting allies and befriended states.[297] This indeed can be seen to be true also in the relation between those states making recommendations in the UPR framework and the particular state under review.

A challenge today, however, continues to be the lack of political will amongst states to hold each other responsible and accountable under the existing frameworks and mechanisms. In that regard, taking the more judicially institutionalised approach to the enforcement of humanitarian assistance through the enforcement of human rights law by the judiciary (or treaty bodies) ensures a more balanced and fair legal evaluation, albeit non-binding in the case of the HRC and CESCR. Indeed, considering the fact that the Security Council has the duty to weigh the facts of a specific situation *whilst it is taking place*, the role of the judiciary continues to remain relevant in the aftermath of a crisis, and as such holds a relevant place within the existing enforcement mechanisms relating to the provision of humanitarian assistance.

8.6 Methods of Enforcement through Individual (Criminal) Responsibility

Individual responsibility in international law has become increasingly relevant in the past decades, through the application of international criminal law by international courts and tribunals, and through the use of certain 'targeted sanctions' by international organisations. Both methods could potentially enforce the delivery of humanitarian assistance. Prior to these developments, the Geneva Conventions had also attempted to regulate the respect for international humanitarian law itself

[294] Iraq: 'Report of the Working Group on the UPR' (15 March 2010) UN Doc A/HRC/14/14 § 81 recommendation 128 by Bosnia and Herzegovina; Libya: 'Report of the Working Group on the UPR' (4 January 2011) UN Doc A/HRC/16/15 § 93 recommendation 56 by Vietnam.
[295] Georgia: 'Report of the Working Group on the UPR' (16 March 2011) UN Doc A/HRC/17/11 § 106 recommendation 13 by Venezuela.
[296] See above in the case of Syria, Myanmar and Ethiopia.
[297] Tomuschat, *Human Rights: Between Idealism and Realism* (n 263) 280.

through the creation of the International Fact Finding Commission.[298] Although created in the 1977 Additional Protocol I, the Commission was not officially constituted until 1991. The Commission has expressed its willingness to address issues pertaining to non-international conflicts also, upon the approval of the parties involved, but to date, no appeal has been made to it, both in times of international and in non-international armed conflict.[299]

Whereas a large part of this research has dealt with 'state sovereignty' as a crucial factor in the provision of humanitarian assistance, individuals form part of the authority acting as sovereign. Indeed, the provision, denial and obstruction of emergency aid all takes place at the hands of human beings. In the circumstance that these persons act with the control to indeed *deny* humanitarian assistance to persons in need of such aid, international law has the opportunity to hold them responsible for such acts or omissions. Individual (criminal) responsibility for the denial or obstruction of humanitarian assistance serves the point, similar to the manner in which human rights mechanisms operate, of holding individuals responsible even though such enforcement does not take place at the time a humanitarian crisis is on-going. Targeted sanctions, on the other hand, allow for immediate action in the midst of a crisis in order to persuade individuals or leaders of regimes to alter their course.

8.6.1 Enforcement through Targeted Sanctions

Sanctions have been an enforcement mechanism of the Security Council for many years since the early 1990's and the end of the Cold war, as a response to internationally wrongful acts.[300] These sanctions focus on individuals and their assets, as opposed to the state or sovereign authority in general and take place under Article 41 of Chapter VII of the UN Charter. 'Targeted' or 'smart' sanctions have been introduced, to ensure minimal humanitarian damage or consequences whilst maintaining the possibility of individual responsibility.[301] The CESCR, out of care for economic, social and cultural rights, in the 1990's even dedicated a General Comment to voice its concern that sanctions should remain in careful consideration of the rights within the ICESCR.[302] In particular, the well-known problems with the 'Oil for Food Programme' in Iraq following Resolution 661 instigated such comments and the need for further development of the concept of sanctions.[303]

[298] Article 90 AP I.

[299] With regard to non-international armed conflicts <http://www.ihffc.org/index.asp?page=recognition_general> accessed 2 November 2014.

[300] August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', (2001) 95 *American Journal of International Law* 4, 851; Andrés Franco, 'Armed Non-State Actors', in David Malone (ed) *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publications 2004) 119.

[301] David Cortright & George A Lopez, 'Reforming Sanctions' in Malone *The UN Security Council: From the Cold War to the 21st Century* (ibid) 170.

[302] CESCR General Comment 8 (12 December 1997) UN Doc E/C.12/1997/8 'The relationship between economic sanctions and respect for economic, social and cultural rights'.

[303] The legality of these sanctions will not be discussed. See in this regard amongst others: Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the

Targeted or smart sanctions thereby provide a solution to both the more invasive use of force and the targeting of large groups, directing themselves at specific individuals or entities, whilst attempting to avoid massive impact on a population. At the same time, these sanctions do take place whilst a 'threat to the peace' is still present, as the Security Council takes its action upon such an establishment. These sanctions therefore must be differentiated from the potential enforcement mechanisms that are open to human rights bodies. They are furthermore different as they target *individuals*, as opposed to the responsible state or sovereign.

In more recent years, the Security Council has initiated the use of targeted or smart sanctions for those responsible for human rights law and humanitarian law violations *that can be related to the provision of humanitarian assistance*. As such, the Council has upon expressing more generally its willingness to take 'appropriate measures' in circumstances where humanitarian assistance is obstructed,[304] also asserted with regard to for example the Cote d'Ivoire over the course of the past decade that it is 'fully prepared to impose targeted measures' against those who are 'responsible for serious violations of human rights and international humanitarian law'.[305] Furthermore, the Council has requested to be informed of those instances in which humanitarian assistance is 'denied as a consequence of violence directed against humanitarian personnel and United Nations and its associated personnel'.[306] More specifically however, the Security Council has determined concerning Somalia that targeted sanctions, such as the prevention of entry or transit through UN member states, financial asset freezing and the prevention of supply and sale of weapons or military equipment or training should be imposed against those individuals and entities:

> "as obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia".[307]

Thus, the Council clearly determines that targeted sanctions can be imposed against individuals or entities that obstruct the delivery, access and distribution of humanitarian assistance.

Following the situations in Cote d'Ivoire and Somalia, the Security Council has reiterated its willingness to consider measures in situations where humanitarian

Imposition of Economic Sanctions' (n 300) 851-872 and Bardo Fassbender, 'Targeted Sanctions Imposed By The UN Security Council And Due Process Rights: A Study Commissioned By The UN Office Of Legal Affairs And Follow-Up Action By The United Nations', (2006) 3 *International Organizations Law Review* 437–485.

[304] UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 § 10; UNSC Res 1296 (19 April 2000) UN Doc S/RES/1296 § 5.

[305] UNSC Res 1727 (15 December 2006) UN Doc S/RES/1727 § 12(d); UNSC Res 1842 (29 October 2008) UN Doc S/RES/1842 § 16(e); UNSC Res 1893 (29 October 2009) UN Doc S/RES/1893 § 20(d); UNSC Res 1946 (15 October 2010) UN Doc S/RES/1946 § 6(d); UNSC Res 1980 (28 April 2011) UN Doc S/RES/1980 § 10(d); UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975 'The situation in Côte d'Ivoir' § 12.

[306] UNSC Res 1844 (20 November 2008) UN Doc S/RES/1844 § 8(b).

[307] Ibid § 1,3,7, and specifically 8(c).

assistance 'is being deliberately obstructed' or where constraints exist on humanitarian access, such as in the Democratic Republic of the Congo.[308] Very specifically, the Council has chosen to impose 'financial and travel measures' against various categories of persons, amongst which 'individuals or entities obstructing the access to or the distribution of humanitarian assistance in the eastern part of the Democratic Republic of the Congo'.[309] On occasion the Security Council has also made a point of *excluding* equipment for humanitarian use and purposes from the targeted sanctions placed upon entities and persons, as done amongst others in Libya and the CAR.[310] Most recently in January 2015 regarding the situation in the CAR, the Council determined an asset freeze and a travel ban for those persons 'obstructing the delivery of humanitarian assistance to CAR, or access to, or distribution of, humanitarian assistance in CAR'.[311]

With time, as has been seen in the previous analysis of the Security Council's resolutions, the Council has thus become increasingly specific in its wording, allowing the use of targeted sanctions against those who obstruct the delivery of humanitarian aid in the widest possible sense. This manner of enforcement, depending of course on the level of implementation by the UN member states, has the opportunity to provide a very effective alternative to the invasiveness of the use of force.[312] Furthermore, *without* the use of force and *if* the sanctions target a cross-range of persons involved in the obstruction of assistance, concerns for a loss of neutrality, one of the core principles, in the provision of humanitarian assistance would also be minimalised.[313]

8.6.2 Enforcement through International Criminal Law

As opposed to the targeted or smart sanctions that may be instated by the Security Council, the enforcement of the provision of humanitarian assistance through international criminal law occurs in the same manner as enforcement through human rights law: by judiciary bodies and after the humanitarian crisis has taken place. Unlike enforcement through human rights law, and congruent to smart sanctions, international criminal law aims to bring individuals to justice, focusing on a criminalisation of violations of humanitarian law. Within the Geneva Conventions, this was envisaged through the 'grave breaches' regime which obliged states parties to enact 'legislation necessary to provide effective penal sanctions' for certain severe violations of humanitarian law.[314] However, this legislation would operate at the national, as opposed to the international level. Attempts of the ILC to create a 'state

[308] UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894 § 4 and 17.
[309] UNSC Res 2078 (28 November 2012) UN Doc S/RES/2078 § 4 (f).
[310] UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970, § 9(a)(b); UNSC Res 2127 (5 December 2013) UN Doc S/RES/2127 § 54(b).
[311] UNSC Res 2196 (22 January 2015) UN Doc S/RES/2196 § 4,7 and 12(e).
[312] Dungel, 'A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems' (n 134) § 5.1.
[313] Ibid § 6.1.2.
[314] Article 146 GC IV. The content of the breaches are explained in Article 147 GC IV.

criminal responsibility' have failed in the past, resulting in a renewed focus on the individual that may have committed violations of international humanitarian law.[315] Following an unsuccessful proposal by the UN Secretary General in 1969 for an independent institution that would supervise adherence to international humanitarian law, it took a while for new suggestions to be put forward.[316] Although individual criminal responsibility existed through customary humanitarian law as well as a duty to prosecute violations of that law, the recognition that all states should have the jurisdiction to prosecute certain crimes has enhanced the enforcement of international humanitarian law, which is relevant to the enforcement of the provision of humanitarian assistance.[317] As seen in previous situations concerning the interstate complaint mechanism in human rights law, whilst a *belief* might exist amongst states that prosecution may be in order, in practice states remained reluctant, as a result of which the development of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (ICTR) was considered a welcome solution by many.[318] It was only a few months prior to the establishment of the ICTY that the Security Council had condemned:

> "the deliberate impeding of the delivery of food and medical supplies to the civilian population of the Republic of Bosnia and Herzegovina, and reaffirms that those that commit or order the commission of such acts will be held individually responsible in respect of such acts".[319]

The Security Council thereby explicitly underscores the individual responsibility for acts such as impeding food and medical aid. Shortly thereafter, the Security Council reaffirmed this stance with regard to individual responsibility for such acts in Somalia.[320] With the establishment of the ICTY, the Security Council has certainly

[315] Recently reaffirmed in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43 § 170. See in this regard also Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment On 'Red Lines' and 'Blurred Lines' (n 241) 970.

[316] UN Secretary General Report 'Respect for Human Rights in Armed Conflict' (20 November 1969) UN Doc A/7720.

[317] Article 49 of Convention I, Article 50 of Convention II, Article 129 of Convention III, or Article 146 of Convention IV. Regarding prosecution for grave breaches, see Articles 50/51/130/147 respectively. However, the first time common article 3 of the 1949 Geneva Conventions was criminalised, was with the creation of the ICTR Statute: 'Report of the Secretary General Pursuant to Paragraph 5 of the Security Council Resolution 955' (13 February 1995) UN Doc S/1995/134 § 12; see also Jean-Marie Henckaerts, 'Assessing the Laws and Customs of War: The Publication of 'Customary International Humanitarian Law', (2005) 13 *Human Rights Brief* 2, 11; René Provost, International Human Rights and Humanitarian Law (Cambridge University Press 2002) 110; Meron, 'The Humanization of Humanitarian Law' (n 46) 253; and A. Cassese, Human Rights in a Changing World 178 (1990).

[318] Antonio Cassese, 'On the Current Trend towards Criminal Prosecution and Punishment of breaches of International Humanitarian Law', (1998) 9 *European Journal of International Law* 1, 17.

[319] UNSC Res 787 (16 November 1992) UN Doc S/RES/787 § 7.

[320] UNSC Res 794 (3 December 1992) UN Doc S/RES/794 § 5.

provided the opportunity to indeed bring those responsible before a judiciary.[321] Cassese has also argued that an increase of national prosecutions of violations of humanitarian law has taken place following the development of the two *ad-hoc* tribunals.[322] For its part, the Security Council has continued to stress the importance of national prosecutions of those 'responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law'.[323] Following the successes of these two tribunals, in 1998 the Rome Statute of the International Criminal Court was developed to ensure permanent possibilities for prosecution and individual criminal responsibility, as set out in Article 25 of the Rome Statute.[324] With the creation of this Court, problems faced with regard to potential immunities of heads of states and state sovereignty were also set aside in a novel manner by those states that have ratified the Statute.[325] The Security Council furthermore maintains the possibility of referring situations to the ICC (given its role in the creation of the ICTY and ICTR), and has on occasion already done so.[326]

As such, the potential legal enforcement following the denial of humanitarian assistance through international criminal law provides for distinct manners in which to forego issues relating to state sovereignty that prove to be a recurring problematic theme within the legal framework concerning the provision of humanitarian assistance. Indeed, whilst states remain largely capable of determining whether or not humanitarian assistance should be provided within their sovereign rights (and duties), international criminal law provides for a method of enforcement upon determination that indeed humanitarian assistance was denied or obstructed contrary to international law. Of course, considering and recognising that *individual* criminal responsibility is at hand, it remains relevant to address the potential responsibility of the sovereign authorities for the denial of assistance. But, such individual responsibility – in particular through Security Council referrals – furthermore counts on situations in which the affected state cannot shirk away from its responsibility to 'hand over' those indicted by the ICC.

With regard to the denial or obstruction of the delivery of humanitarian assistance, certain crimes under international law and as incorporated in the ICC Statute are of particular relevance. The General Assembly for its part has welcomed the inclusion of certain provisions in the Statute that are particularly related to the provision of

[321] See in this regard amongst others *Prosecutor v. Krstic* (Appeal Judgment) IT-98-33-A (19 April 2004) § 89 in which the blocking of aid convoys – denying humanitarian assistance – formed a part of the finding by the ICTY that crimes were committed.
[322] Cassese, 'On the Current Trend towards Criminal Prosecution and Punishment of breaches of International Humanitarian Law' (n 318) 6. Evidence hereof is a first example such as the Danish case concerning the conflict in the Former Yugoslavia '*The Prosecution v. Saric*', Eastern Division of High Court (Third Chamber) (25 November 1994).
[323] UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674 § 8.
[324] Rome Statute of the International Criminal Court (n 217).
[325] Article 27 and Article 98 ICC Statute.
[326] For example the referral of the situation in Darfur: UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593 § 1-3.

assistance and the safety of those delivering aid.[327] Indeed, the ICC Statute provides for the criminalisation of several acts in international humanitarian law that are specifically relevant to the delivery of humanitarian assistance. Chapters 6 and 7 have shown that a multitude of provisions exist in the Geneva Conventions and their Protocols concerning the duties and rights in relation to the provision of humanitarian assistance.[328] To briefly recapture these it is relevant to note that with regard to an international armed conflict, states are obliged to allow the passage of assistance subject to the condition that there are no serious reasons to decide otherwise (Article 23 GC IV), and are prohibited to destroy objects that are 'indispensable to the survival of the civilian population' (Article 54 AP I). In conjunction with Article 54 AP I, relief actions 'shall be undertaken' if the civilian population is inadequately supplied (Article 70 AP I). States must furthermore allow and facilitate the rapid and unimpeded passage of all relief consignments, prohibition of delaying humanitarian assistance (Article 70 AP I) and provide for the safety of humanitarian personnel (Article 71 AP I). Concerning non-international armed conflicts, a prohibition of starvation of civilians 'as a method of combat' exists (Article 14 AP II) and as a corollary, subject to the consent of the state, relief 'shall' be undertaken in the event of undue hardship (Article 18 AP II). Lastly, regarding a situation of occupation, the Geneva Convention provides that the duties of the occupier include to 'ensure to the fullest extent of the means available' that the population is provided with food and medical supplies (Article 55 GC IV). The occupier shall furthermore agree to relief schemes on behalf of the population, and shall facilitate them, as well as permitting the free passage of assistance and guaranteeing the protection of those providing assistance, whilst maintaining the right to regulate passage of convoys (Article 59 GC IV). Furthermore, the occupying power has a duty to allow existing Red Cross societies and other similar humanitarian organisations in a territory to continue with their activities (Article 63 GC IV) and must 'to the fullest extent of the means available to it', also ensure clothing, shelter and other supplies that may be 'essential to the survival of the civilian population' (Article 69 AP I). Under human rights law, the rights to life, food and health remain relevant. The ICC Statute, as discussed below, allows for potential individual criminal responsibility for violations of certain of these acts, rights and duties.

This brief revisit will allow a discussion of the provisions in the Rome Statute that provide for the criminalisation of certain acts related to the Geneva Conventions and their Protocols. The ICC has jurisdiction over the crimes of genocide, aggression, crimes against humanity and war crimes.[329] In particular the latter two, as opposed to genocide and aggression, are of relevance in the enforcement of the provision of humanitarian assistance as their specific provisions are most tailored to

[327] Amongst others UNGA Res 54/192 (21 February 2000) UN Doc A/RES/54/192 preamble and § 4; UNGA Res 56/217 (19 February 2002) UN Doc A/RES/56/217 preamble. More recently see UNGA Res 65/132 (1 March 2011) UN Doc A/RES/65/132 preamble.
[328] See in particular the Annexes to Chapter 6 and Chapter 7 for an overview.
[329] Article 5.1 ICC Statute.

circumstances of denial of humanitarian assistance. For both crimes, a level of 'intent and knowledge' is required as determined by Article 30 of the ICC Statute.

Aside from the ICC Statute, certain acts have also been criminalised in regional international law, but cannot be focused on specifically in this Section. A primary example however includes Article 7(4) and (5)(g-i) of the Kampala Convention, asserting criminal responsibility for members of armed groups that obstruct the safe passage and access of humanitarian assistance and personnel. Given the role played by the ICC in international criminal law today, a focus will be had on this institution, supported by the case law of other (regional) tribunals and customary international law.

8.6.2.1 War Crimes and Humanitarian Assistance

A connection between a crime and an armed conflict must be established, in order for the crime to be considered constituting a 'war crime'.[330]

Specifically, Article 8 ICC Statute regarding war crimes holds several elements that can be applied to circumstances pertaining to the delivery of humanitarian assistance. As such, with regard to an international armed conflict and relevant to the criminalisation of the denial of humanitarian assistance, Article 8(2) ICC Statute declares:

> "For the purpose of this Statute, 'war crimes' means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: […] (ii) […] inhuman treatment […] (iii) Wilfully causing great suffering, or serious injury to body or health; […] (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: […] (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; […] (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; […] (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their

[330] *Prosecutor v. Tadić a.k.a "Dule"* IT-94-1-AR72 (n 45) § 70; *Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landžo (aka "Zenga") (Celebici - Case)* (Trial Chamber) IT-96-21-T (16 November 1998) § 193.

> survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions".[331]

Thus, the ICC Statute considers a large range of actions that may be related to the denial or obstruction of the provision of assistance as potential war crimes in an *international* armed conflict (see supra Sections 6.5.1.1 and 7.5.2.1). These include wilfully causing great suffering or injury to persons health, intentional attacks against civilians or personnel involved in humanitarian assistance, launching an attack which might severely damage the environment (the principle of proportionality), outrages upon personal dignity, directly attacking personnel displaying the emblems of the Geneva Convention (the principle of distinction) and using starvation as a method of warfare. From the above, it becomes apparent that in particular Article 8(2)(b)(iii) and (xxv) concerning the attacks on those providing humanitarian assistance and the use of starvation by depriving civilians of means for survival respectively, are most specifically tailored towards the enforcement of the provisions in the Geneva Conventions and their Protocols concerning the delivery of emergency aid to persons in need. The ICRC Customary International Humanitarian Law Study argues that its rule 'Objects used for humanitarian relief operations must be respected and protected' functions as a corollary to the prohibition of starvation.[332] Furthermore, human rights law continues to be applicable, and as such these crimes may also be violations in more general terms of the rights to life and food. Other than the ICRC Study, the ICC Statute and the Geneva Conventions maintain distinct provisions for the prohibition of starvation and the protection of those providing assistance. Article 8(2)(b)(iii) ICC Statute indeed quite succinctly reflects the wording of Article 71 AP I. It also formulates the international criminalisation of Article 9 of the Convention 'On The Safety Of United Nations And Associated Personnel', which entered into force in 1999.[333] Furthermore, the ICC 'Elements of the Crime' reflect that the attack – within the context of an armed conflict – must have been intentionally directed towards those persons or materials involved in the provision of aid whilst they were entitled to protection, and the perpetrator must have been aware of these circumstances.[334] A certain degree of *wilfulness and knowledge* of the circumstances are therefore presupposed, for an attack against humanitarian personnel or materials to amount to a war crime in an international armed conflict.

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[331] Article 8(1) furthermore provides that: "1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". It must however be noted that this is not an element of the crime; even one isolated act can be considered a war crime. See in this regard Robert Cryer, Hakan Friman, Darryl Robinson and Elisabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2010) 288.

[332] Henckaerts & Doswald-Beck, ICRC Customary International Humanitarian Law Study (n 103) Rule 32 'Objects used for humanitarian relief operations must be respected and protected'. The ICRC argues this rule to be a corollary of Rule 53 regarding the prohibition of starvation.

[333] Article 9 of the Convention 'On The Safety Of United Nations And Associated Personnel', United Nations, Treaty Series , vol. 2051, p. 363, New York, 9 December 1994 (entered into force 15 January 1999) pertains to the attacking of such personnel.

[334] ICC Elements of the Crime concerning Article 8(2)(b)(iii) ICC Statute.

Closely related to Article 8(2)(b)(iii) is Article 8(2)(b)(xxiv). It has been argued that Article 8(2)(b)(xxv) then reflects the obligations as set out in Article 23 GC IV and Articles 54 and 70 AP I and thus the *deliberate obstruction* of relief supplies can be distinguished as a war crime.[335] Indeed, Article 8(2)(b)(xxv) states that only the 'wilful' impediment of humanitarian assistance shall amount to a crime. In this manner Article 8(2)(b)(xxv) continues to 'leave the door ajar' to the potential refusal by the affected state of consent to allow assistance from outside a territory.[336] The ICC Elements of the Crime explain that here too a nexus to an international armed conflict is required, with an awareness thereof by the perpetrator, who must have 'intended to starve civilians as a method of warfare' by depriving them of objects which would be 'indispensible' to their survival.[337] As such, the current provisions in Article 8 of the Statute criminalise the existing legal framework in terms of reflecting both the provisions of the Geneva Conventions and their Protocols as well as the human rights to life, food and health.[338]

The discussed crimes, however, are not listed as the 'grave breaches' of international humanitarian law in Article 147 GC IV. Yet, besides the provisions of Article 8(2)(b)(iii) and (xxv) that are not considered grave breaches of humanitarian law as their origins lie with the Hague Conventions, other instances *are* listed as grave breaches and may also reflect certain actions *related* to the provision of humanitarian assistance. As such, Article 8(2)(a)(iii) concerning the wilful causing of 'great suffering, or serious injury to body or health' falls within that category, and it can be argued that withholding water, food, medical and other supplies necessary for the immediate survival of persons can be considered at least the causing of serious injury to the health of a person; and thereby a violation of their right to health. Relevant in this situation is in particular that the suffering should amount to the causing of 'great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons'.[339] A level of intentionality is required, which is however not required for Article 8(2)(a)(ii) concerning 'inhuman treatment' and might therefore be argued more easily concerning the withholding of humanitarian aid. As opposed to Article 8(2)(a)(iii) for which the Elements of the Crime explain that the perpetrator must 'cause' the suffering; the Elements of the Crime explain concerning Article 8(2)(a)(ii) that the perpetrator must merely 'inflict' such pain or suffering.[340] Considering the denial of humanitarian assistance either wilful killing or torture as a war crime however may be one bridge too far, given the elements of these crimes.[341]

[335] Dinstein, 'The Right to Humanitarian Assistance' (n 242) 82; Rottensteiner, 'The denial of humanitarian assistance as a crime under international law' (n 109) 565.
[336] Ryngaert, 'Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective' (n 110) 7.
[337] ICC Elements of the Crime concerning Article 8(2)(b)(xxv) ICC Statute.
[338] 'The Right to Food – Note by the Secretary-General' (23 July 2001) UN Doc A/56/210 § 45 and 28.
[339] ICC Elements of the Crime concerning Article 8(2)(a)(iii) ICC Statute.
[340] ICC Elements of the Crime concerning Article 8(2)(a)(ii)-2 ICC Statute.
[341] See ICC Elements of the Crimes. For an alternative perspective Rottensteiner, 'The denial of humanitarian assistance as a crime under international law' (n 109) 565-566.

Other potential provisions exist in the ICC Statute that – although not particularly tailored to size – may be related to the denial of humanitarian assistance. Such clauses fall outside the 'grave breaches' regime, as does the above discussed Article 8(2)(b)(iii) and (xxv). In particular Article 8(2)(b)(iv) concerning attacks that lead to damages to the environment or Article 8(2)(b)(xxi) concerning acts that result in outrages upon personal dignity, may be related to the denial or obstruction of humanitarian assistance. With regard to Article 8(2)(b)(iv), a presupposition of knowledge of the extent of the damages is assumed, as well as the fact that the attack must be 'clearly excessive in relation to' the military advantages.[342] This reflects the proportionality principle as enshrined in international humanitarian law. Article 54(2) AP I declares a prohibition to 'destroy objects indispensable to the survival of the civilian population', as an explanation of the most common ways in which the starvation of a population is obtained. The *Commentary* to the Protocol asserts that this includes agricultural areas in 'the widest sense' and acknowledges that this excludes circumstances of military necessity.[343] As such, whilst it perhaps does not specifically tailor to the obstruction of aid, Article 8(2)(b)(iv) ICC Statute concerning damages to the environment may indeed reflect the provisions of Article 54(2) AP I when it comes to deliberately obstructing a population from sustaining themselves and thereby exacerbating a humanitarian crisis and violating the right to food of these persons. Article 8(2)(b)(xxi) ICC Statute concerning acts that result in outrages upon personal dignity may also be placed within a human rights discourse, as reflecting a violation of a person's right to life or health. The Elements of the Crime explain that in order for acts to amount to such a crime, one or more persons must be humiliated, degraded or 'otherwise violated' in their dignity to the extent that it is 'generally recognized as an outrage upon personal dignity'.[344] It follows from this explanation that potentially this provision in the ICC Statute might serve as a subsidiary provision when prosecuting persons for the denial or obstruction of humanitarian assistance.

It remains important to be cognisant that whereas certain circumstances may *appear* to be a denial of humanitarian assistance, military necessity may be grounds for justification of certain acts.[345] Certainly, the element of 'intentionality' will in such circumstances be difficult to prove, if and when the specific intent to harm a group of people was absent from the outset. However, such military necessity at least in an international armed conflict may never amount to the situation in which it 'leaves the civilian population with such inadequate food or water as to cause its starvation'.[346] As a result, the actual *denial* of emergency aid is not to be justified with an argument towards military necessity.

Furthermore, Articles 59 GC IV and 69 AP I pertaining to humanitarian assistance in times of occupation are not reflected in the 'grave breaches' regime of the Geneva

[342] ICC Elements of the Crime concerning Article 8(2)(b)(iv) ICC Statute.
[343] Sandoz, Swinarski & Zimmermann *Commentary to the Additional Protocols* (n 74) Protocol I Article 54, 655-656.
[344] ICC Elements of the Crime concerning Article 8(2)(b)(xxi) ICC Statute.
[345] Eyal Benvenisti, 'International Protection of the Right to Water', (October 2010) *Max Planck Encyclopedia of Public International Law* § 20.
[346] Article 54(3)(b) Additional Protocol I.

Conventions, nor are they reflected as such in the ICC Statute.[347] The ICC distinctly only differentiates between international and non-international armed conflicts, as is also reflected in the need for a nexus to an armed conflict. Establishing individual criminal responsibility *specifically* for the obstruction of emergency aid as a war crime appears therefore to be restricted to circumstances of either international or non-international armed conflict.

Similar to circumstances of international armed conflict, the ICC Statute provides for the potential of individual criminal responsibility for war crimes in a *non-international* armed conflict for actions related to the denial or obstruction of the provision of humanitarian assistance. Article 8(2) ICC Statute notes that serious violations of Common Article 3 of the Geneva Conventions shall be considered war crimes, namely:

> "(c) […] any of the following acts committed against 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: […] (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; […]
> (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: […] (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict".

Thus, the ICC Statute declares that in a non-international armed conflict, similar to in an international armed conflict, attacking those persons or objects involved in the provision of humanitarian assistance shall amount to war crimes (Article 8(2)(e)(ii) and (iii)). These provisions do not find their equivalent specifically in the Geneva Conventions or the Additional Protocol pertaining to non-international armed conflicts, but are a reflection of those provisions pertaining to international armed conflicts with customary law status. Furthermore, the provisions of 8(2)(e) exclude circumstances of 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature' that do not meet the threshold of a 'protracted armed conflict'.[348] Articles 8(2)(b)(iii) and (2)(e)(iii) of ICC Statute therefore define both in international and non-international armed conflict the intentionally attacking of humanitarian personnel and materials as a war crime. Although this has been established as reflecting pre-existing international law,

[347] Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009) 192.
[348] Article 8(2)(f) ICC Statute.

it does indeed also reflect the international community's continued dedication to the provision of humanitarian assistance in times of a humanitarian crisis.

The Security Council has repeatedly also condemned such violence against humanitarian personnel and called upon states to abide by their obligations under international law with regard to such personnel.[349] The Special Court for Sierra Leone was in 2009 the first international tribunal to indeed *convict* persons for attacking humanitarian personnel under Article 4(b) of its Statute concerning 'Other Serious Violations of International Humanitarian Law':

> "The Chamber holds that the elements of the offence of intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations are as follows: (i) The Accused directed an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations; (ii) The Accused intended such personnel, installations, material, units or vehicles to be the object of the attack; (iii) Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict; and (iv) The Accused knew or had reason to know that the personnel, installations, material, units or vehicles were protected. In the view of the Chamber, the primary object of the attack must be the personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission. There exists no requirement that there be actual damage to the personnel or objects as a result of the attack and this Chamber opines that the mere attack is the gravamen of the crime […]".[350]

In doing so, the Special Court elaborated on the scope of the crime to include an intentional attack, whilst the perpetrator was knowledgeable of the fact that it was directed at persons who were entitled to protection. Subsequently in 2010, the ICC Prosecutor also argued a potential violation of Article 8(2)(e)(iii) ICC Statute.[351] The elaboration of the Special Court for Sierra Leone is indeed also reflected in the ICC's Elements of the Crime concerning both Article 8(2)(e)(ii) and (iii), which states a need for intentionality and awareness that the objects of the attack were under protection of the Geneva Conventions.[352]

Conversely, unlike the case concerning international armed conflicts, Article 8 ICC Statute does *not* criminalise starvation as a method of warfare in non-

[349] UNSC Res 1502 (26 August 2003) UN Doc S/RES/1502 'Protection of Personnel in Conflict zones' § 1 &3; in this regard also concerning the DRC: UNSC Res 1794 (21 December 2007) UN Doc S/RES/1794 § 17; UNSC Res 1991 (28 June 2011) UN Doc S/RES/1991 preamble; as well as in Afghanistan UNSC Res 1868 (23 March 2009) UN Doc S/RES/1868 preamble; and UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894 § 16.

[350] *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment)*, Case No. SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009 § 214 and more specifically 219-220.

[351] *The Prosecutor v. Abu Garda*, Case No ICC-02/05-02/09 Decision on Confirmation of Charges (8 February 2010) § 21(ii).

[352] ICC Elements of the Crime concerning Article 8(2)(e)(ii) ICC Statute and ICC Elements of the Crime concerning Article 8(2)(e)(iii) ICC Statute.

international armed conflicts, which *has* been recognised by Article 14 AP II, followed by the provision of Article 18 AP II that relief shall be undertaken 'in the event of undue hardship'. Thus, the ICC Statute undeniably differentiates between international and non-international armed conflicts and does not follow the line of AP II. The explanation can be sought in the fact that at the time of the drafting, consensus could not be reached on these potential acts amounting to war crimes in international customary law, although they had been criminalised in the national legislation of multiple states.[353] Given the rise in non-international armed conflicts around the globe over the past years, this lacuna in Article 8 results in the situation that the denial of humanitarian assistance in a non-international armed conflict *per se* would not be punishable under the current provisions of the Statute. Only an *attack* on those providing assistance or their resources would be considered a war crime in a non-international armed conflict under the ICC Statute. The provisions of the Statute, however, do not entirely preclude the consideration that 'starvation as a method of warfare' is considered prohibited in international humanitarian law, potentially as customary international law as embraced by the ICC Statute.[354] Indeed, in certain instances prior to the establishment of the Rome Statute, the Security Council already asserted that those whom 'deliberately *impede'* (not 'attack') the provision of assistance in non-international armed conflicts shall be held individually responsible for such acts.[355] Therefore, despite the non-inclusion of such acts in the Rome Statute, the Security Council and AP II recognise the prohibition of the deliberate impediment of aid in non-international armed conflicts, leading to the possibility of individual states prosecuting persons within their jurisdiction for such acts. Alternatively, state responsibility might be asserted for such deliberate impediments, should the impediments occur by way of the sovereign, as opposed to armed groups without such a title. Given the Security Council's assertions, as well as the incorporation of such acts in the national penal codes of several countries, a case might be made as to the customary international legal status of the prohibition of starvation in non-international armed conflicts. Indeed, the ICRC has argued the existence of such a rule in customary international humanitarian law.[356] Adding hereto, such arguments may also be made with regard to violations of the right to life and food, in instances of starvation through the denial of humanitarian assistance in

[353] Cryer, Friman, Robinson and Wilmshurst, *An Introduction to International Criminal Law and Procedure* (n 331) 278; Felix Schwendimann, 'The legal framework of humanitarian access in armed conflict', (2011) *93 International Review of the Red Cross* 884, 1005.

[354] See in this regard Article 10 ICC Statute: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute".

[355] For example the Security Council with regard to the situation in the Former Yugoslavia, UNSC Res 787 (16 November 1992) UN Doc S/RES/787 § 7 (cited above); UNSC Res 794 (3 December 1992) UN Doc S/RES/794 § 5 concerning Somalia: "Stronglv condemns all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population, and affirms that those who commit or order the commission of such acts will be held individually responsible in respect of such acts".

[356] Henckaerts & Doswald-Beck, ICRC Customary International Humanitarian Law Study (n 103) Rule 53 Starvation as a Method of Warfare.

times of non-international armed conflict, as human rights law does not cease to be applicable. This would indeed allow for criminalisation on a different international legal basis. Furthermore, it has been asserted by the ICTY that in the absence of the codification of a specific provision of prohibition of an act in the Geneva Conventions, criminal responsibility for the act may still be established.[357] However, consensus could not be reached in the ICC Statute regarding this provision, which opposes the argument held in the ICRC's customary law study. Given the surge of non-international armed conflicts over the past decades, it is evidenced that the denial of humanitarian assistance continues to play a role and that it remains relevant therefore to determine to what extent starvation may be considered a war crime in a non-international conflict, and under which circumstances. In this regard, should the notion continue to develop and be established as a customary international legal norm, it can be implemented through Articles 21(1)(b) and (c) and 21(2) of the ICC Statute, allowing the applicability of the law of armed conflict, general principles of law and previous findings in case law of the Court.[358] Through this consideration, the provisions of AP II can indeed also be embraced at this time.

Another provision which is criminalised in both international and non-international armed conflicts according to Article 8(2)(c)(ii) ICC Statute is the concept of 'outrages upon personal dignity'. Under the ICC Statute such acts are punishable as a war crime also in regard to non-international armed conflicts, since it draws from Common Article 3 of the Geneva Conventions.[359] Whilst not distinctly framed with a view to the provision of humanitarian assistance, it may certainly be argued that the non-provision of humanitarian aid results in an outrage on a person's dignity, in view of the Elements of the Crime that are similar to those of the crime in an international armed conflict.[360] Lastly, it must be noted that Article 8(2)(b)(iv) concerning damages to the environment is absent from the provisions of Article 8 ICC Statute with regard to non-international armed conflicts, as is Article 8(2)(a)(iii) regarding the 'grave breach' of doing wilful damage to a person's health. Whilst both provisions are not specifically tailored to the denial of the provision of humanitarian assistance, in fact the obstruction of a person's ability to sustain themselves through damages to the environment may well result in an outrage on a person's dignity; both in an international and in a non-international armed conflict.

Despite the intentional stripping down of individual criminal responsibility for acts during non-international armed conflicts in the ICC Statute compared to acts which may be equivalent during international armed conflicts, ample opportunity remains to prosecute individuals for war crimes that have denied or obstructed the provision of humanitarian assistance. Indeed, the ICC Statute provides for

[357] *Prosecutor v. Tadić a.k.a "Dule"* IT-94-1-AR72 (n 45) § 128 where the ICTY follows the line of reasoning of the Nuremburg Tribunal. See also Rottensteiner, 'The denial of humanitarian assistance as a crime under international law' (n 109) 565.

[358] In these circumstances Article 22 ICC Statute regarding the principle of 'nullum crimen sine lege' remains relevant of course.

[359] Cryer, Friman, Robinson and Wilmshurst, *An Introduction to International Criminal Law and Procedure* (n 331) 291.

[360] ICC Elements of the Crime concerning Article 8(2)(c)(ii) ICC Statute.

opportunities to prosecute individuals for war crimes related to the obstruction of the provision of assistance in both international and non-international armed conflicts. The breadth of the opportunity however does differ. Codification of individual criminal responsibility for attacking those involved in the provision of assistance or their resources has been criminalised by the ICC Statute with regard to both types of conflicts, as well as criminalising outrages upon personal dignity. However, the Statute only recognises the possibility of prosecution for starvation as a method of warfare and for damages to the environment as well as the 'grave breach' of inhuman treatment and wilfully causing great suffering to a person's health, in the situation of an international armed conflict and it is regrettable that the criminalisation of such acts has not been more equal.

8.6.2.2 Crimes Against Humanity and Humanitarian Assistance

Secondly, relevant to the obstruction of the delivery of assistance, the ICC Statute provides for the individual criminal responsibility for crimes against humanity in Article 7. With regard to the enforcement of humanitarian assistance, specifically relevant are the provisions of Article 7 stating:

> "1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: […] (b) Extermination; […] (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
> 2. For the purpose of paragraph 1: […] (b) 'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population".

With regard to the denial of the provision of assistance, several aspects are key in Article 7 of the Rome Statute. Firstly, no distinction can be found between an international or non-international armed conflict; in fact, the nexus to an armed conflict has been completely removed from the notion of a 'crime against humanity' in the ICC Statute; it is not even mentioned in the provision. Today such a nexus is no longer necessary and such crimes may also take place outside the context of a conflict altogether.[361] This also results in the opportunity to somewhat forego the debate regarding the *lex specialis* relationship between humanitarian law and human

[361] Note the development in this regard from Article 5 ICTY Statute that does require a nexus ("The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population […]"), to Article 3 ICTR where this is no longer needed ("The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic. racial of religious grounds […]"). See in this regard also *Prosecutor v. Tadić a.k.a "Dule"* IT-94-1-AR72 (n 45) § 141 on the development thereto in customary law. Concurring furthermore the UN CHR Report of the Secretary General 'Promotion and Protection of Human Rights: Fundamental Standards of Humanity' (18 December 1998) UN Doc E/CN.4/1999/92 § 12.

rights law in the consideration of which provisions underlie the crime as phrased in Article 7 ICC Statute.[362] Indeed, a state's duties pertaining to its obligations in upholding the right to life, food, health (and water) remain at the forefront also in particular concerning Article 7(2) ICC Statute, which explains the notion of 'extermination'. Thus 'most tailored' or most specific clause can be considered as the *lex specialis*, regardless of whether it may be a provision of humanitarian law or human rights law.[363]

Today, ascertaining that a situation (outside of armed conflict) amounts to a crime against humanity also gives rise to the responsibilities of states and the UN Security Council for the potential use of force under the Responsibility to Protect doctrine, given the incorporation of crimes against humanity as one of the 'core crimes'.[364] Such use of force is traditionally reserved for situations threatening the international peace and security through armed conflict, but has been accepted to include 'crimes against humanity' which do not require such a nexus, although they do in and of themselves quite logically through their nature affect the international peace and security. These arguments were also raised in the aftermath of cyclone Nargis in 2008 as manner to convince the taking of international action by the Council (which did not occur). As such, the Security Council may be inclined to act upon the establishment that a crime against humanity has taken place despite the lack of an armed conflict. In practice however, criminal enforcement takes place at a later stage than when forceful action of the Security Council might be necessary, resulting in a potential action of the Security Council prior to a definitive judicial finding regarding the crime.[365]

Furthermore, whereas one single act may amount to a war crime, for an act to be considered a crime against humanity, it must occur 'as part of a widespread or systematic attack'. As such, with regard to the denial or obstruction of humanitarian assistance, for such an act to be considered the 'deprivation of access to food and medicine' and thereby amount to extermination of civilians (or other inhumane acts) as described by Article 7(1)(b) (k) and 7(2) ICC Statute, some form of systematic or widespread targeting of a particular group must be involved, or alternatively, a single strategic action with the *intent* of impacting a large group of people.[366] This shall to a certain extent have an effect on the applicability of the crime in times of a non-international armed conflict, as the level of organisation needed for such a crime might not be present or possible to prove for certain armed groups or non-state actors. Yet, intent towards the causation of the *attack* itself (as opposed to the targeting of a

[362] See also Article 21(3) ICC Statute.
[363] Section 3.4.3
[364] UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 'World Summit Outcome Document' regarding the crimes giving rise to the Responsibility to Protect doctrine within the United Nations.
[365] Ford, 'Is The Failure To Respond Appropriately To A Natural Disaster A Crime Against Humanity? The Responsibility To Protect And Individual Criminal Responsibility In The Aftermath Of Cyclone Nargis', (n 109) 238-240.
[366] Dungel, 'A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems' (n 134) 8; and Rottensteiner, 'The denial of humanitarian assistance as a crime under international law' (n 109) 568.

group of people) needs not to be proved; suffice that the accused be aware of the fact that the attack took place.[367] Such consideration has also been given by the ICTY in several instances, where the Tribunal has noted the option that *one* act may amount to a crime against humanity should there be a connection to being a widespread or systematic attack, or knowledge of the broader context in which the act is committed.[368]

The ICC Elements of the Crime do not elaborate on the inclusion of 'deprivation of access to food and medicine' as part of the crime of extermination in Article 7(1)(b) and 7(2) ICC Statute, but do indeed reiterate the need for intent to 'bring about the destruction of part of a population' as well as an awareness on the part of the perpetrator that the act was part of such a widespread or systematic attack against a civilian population.[369] Furthermore, concerning Article 7(1)(k) ICC Statute, the Elements of the Crime note that 'serious injury to body or to mental or physical health, by means of an inhumane act' must have been inflicted, again as part of a widespread or systematic attack, including an awareness on the part of the perpetrator.[370] The ICTY has noted similar elements with regard to 'inhumane acts' (as codified in the ICC Statute in Article 7(1)(k)), whilst including that such acts might also amount to a crime against humanity in the case of an 'omission' and that while lasting effects of the act are not necessary to amount to 'inhumane acts', they can be evidence of the seriousness of the act.[371] It follows reason that indeed also an 'omission' as opposed to an 'act' can result in a crime against humanity, should the element of intent be present.[372]

Interestingly, the fact that the choice was made to elaborate on the notion of 'extermination' in the ICC Statute itself – as opposed to incorporation in the Elements of the Crime – specifically including the deprivation of access to food and medicine, can be seen as evidence of the willingness to consider the seriousness of the obstruction or denial of humanitarian assistance as a crime against humanity. In particular concerning the obstruction of humanitarian assistance, the ICTY has found that the blocking of access to aid as envisaged by the Serbian Republic in its 'Directive 7' with regard to Muslim enclaves was with 'catastrophic' results that functioned as a prelude and amongst other factors lead to individual responsibility

[367] Ford, 'Is The Failure To Respond Appropriately To A Natural Disaster A Crime Against Humanity? The Responsibility To Protect And Individual Criminal Responsibility In The Aftermath Of Cyclone Nargis', (n 109) 256.
[368] *Prosecutor v. Tadić a.k.a "Dule"* (Judgment Trial Chamber) IT-94-1-T (7 May 1997) § 649.
[369] ICC Elements of the Crime concerning Article 7(1)(b) ICC Statute.
[370] ICC Elements of the Crime concerning Article 7(1)(k) ICC Statute.
[371] *Prosecutor v. Dario Kordić and Mario Čerkez* (Appeal Judgment) IT-95-14/2-A (17 December 2004) § 117; *Prosecutor v. Vasiljevid* (Appeal Judgment) IT-98- 32-A (25 February 2004) § 16; *Prosecutor v. Galić* (Trial Judgment) IT-98-29-T (5 December 2003) § 152-154; *Prosecutor v. Blagojević & Jokić* (Trial Judgment) IT-02-60-T (17 January 2005) § 626-627.
[372] Ford, 'Is The Failure To Respond Appropriately To A Natural Disaster A Crime Against Humanity? The Responsibility To Protect And Individual Criminal Responsibility In The Aftermath Of Cyclone Nargis', (n 109) 243.

for both inhumane acts and persecution; therefore as crimes against humanity.[373] With regard to extermination as potential crime against humanity, it goes to reason that a certain 'number' or 'amount' of persons must be affected. The ICTY has argued that less than 1700 people or, in referral to the Nuremberg Tribunal, even less than 800 people may be sufficient to amount to 'extermination'; declaring itself unwilling to suggest a threshold, although a 'collective' element should be present rather than singling out individuals.[374]

Some have argued that individual responsibility for torture (7(1)(f)), persecution (7(1)(h)) and murder (7(1)(a)) as crimes against humanity may also be incurred when humanitarian aid is obstructed.[375] Yet, Articles 7 and 8 ICC Statute contain specific clauses related directly to the provision of aid and the obstruction thereof, as well as related to the denial of access or targeting of those providing humanitarian aid, allowing for a more tailored prosecution by way of these provisions. Furthermore, whilst the proper incurrence of individual criminal responsibility for the denial or obstruction of humanitarian assistance is of the utmost importance as the insurance of the provision of aid to those in need is fundamental, it remains important to not attempt to 'adjust' the criteria or elements of certain crimes in international law to fit the 'mould' of humanitarian assistance. For instance, a too frequent coining of a situation as 'genocide' may water down this specific crime. In order for the denial of humanitarian aid to be considered as genocide, a specific kind of intent to destroy a particular group of people must be present; an intent that may be difficult to prove in the case of the denial of aid.[376] In fact, the *allowance* of the provision of humanitarian assistance has been used to argue the *lack* of genocidal intent in the case of Darfur.[377] Conversely, despite not (yet) resulting in specific convictions for this fact, the Prosecutor of the ICC has argued that the denial of humanitarian assistance has formed part of genocidal intent.[378] The Prosecutor has specifically stated that 'denial and hindrance of medical and other humanitarian assistance needed to sustain life in

[373] *Prosecutor v. Krstic* (Trial Judgment) IT-98-33-T (2 August 2001) § 28, 615 and 653. See also *Prosecutor v. Krstic* (Appeal Judgment) IT-98-33-A (19 April 2004) § 89.

[374] *Prosecutor v. Radoslav Brdanin* (Trial Judgment) Case No IT-99-36-T (1 September 2004) § 465. In the *Prosecutor v. Mitar Vasiljevic* (Trial Judgment) Case No IT-98-32-T (29 November 2002) the ICTY notes regarding the concept of 'extermination' in *footnote* 587: "in one case, the court used the expression "extermination" when referring to the killing of 733 civilians (United States v Ohlendorf and others ("Einsatzgruppen case"), IV Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No 10, 421). The Trial Chamber is not aware of cases which, prior to 1992, used the phrase "extermination" to describe the killing of less than 733 persons. The Trial Chamber does not suggest, however, that a lower number of victims would disqualify that act as "extermination" as a crime against humanity, nor does it suggest that such a threshold must necessarily be met".

[375] Rottensteiner, 'The denial of humanitarian assistance as a crime under international law' (n 109) 568-570; Dungel, 'A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems' (n 134), 8; Schwendimann, 'The legal framework of humanitarian access in armed conflict', (n 355) 1006.

[376] Ibid Rottensteiner 571.

[377] 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (25 January 2005) § 515.

[378] *The Prosecutor v. Al Bashir*, Case No ICC-02/05-01/09 Second Decision on the Prosecution's Application for a Warrant of Arrest (12 July 2010) § 34 and 35.

IDP camps' formed a method of destruction as part of the Sudanese President Al Bashir's genocidal plan, as well as arguing that the 'obstruction of humanitarian aid' amounted to the crime of extermination.[379] Such allegations from the Prosecutor – as well as the Prosecutor's willingness to assert that the denial of assistance leads to other crimes under international law – prove that at least the Office is willing to assert that the denial of humanitarian assistance leads to individual criminal responsibility in practice, and that such actions must lead to consequences.

Intentionality with regard to the denial or obstruction of humanitarian assistance shall also continue to be a difficult aspect of arguing that a certain act amounts to a crime against humanity. Denying humanitarian assistance in and of itself amounts to certain specific crimes. Should a circumstance match the framework of another crime, it may be tried before the ICC as such, on its own merits. Thus, a more specific framework for the denial of assistance within international criminal law already exists, and there is no immediate need to have recourse to a series of particular crimes that have specificities that will be difficult to fulfil when considering the obstruction of the delivery of aid, such as torture, persecution and murder. The above examined crimes of extermination and 'other inhumane acts' are at this stage best designed for this purpose within the spectrum of crimes against humanity as laid down in Article 7 ICC. That being said, of course this does not preclude the potential determination that for example the denial of humanitarian aid in a particular circumstance amounts to persecution (as formulated in Article 7(1)(h) ICC Statute) should the criteria be fulfilled. Also, given that the ICC applies – next to the explicit provisions of its own Statute – the 'principles and rules of international law' as well as 'general principles of law', it has the opportunity to embrace those developments in humanitarian law or human rights law as related to humanitarian assistance that may take place in the future.[380] Furthermore, individual criminal responsibility for certain crimes under international law does not preclude the possibility discussed above of holding a *state* responsible under the law of state responsibility for certain situations in which the denial of humanitarian assistance amounts to a violation of international law that may be attributable to it.

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

This Chapter has touched upon the legal enforcement mechanisms of the international community in relation to the provision of humanitarian assistance, and the present Section lastly addresses the more problematic circumstance of dealing with the delivery and enforcement of humanitarian assistance in the absence of a sovereign. The absence of a sovereign may occur in a variety of circumstances, such as in 'failed' or 'failing' states, times of non-international armed conflict with a loss of control by the affected state and no clear entity to fill the void, or disasters in

[379] Ibid.
[380] Article 21(1)(b) and (c) ICC Statute.

fragile states, also resulting in a lack of control. In the absence of a true sovereign entity in the territory of the 'affected state', an alternative method of enforcement of the duties to provide assistance must be sought, similar to the circumstance that the 'affected' state becomes the 'inflicting' state. Yet, these circumstances cannot be compared entirely, as the 'inflicting' state shall actively oppose the provision of assistance (leading to circumstances in which the Security Council might enforce the provision of aid through the use of force), whereas the absence of a sovereign leaves a vacuum as to the determination of a responsible actor in the provision of assistance and thereby also in its enforcement. In reality of course, such circumstances might also lead to a threat to the peace, warranting Security Council action.

What *can* be assessed, however, is that if no entity is in place to fulfil the role of sovereign, no duties of the 'affected state' can be imposed. Given the fact that Chapters 6 and 7 have shown that the primary duties and responsibilities for the provision of aid and access therefore lie with the 'affected state', an absence of such an entity brings a problem of enforcement to the forefront. Such circumstances where no sovereign exists may be armed conflict, natural disaster or other crises in which a collapse of state authority takes place such as just mentioned above. These may be natural disasters in failed or fragile states, where it is simply unclear which entity assumes responsibility over the territory like for example in Somalia. One can also consider disasters in areas where insurrectional movements are active that make the sovereign hesitant to allow access to those particular regions of a state where a loss of control exists when disaster strikes, such as was the case in Sri Lanka. Furthermore, considering non-international armed conflicts, the circumstance in which the affected state may not be in the position to provide assistance due to the fact that access to the specific territory may be impeded by the presence of armed groups is relevant, as the past years in Syria have evidenced. Alternatively however, in a circumstance of occupation, the void of the original sovereign of a territory is filled with an occupier that shall take on the responsibilities of a sovereign.[381]

In the absence of an entity fulfilling the 'primary' responsibility of the affected state, the void must be filled by other actors in the international community, for the simple reason that the affected persons are in a humanitarian crisis and are in need of assistance. The absence of a sovereign with certain responsibilities does not change the circumstances of those in need of assistance. Whilst no hard 'human right to receive' aid can be claimed, it is a vehicle in the fulfilment of many human rights, which are held by persons against their sovereign, as addressed in Chapter 5. Should any of the above circumstances arise in which a territory may be *lacking* a sovereign, enforcement of the provision of humanitarian assistance must be transferred to the international community.[382] It goes without saying that the provision of humanitarian assistance in failed states should be for the purposes of remedying the crisis in which

[381] Sections 6.5.3 and 3.2.2.1.

[382] Determining exactly when 'a sovereign is lacking' or 'absent' remains outside the scope of this research. For the purpose of this research, it will be assumed that such an assessment will have taken place by an authoritative body in international law, such as relevant UN organs or international courts or tribunals, as part of their assessment whether or not humanitarian aid needs to be delivered.

persons find themselves. The international community, when providing such aid, should be well aware of the risks of exacerbating a crisis in the event that assistance is provided without proper distribution channels due to a lack of authorities in a territory.[383] In that sense, to avoid prolonging a crisis more action than the *sec* provision of assistance may be necessary. Thus, the law must be examined to determine on which basis the international community, in the absence of a primary duty-bearer (under human rights law, humanitarian law or other principles of law) in the form of a sovereign entity, has the right or duty to enforce the provision of assistance. The current conflict in Syria with continued clashes between governmental forces and the Islamic State, increasingly obtaining control, is a prime example of these difficulties.

Firstly, a distinction must be made between a 'de facto' government or authority and a failed state in which no sovereign entity exists altogether. The ARSIWA note that the conduct of an insurrectional movement which becomes 'the new government' of that particular state or which creates a new state in that same territory, shall be considered as the conduct of that state for means of state responsibility.[384] Furthermore, the ARSIWA declares in Article 9 that state responsibility can also be applied to 'de facto' regimes:

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority".

The exercise of governmental authority thereby provides the means for state responsibility to be applied to certain groups or movements that exercise a sufficient level of control, yet the ARSIWA distinctly do not apply to non-state actors.[385] A somewhat more broad and pragmatic view was held by the ICJ in its Advisory Opinion on Namibia, arguing that the exercise of physical control over a territory 'and not sovereignty or legitimacy of title' serves as the basis for liability.[386] Should therefore forms of control be exercised by authorities with some form of organisation, a claim can be made as to their responsibility in providing aid or consenting to its provision subject to international legal regulations. Alternatively, such regimes may themselves address the international community in an attempt to receive external assistance in the provision of aid when facing a humanitarian crisis. Evidence of this can be seen amongst others in Somalia, where Farole, leader of Puntland, called upon

[383] The Netherlands Advisory Council on International Affairs (AIV), Report 'Failing States A Global Responsibility' No. 35 (May 2004) 51.
[384] Article 10 ARSIWA.
[385] 'Report of the International Law Commission' UN Doc A/56/10 (n 10) 62.
[386] 'Legal Consequences for States of the Continued Presence of South Africa in Namibia' ICJ Advisory Opinion (n 62) § 118.

the UN to assist in the delivery of humanitarian assistance following a tropical storm in 2013, which was indeed delivered.[387]

Yet, in the absence of any proper and sufficient governmental authority, direct recourse must be had to provisions in human rights law and international humanitarian law. In principle, human rights conventions lay obligations upon states parties, through which responsibilities exist to provide – and thereby as a derivative also to enforce – humanitarian assistance. Yet, Chapter 6 has addressed the status of responsibility for non-state actors in the provision of humanitarian assistance under human rights law, noting that it has become generally accepted in international law today that non-state actors or those exercising *de facto* control over a territory must abide by human rights obligations.[388] Therefore, a prohibition rests upon those exercising control over a territory to violate the human rights of persons under their control. However, enforcement through human rights mechanisms, as seen above, shall remain challenging, considering that this route is merely open to those wishing to hold a state party to a treaty accountable, or a state in a UN context, as opposed to non-state actors.[389] Thus, whilst non-state actors must abide by international human rights law, enforcement of breaches by the judiciary remains lacking.

In the event such breaches become threats to the international peace and security, the UN Security Council does have the opportunity based on Article 39 UN Charter to take enforcement measures, similar to circumstances in which a state would have been responsible for such breaches. This can indeed also be deduced from the fact that the Security Council has for many years assumed such responsibilities for non-state actors, calling in its resolutions upon 'all parties' (to a conflict) to abide by human rights law, humanitarian law and other bodies of law relevant to the provision of humanitarian assistance.[390] Through the reiteration of such wording, the addressing of non-state actors by the Council is reflected. Furthermore, such action towards enforcement is also supported by the doctrine of the Responsibility to Protect that has been embraced by the Security Council, which argues a responsibility for the international community in the event the affected state does not take up responsibility itself.[391] Thus, the Security Council sees opportunities for the international community to take action, should non-state actors or armed groups not abide by their duties under human rights law (such as the duty to provide aid in the fulfilment of the rights to life, food, health (and water)) which amount to a threat to international peace and security. The above Section 8.4 must therefore be seen in this light.

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[387] <http://m.nos.nl/artikel/573773-somali-vraagt-hulp-vn-na-storm.html> News of 11 November 2013, accessed 8 July 2014 and <http://reliefweb.int/report/somalia/un-envoy-somalia-puntland-discuss-tropical-cyclone-response-and-forthcoming-elections> news of 20 November 2013, accessed 8 July 2014. In particular with a view to the provision of aid, the UN Security Council had earlier lifted the embargo on Member States related to the situation in the country, for the purpose of delivering humanitarian assistance to Somalia: UNSC Res 2060 (25 July 2012) UN Doc S/RES/2060 § 7.

[388] Section 6.3.1.

[389] Section 8.5.

[390] Amongst others UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 § 4; UNSC Res 1863 (9 July 2009) UN Doc S/RES/1863 § 19 and UNSC Res 2036 (22 February 2012) UN Doc S/RES/2036 § 16.

[391] Section 4.2.3.1.

Given the fact that threats to international peace and security often amount to armed conflicts, humanitarian law remains relevant too. The stance of the Security Council is indeed also in line with international humanitarian law as discussed in Chapter 6, which notes that the responsibility to provide assistance is transferred to the entity *acting as sovereign* when a conflict exists in a certain territory that does not fall under the control of the sovereign, which in such a circumstance will be the armed group.[392] Of particular relevance in the case of the *absence* of a sovereign, however, is the matter of enforcement in times of a non-international conflict, where such an absence is most likely to occur in practice. During such conflicts, armed groups or other non-state actors may not have acquired the level of organisation necessary to consider them as 'de facto' regimes, and the result may be a more general lack of control and sovereign power. In this regard, the Commentary to Article 18 AP II pertaining to the delivery of aid, notes that:

> "In exceptional cases when it is not possible to determine which are the authorities concerned, consent is to be presumed in view of the fact that assistance for the victims is of paramount importance and should not suffer delay".[393]

The Additional Protocol therefore operates under the *assumption* that in the absence of a sovereign, or in the event of difficulty establishing which actor is the authority, the consent to gain access to a territory may be assumed. Whilst such an assertion may seem forward and bold, in reality it matches the manner in which the Geneva Conventions and Protocols deal with the matter of consent when a sovereign *does* exist: such a sovereign may not 'arbitrarily' refuse access to a bona fide offer of assistance.[394] In the absence of a sovereign to make such judgment calls, the assumption is held that no reasons exist to refuse consent and therefore the international community shall have the opportunity to gain access to enforce the provision of assistance.

From the above, it becomes apparent that the absence of a sovereign also leads to the absence of 'holding a sovereign accountable' under international law. State responsibility and human rights law do not offer solutions for such accountability in the absence of a sovereign, and the Security Council's manner of enforcement often entails the use of force. International criminal law however is tailored towards the responsibility of individuals in international law, and as such can be a mechanism in holding those responsible that have violated amongst others Article 7 or 8 of the ICC Statute.[395] Yet here too, an assumption is made that 'a responsibility' exists, either through the existence of persons exercising governmental authority or through *de facto* regimes and armed groups, rather than providing solutions for the actual absence of an authority. This remains logical, as in

[392] Section 6.4.1 and 6.5.1.2 regarding the obligations of armed groups in the provision of humanitarian assistance.
[393] Sandoz, Swinarski & Zimmermann *Commentary to the Additional Protocols* (n 74) Protocol II Article 18, 1479.
[394] Section 8.3.
[395] Section 8.6.2.1 and 8.6.2.2.

the absence of a *factually* responsible person or party, holding a person or party *legally* responsible shall be difficult to prove in a court of law. Indeed, in the total absence of a responsible actor, the obstruction or impediment of humanitarian assistance is often not the largest problem, rather the factual provision of assistance to those persons in crisis with no authority to turn to.

The Security Council, as a body dealing with impending crises as opposed to judicial responsibilities after the fact, is therefore in the current international legal order the most appropriate enforcer of humanitarian assistance in circumstances where a humanitarian crisis takes place in the absence of a sovereign. The Council, in particular, will be most suitable for responses to natural disasters in areas where a sovereign is absent, as such disasters are often sudden, and require quick and decisive action. Equally, such action is suitable to circumstances of non-international armed conflicts where often a lack of control or absence of a sovereign over parts of a territory exists. In such circumstances where massive humanitarian crises arise without a sovereign to take charge and provide assistance, it may be argued that a threat to the peace exists, warranting Security Council action. Furthermore, it remains relevant that after the fact, armed groups, or other non-state actors might be held responsible in national judicial proceedings.

It must be noted that much of the law pertaining to the absence of a sovereign is through inference; deducing the law, based upon other existing obligations. The ILC has sought to prevent such analogies by incorporating an option for enforcement in its Draft Articles on the Protection of Persons in the Event of Disasters in the absence of a sovereign. Draft Article 14(3) notes that pursuant to an external offer of humanitarian assistance, the affected state shall 'whenever possible, make its decision regarding the offer known'.[396] This ambiguous wording has been explained by the ILC's Drafting Committee as to acknowledge the possibility that a functioning sovereign may be absent, upon which consent must be considered implied.[397] Such wording follows the line of reasoning of AP II concerning matters in a non-international armed conflict as discussed above. Although the Draft Articles are not hard law (yet), Draft Article 14(3) follows the current state of the law, where the Security Council – as authoritative body – shall have the opportunity to assess whether or not a threat to the peace exists upon which assistance is needed, and whether or not consent must be implied. Whilst the current law on enforcement in the absence of a sovereign is vague, and provisions are few and far between, in practice, the absence of a sovereign in (parts of) a territory upon which a non-international armed conflict exists or natural disaster takes place is the reality on the ground. Often non-governmental actors providing aid will continue to attempt to reach such territories, in order to supply persons in need with humanitarian assistance. These circumstances in particular point out the need for clarity of the law, to enable providers of aid guidance in their work.

[396] ILC 'Protection of persons in the event of disasters' Draft Articles UN Doc A/CN.4/L.831 (15 May 2014).
[397] 'Statement of the Chairman of the Drafting Committee pertaining to Article 14 [11] Protection of Persons in the Event of Disasters' (2 August 2011) 5.

8.8 Conclusion

This Chapter has taken the research into the legal framework on the provision of humanitarian assistance to the level of enforcement. In the event of a sovereign not fulfilling its duties and providing assistance (duties such as discussed in Chapter 6) or allowing assistance by third parties (discussed in Chapter 7), this Chapter has addressed the potential methods of enforcement of humanitarian assistance through international law. These methods consist of applying the law at an interstate level through state responsibility, the use of force by way of the Security Council and enforcement through human rights mechanisms, as well as individual responsibility through targeted sanctions or individual criminal responsibility.

State sovereignty continues to play an important role in this aspect of the legal framework. In particular, with regard to the assessment of which acts or omissions may lead to an obstruction or denial of humanitarian assistance, the affected state has the primary responsibility. The enforcement of humanitarian assistance through state responsibility remains the primary approach, given the fact that the affected state's sovereignty entails the responsibility to provide assistance in times of a crisis. As the ICJ in its Barcelona Traction judgment and the ARSIWA have both left the purely bilateral view to state responsibility behind, the international community can now be seen to be vested with joint responsibility.[398] Whereas state responsibility presupposes an act or omission of a state which amounts to a breach of international law that is attributable to that state (Articles 2 and 3 ARSIWA), state responsibility is also possible for those acts attributable to a state through various other means (Articles 4-11 ARSIWA).[399] The ARSIWA provide in circumstances precluding wrongfulness in its Articles 20-25, whereas most relevant regarding the provision of assistance is Article 23 concerning *force majeure*. In practice it might be potentially invoked by an affected state as a reason for denial of humanitarian assistance, although such a denial may not lead to breaches of peremptory norms. In particular concerning the delivery of humanitarian assistance, such norms include the prohibition of genocide, racial discrimination, war crimes and crimes against humanity.[400] Interestingly, with a more communal approach, the ARSIWA envisages through Articles 42 and 48 the possibility for third states to hold the affected state

[398] 8.2.1 State Responsibility, the ARSIWA and Humanitarian Assistance

[399] 8.2.2 The ARSIWA, Peremptory Norms and the Denial of Humanitarian Assistance.

[400] See amongst others *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, § 64 concerning the prohibition of genocide; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422 § 99 concerning the prohibition of torture; Barcelona Traction, Light and Power Company Limited (Belgium v. Spain) case ICJ Reports 1970, § 33-34 regarding the prohibition of aggression and genocide, as well as 'basic human rights' such as the protection from slavery and racial discrimination; and *Prosecutor v. Kupreškić et al. (IT-95-16) "Lašva Valley"*(Judgment Trial Chamber) IT-95-16-T (14 January 2000 § 520; *Prosecutor v. Furundzija* (Trial Judgment) IT-95-17/1-T (ICTY 10 December 1998) § 151-157; *Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landžo (aka "Zenga") (Celebici - Case)* (Appeals Chamber) IT-96-21-A (20 February 2001) § 172; *Prosecutor v. Krstic* (Trial Judgment) IT-98-33-T (2 August 2001) § 541.

accountable for a breach of an obligation owed to the international community in general; an aspect of particular relevance in the provision of assistance. This non-provision may either affect a larger territory and thus amount for example to a threat to the international peace, or such non-provision may be a breach of a peremptory norm which shall according to the ARSIWA induce the international community to act.

As such, Articles 40 and 41 ARSIWA specifically call upon third states to take responsibility through a *positive* obligation, and cooperate in bringing breaches of peremptory norms that are gross failures of the affected, responsible state to an *end*: envisioning an obligation of result.[401] The ICJ has also seconded this view, although arguing an 'obligation of conduct' for state parties to the Genocide Convention, which, when such an obligation of conduct for third parties is applied to the provision of humanitarian assistance, can found also in both human rights law and humanitarian law.[402] In these bodies of law the affected states can be held accountable, whilst the international community (mostly under the ICESCR and the Geneva Conventions) can be seen to be called upon in assistance. The ARSIWA's 'duty to cooperate' for the international community under Articles 40 and 41 to bring such violations to an end can also be found in Article 42 of the ILC Draft Articles on the responsibility of international organisations as well as in Article 89 AP I. Although none of these provisions argue that states in the direct vicinity have a higher duty, their possibilities are often greater due to their location close to the affected territory. Lastly with regard to state responsibility, this Chapter has considered the role of the ILC Draft Articles on the protection of persons in the event of disasters, and concluded that these Articles too express a potential (although softer) obligation for third states to cooperate in the face of disaster under Draft Article 8 (and a role under Draft Article 12).[403] Given the formulations, these Draft Articles must also be read as duties of conduct, should they be codified in the future.

Upon a lack of provision of aid by the affected sovereign, a body such as the Security Council or an international court upon which authority has been bestowed shall have to determine whether or not enforcement is or was indeed necessary.[404] Of course, the current existing international bodies are not infallible, nor can each decision be presumed just, in particular due to the political realities with which the world deals, but in the current state of the law these bodies are those that have been given jurisdiction or power by sovereign states to act. The exact determination of which acts or omissions amount to violations of international law – through specific duties in human rights law and humanitarian law – can only be made on a case-by-case basis, through the assessment of several key factors.

The authoritative body in a particular circumstance shall determine (1) whether or not a humanitarian crisis exists in which the population is inadequately supplied,

[401] 8.2.3 State Responsibility and the Potential Duty to Cooperate in the Event of a Breach.
[402] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43 § 430.
[403] 8.2.4 State Responsibility, Humanitarian Assistance and Legal Developments.
[404] 8.3 Acts Constituting Denial or Obstruction of Humanitarian Assistance.

thereby warranting assistance, (2) subsequently whether or not the affected state is fulfilling its sovereign duties in the provision of aid, (3) in the event it is not capable of doing so, whether it has requested help or refused consent to an offer of assistance (sovereignty considerations are granted the most leeway in circumstances of natural disaster and non-international armed conflict) and (4) lastly, whether or not such consent was arbitrarily denied.

Upon establishment of the above, the facilitation of access by the Security Council's resort to the use of force, or determination of legal responsibility through an international legal body, can be done. Both types of bodies have been donned with the appropriate authority to consider such assessments. The assessments regarding potential violations of international law remain twofold: firstly, the assessment whether or not the affected state itself has unlawfully denied humanitarian assistance (according to the duties discussed Chapter 6) and secondly, whether the affected state unlawfully denied the external offer of assistance and the related right of third parties to access the affected territory (as discussed in Chapter 7).

When the affected state violates its duties, it is seen above that a secondary responsibility is put to third states. Third states may ensure the enforcement of the provision of assistance following violations of peremptory norms of international law, through the use of force by way of the Security Council. The Council is the current appropriate body to this end as it has been provided with authority through Articles 25, 39 and 103 of the UN Charter. In this manner of enforcement, it remains crucial to continue to distinguish between those *providing* aid and those enforcers taking action to *enable the providers* of assistance. In the current legal framework regarding the provision of humanitarian assistance and the use of force, the Security Council is the sole body with the opportunity to determine in a situation that amounts to a threat to the peace, whether or not a humanitarian crisis is taking place, and whether or not external assistance is needed; upon which it may decide to 'enforce' such assistance.[405] Such a determination is simultaneously also the determination that the affected territory is inadequately supplied and the affected state is not fulfilling its sovereign obligations to take care of those under its jurisdiction. Whilst the influence of the veto powers of the 'permanent five' indeed cannot be neglected, it does not appear likely that the current composition and *modus operandi* of the Council will change in the foreseeable future.

As discussed in Section 8.4.2, the Council commenced with enforcement actions in the early 1990's, in Somalia, followed by a more troubled approach in the Former Yugoslavia, upon which the theme of 'humanitarian assistance' was brought to the table in a more consistent manner. This was done through adding the topic 'Protection for humanitarian assistance to refugees and others in conflict situations' in 1997 and in 1999 the item of 'Promoting peace and security: humanitarian activities relevant to the Security Council' to the Council's agenda, as well as the thematic resolutions on the protection of civilians in armed conflict (most notably Resolution 1265). Whilst the Security Council faced certain difficulties in this initial period, pertaining amongst other problems to the adaptation of traditional peacekeeping missions to

[405] 8.4.1 Security Council Action: Enforcement through the UN system and the Responsibility to Protect.

circumstances warranting more explicit use of force, ascertaining whether or not the Council authorises the use of force under Chapter VII continues to be of importance to distilling the approach taken by the body in the enforcement of the provision of aid. It becomes apparent in the above that in fact the Council today is quite comfortable asserting the use of Chapter VII, to ensure the provision of humanitarian assistance, whilst in its initial period in the 1990's the Council was reserved in the use of force pursuant to Article 42 UN Charter and did not set out a clear line of action though the *option* of the use of force was on the table.[406]

Following the UN embracement of the Responsibility to Protect in 2005, the Security Council did not classify each act under Chapter VII as such, but does continue to express its readiness to take action in the face of flagrant and widespread violations of human rights or humanitarian law and continues to address the need for methods to strengthen humanitarian access.[407] Whilst most peacekeeping missions and hybrid missions were in cooperation with the affected state, whose sovereignty therefore was not too tainted or affected, the Council does increasingly note the possibility to use force explicitly *for the purpose of the enforcement of humanitarian assistance* as well as opening the door to the use of force where humanitarian assistance is 'deliberately obstructed' as noted in its thematic resolutions. The circumstances in Libya in 2011 have shown the Security Council's willingness to use both force and to apply the RtoP doctrine, strikingly in direct connection to the enforcement of humanitarian assistance.[408] Despite subsequent Chapter VII action in Somalia and the South Sudan, the Council fails in consistency as it did not embrace RtoP in these circumstances, nor did it refer to Chapter VII in the case of Mali and Syria to date, although it alluded to Syria's responsibility to protect its citizens. Indeed, in a novel approach the Council has called upon the provision of humanitarian assistance in Syria 'across conflict lines'.

Increasingly the Council has also become more specific with the language in its resolutions, focusing with greater detail on the use of force for *the purpose of enforcement* of aid delivery, such as in Somalia and Mali, yet continues to grapple with the difficulties of state sovereignty. Thus, as concluded above, it may be useful to find a formulation for the Council to take more consistent and firm action, although this may not be realistic and viable in practice, given the *ad hoc* basis upon which the Council operates.[409] Despite lacking consistency in action, this must not be read as a determination that the use of force is *prohibited*, as the Council has clearly demonstrated its willingness and readiness to use force either through strengthening existing missions, or through calling upon its member states, both in circumstances where the sovereign has cooperated and in circumstances against the direct wishes of such a sovereign. The Council's actions hereby follow the line of the on-going debate pertaining to issues with the permeability of state sovereignty in the event a sovereign does not protect those under its jurisdiction. With the on-going developments

[406] Section 8.4.2 The Beginning of Security Council Action.
[407] 8.4.3 Security Council Action since the UN embracement of the Responsibility to Protect.
[408] Ibid.
[409] Ibid.

surrounding RtoP, a case-by-case analysis will continue to be the manner in which to follow the Council's actions in order to distil more clarity.

Besides the ad-hoc action by the Security Council, enforcement options are also available through human rights law, either by way of (semi-) judicial treaty-bodies or through the UN Charter system, in which both individuals and states may hold the affected state accountable for violations of the rights to life, food, health (and water) that may incur should humanitarian assistance not be provided.[410] This Chapter has addressed the position of four main treaty body mechanisms concerning the enforcement of humanitarian assistance, which are all limited in their scope of application to the content of their respective treaties. Both the ICCPR and ICESCR have treaty bodies: their findings are not binding and cannot hold states legally accountable for potential violations of human rights.[411] Their interstate complaint mechanism has furthermore not been used, nor is it expected to be used, given the political implications. Independently, the HRC has recognised on occasion that the non-provision of humanitarian assistance may amount to a violation of the right to life under the ICCPR, thereby opening the door to subsequent findings. Problematic to the CESCR is that the rights in the ICESCR are obligations of conduct rather than hard result (with the exception of the minimum core obligations) and as such may be more difficult to argue as having been violated. For the purpose of the delivery of humanitarian assistance however, the minimum core obligations are of particular relevance, as addressed in Chapter 5. Furthermore, the CESCR individual complaint procedure has not existed long enough to have allowed for any findings related to the delivery of humanitarian assistance, leaving only the General Comments procedure through which the Committee has indeed argued potential violations of Articles 11 and 12 should humanitarian assistance not be provided.

It is particularly regrettable that the ECtHR, although having had ample opportunity, has neglected to connect the non-provision of humanitarian assistance consistently to the violation of human rights under its Convention. The Court has done so only in relation to potential violation of Article 3 (cruel or inhuman treatment), and noting the obstruction of aid as a serious 'abuse' rather than as a human rights abuse, thereby foregoing the opportunity to classify the denial of aid as a violation of a human right, more specifically as a violation of the right to life.[412] The IACtHR lastly also recognises both the individual and state complaint procedure, but no jurisprudence to date is specifically relevant to this research into the enforcement of humanitarian assistance.

The latter notion of 'state complaints' reflects a shared responsibility of all states parties to the respective Conventions, such as also can be seen in the ARSIWA and the ICJ's perspective in the *Barcelona Traction* case. Difficult for the treaty bodies however remains, in particular concerning obligations of conduct, the ascertaining of whether or not *enough* has been done by the affected state to fulfil the basic requirements of the right to food, health (and water), as well as ensuring the right to

[410] 8.5 Enforcement through Human Rights Law.
[411] 8.5.1 Enforcement through Human Rights Treaty Mechanisms.
[412] *Mohammed v. Austria* (App no 2283/12) ECHR 6 June 2013, Final 6 September 2013 § 52.

life; through the indiscriminate provision of emergency assistance. Given the attempts, slowly, to also apply humanitarian law where necessary, these bodies may well use the wording of that law such as 'arbitrary refusal' or 'adequate supply' to add more specificity to their findings. However, even outside of armed conflict, the formulations of the rights to life, food and health are not so vague as to not allow the enforcement bodies to assess whether or not the non-provision of assistance entailed a violation of a right.[413]

Operating next to the treaty bodies are the Charter-based organs and bodies of the UN, with a more broad and political mandate, such as the Human Rights Council with its UPR system and the Special Rapporteurs.[414] Both in the UPR system as well as through the Special Rapporteurs, the UN member states have been called on to allow for humanitarian access and assistance, and such bodies have placed the denial of assistance clearly within a human rights context, condemning states for inaction. Such recommendations (some coming from third states) contribute to the general consensus that the enforcement of humanitarian assistance can be viewed from a human rights perspective, although they remain non-binding. In particular, the politics of the Human Rights Council mechanisms must be recognised and taken into consideration, when addressing their value.

Lastly, individual responsibility is addressed in this Chapter through targeted sanctions and criminal responsibility. Individual responsibility can be asserted by the Security Council, in its appliance of sanctions as an enforcement mechanism 'targeted' towards individuals, a mechanism it has used since the 1990's and which has become more and more specific over recent years, also with regard to those responsible for human rights- and humanitarian law violations related to the non-provision of humanitarian assistance.[415] In instances such as in Cote d'Ivoire, Somalia, the DRC and the CAR, the Security Council has expressed its willingness to take action against those that have denied or obstructed humanitarian assistance or directed violence towards humanitarian personnel, through asset freezing, travel bans and similar sanctions. This enforcement mechanism of the Council has proven an increasingly useful tool, as it avoids the impact on the civilian population in general that may be had by the use of force. As it is subject to the implementation of member states, its impact may however not be great enough to pressure authorities into allowing aid into a territory.

Unlike targeted sanctions, individual criminal responsibility is allocated often after the crisis has taken place, similar to the work of human rights enforcement mechanisms. With the creation of the ICC a permanent court has jurisdiction over the crimes of aggression, genocide, war crimes and crimes against humanity, the latter two of which are of particular relevance to the enforcement of the provision of humanitarian assistance.[416] The ICC has also the crucial novel capacity to forego many obstacles pertaining to the immunities of sovereigns and other authorities.

[413] 8.5.1 Enforcement through Human Rights Treaty Mechanisms.
[414] 8.5.2 Human Rights Enforcement through the UN Charter System.
[415] 8.6.1 Enforcement through Targeted Sanctions.
[416] 8.6.2 Enforcement through International Criminal Law.

Article 8 ICC Statute pertaining to war crimes recognises a wide variety of actions that may be related to the denial or obstruction of humanitarian aid, separately in an international armed conflict and in a non-international armed conflict.[417] In an international armed conflict, such actions include wilfully causing great suffering or injury to a person's health, intentional attacks on civilians or personnel involved in humanitarian assistance, launching attacks which might severely damage the environment (a violation of the principle of proportionality), outrages upon personal dignity, directly attacking personnel displaying the emblems of the Geneva Convention (a violation of the principle of distinction) and using starvation as a method of warfare. The provisions of the ICC reflect the criminalisation of provisions in the Geneva Conventions and their Protocols, such as Articles 23 GC IV, and 54 and 71 AP I as well as the human rights to life and food. The ICC does leave room for the consent of the affected state, as it criminalises the 'wilful impediment' of aid in Article 8(2)(b)(xxv). However, such intentionality is not necessary with regard to the crime of inhuman treatment: Article 8(2)(a)(ii) clarifies that merely 'inflicting' pain or suffering suffices for criminalisation.

In particular it must be noted that military necessity may be argued as a justification for certain acts of non-provision of humanitarian assistance as long as these do not amount to starvation.[418] In non-international armed conflicts, the ICC Statute has criminalised serious violations of common Article 3 of the Geneva Conventions, detailing these as intentionally attacking those persons or objects involved in the provision of humanitarian assistance (Article 8(2)(e)(ii) and (iii)). However, starvation as a method of warfare is not criminalised, despite the recognition of its unlawfulness both by AP II and the Security Council. Alternative methods of prosecution would be possible through the argument that this norm is part of customary international law. Another distinction between international and non-international armed conflicts – although 'outrages upon personal dignity' are criminalised for both, is that the ICC Statute furthermore only criminalises damages to the environment as well as the 'grave breach' of inhuman treatment and wilfully causing great suffering to a person's health in the situation of an international armed conflict.

Secondly, individual criminal responsibility for the obstruction or denial of humanitarian assistance is possible through Article 7 ICC Statute pertaining to crimes against humanity. Unlike war crimes, crimes against humanity no longer warrant a nexus to an armed conflict, thereby also putting the debate concerning the concept of the 'lex specialis' relationship between human rights law and humanitarian law somewhat more aside.[419] In particular in relation to the non-provision of assistance, Article 7(2) ICC Statute criminalises 'extermination', which includes the 'deprivation of access to food and medicine'. A crime against humanity however must be a widespread or systematic attack, or, in the event of a single strategic act, it must have occurred with the intent of impacting a larger group,

[417] 8.6.2.1 War Crimes and Humanitarian Assistance.
[418] Ibid.
[419] 8.6.2.2 Crimes Against Humanity and Humanitarian Assistance.

bringing about the destruction of part of a population.[420] Intentionality remains a difficult aspect of this crime in relation to humanitarian assistance, but the willingness of states to put the delivery of humanitarian assistance at the forefront of criminalisation can be seen in their inclusion of such obstruction as an act of 'extermination' *within the text* of Article 7 of the ICC Statute. 'Other inhumane acts' as mentioned in Article 7 ICC Statute shall then provide for alternative means of prosecution in the denial or obstruction of assistance by certain individuals.

Finally, this Chapter has also ascertained in what manner enforcement options are available in those circumstances in which a sovereign is absent partly or entirely. Given that the sovereign is the primary responsible party for the provision of assistance, state responsibility shall not be able to be asserted, save for in the circumstance of a de facto regime as meant in Article 9 ARSIWA.[421] The ICJ has declared more broadly that the 'exercise of physical control over a territory 'and not sovereignty or legitimacy of title' serves as the basis for liability.[422] Indeed, the absence of a sovereign does not change the fact that a crisis may take place, and that persons may be in dire need of humanitarian assistance. The provision of assistance continues to be a fulfilment of the human rights of such persons as well as a fulfilment of certain provisions in humanitarian law (should an armed conflict take place). The international community shall therefore have the opportunity to enforce the provision of humanitarian assistance directly on the basis of these bodies of law, as both bodies recognise the responsibility of non-state actors to abide by international law.[423] In particular Article 18 AP II presupposes the consent to access a territory in the event of difficulty establishing which actor is the authority.

Naturally international criminal law is also tailored to individual responsibility, and as such can also hold those non-state actors responsible that have committed violations of Articles 7 or 8 of the ICC Statute, although difficulties will continue to exist in an absolute void of authority. Such a void shall however potentially enhance the opportunity of the Security Council to take immediate action to provide aid, without struggling with the difficulties of crossing sovereignty barriers. In particular for circumstances of natural disaster, the ILC Draft Articles attempt to fill the gap through Draft Article 14(3) allowing for an implied consent in the absence of a sovereign.[424] Problematic to the complete absence of a sovereign, however, is the need to *infer* many of the enforcement options throughout the bodies of law. As seen throughout this Chapter, many of the circumstances bound to occur in practice do not have explicit legal equivalent solutions. As such, in international law enforcement currently continues to be a case-by-case assessment.

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[420] Ibid.

[421] 8.7 The Enforcement of Humanitarian Assistance and the Absence of a Sovereign.

[422] 'Legal Consequences for States of the Continued Presence of South Africa in Namibia' ICJ Advisory Opinion (n 62) § 118.

[423] 6.3.1 Duties of the Affected State and Non-State Actor under Human Rights Law and AP II. See amongst others also for the position of the Security Council UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265 § 4; UNSC Res 1863 (9 July 2009) UN Doc S/RES/1863 § 19 and UNSC Res 2036 (22 February 2012) UN Doc S/RES/2036 § 16.

[424] 8.7 The Enforcement of Humanitarian Assistance and the Absence of a Sovereign.