

Facilitating humanitarian assistance in international humanitarian and human rights law

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Abstract

In 2008, 260 humanitarian aid workers were killed or injured in violent attacks. Such attacks and other restrictions substantially limit the ability of humanitarian aid agencies to provide assistance to those in need, meaning that millions of people around the world are denied the basic food, water, shelter and sanitation necessary for survival. Using the humanitarian crises in Darfur and Somalia as examples, this paper considers the legal obligation of state and non-state actors to consent to and facilitate humanitarian assistance. It is shown that the Geneva Conventions and their Additional Protocols, as well as customary international law, require that states consent to and facilitate humanitarian assistance which is impartial in character and conducted without adverse distinction, where failure to do so may lead to starvation or otherwise threaten the survival of a civilian population. This paper considers whether this obligation has been further expanded by the development of customary international law in recent years, as well as by international human rights law, to the point that states now have an obligation to accept and to facilitate humanitarian assistance in both international and non-international armed conflicts, even where the

* The views expressed in this paper are those of the author and do not necessarily represent the views of World Vision.

denial of such assistance does not necessarily threaten the survival of a civilian population.



The environment in which humanitarian agencies and their staff provide assistance to populations affected by armed conflict and natural disaster has changed in significant and concerning ways over the past decade. The majority of conflicts taking place in the world today are non-international in character, with national and/or multinational forces fighting a variety of armed groups, often with significant asymmetry between the parties.¹ Characteristics of contemporary armed conflicts include the deliberate targeting of civilians, large scale population displacement, grave violations of international humanitarian and human rights law, the targeting of international humanitarian personnel, and restrictions on humanitarian access to civilians.² Recent decades have also seen a significant increase in the number of people in need of humanitarian assistance in the aftermath of natural disaster,³ with similar restrictions imposed upon humanitarian access. In 2004, the UN General Assembly estimated that more than 10 million people in 20 countries affected by complex emergencies (including both natural disasters and conflict situations) were inaccessible to humanitarian agencies.⁴ For many of these people, restrictions on humanitarian assistance mean restrictions on the basic food, water, sanitation and shelter necessary for survival.

This paper considers the legal obligation of state and non-state actors to provide an environment in which humanitarian organizations can effectively and safely deliver humanitarian assistance to populations in need. As an illustration of the restrictions imposed on the provision of humanitarian assistance, the paper begins with a brief description of the humanitarian crises in Darfur and Somalia. In both cases, the scale of human suffering is enormous, and yet the ability of the international community to deliver humanitarian assistance is severely restricted. The Geneva Conventions and their Additional Protocols, and customary international law as reflected in the International Committee of the Red Cross (ICRC) 2005 study on the rules of customary international law,⁵ require that states consent to humanitarian assistance where failure to do so would risk causing starvation or otherwise threaten the survival of a civilian population. This paper considers whether this obligation has been further expanded by the development of customary international law in recent years, to the point that states now have an

1 *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2007/643, 2007, p. 2.

2 *Ibid.*, p. 6.

3 UN Office for the Co-ordination of Humanitarian Affairs, *Natural Disaster Bulletin No. 8*, October 2007, p. 1.

4 *Strengthening the Co-ordination of Emergency Humanitarian Assistance of the United Nations: Report of the Secretary-General*, UN GAOR, 59th sess., UN Doc. A/59/93-E/2004/74 (2004), p. 11.

5 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, ICRC/Cambridge University Press, Geneva/Cambridge, 2005, pp. 105, 193.

obligation to accept and to facilitate humanitarian assistance – which is impartial in character and conducted without adverse distinction – in both international and non-international armed conflicts, whether or not the denial of such assistance threatens the survival of a civilian population. Finally, it is shown that the provision of humanitarian assistance is further protected by international human rights law, which requires states to use the maximum of their available resources – including offers of international humanitarian assistance – to meet their minimum core obligations with regards to, *inter alia*, the rights to an adequate standard of living and to the highest attainable standard of health. While this paper focuses primarily on the protection of humanitarian assistance in conflict and post-conflict situations, the discussion regarding international human rights law – and the crisis facing the provision of humanitarian assistance in general – is equally applicable in the aftermath of natural disaster.

Restricted humanitarian assistance: Darfur and Somalia

One of the most concerning manifestations of the deteriorating environment for the provision of humanitarian assistance in recent years has been a rapid decline in the security of humanitarian staff. A recent study by the Humanitarian Policy Group (HPG) found that 260 humanitarian aid workers were killed, injured or seriously injured in violent attacks in 2008 – the highest toll in the twelve years that such incidents have been tracked by the HPG.⁶ The study found that the average annual number of attacks was almost three times higher than the annual average for the preceding nine years, and that relative rates of attacks against aid workers (number of attacks per aid workers in the field) had also increased by 61%.⁷ Three-quarters of the attacks in 2008 took place in just six countries, with the highest number of attacks occurring in Sudan (Darfur), Afghanistan and Somalia. The study found that the spike over the past three years was attributable to the surge in violence in these three most dangerous countries.⁸

The following discussion considers the restrictions placed on humanitarian assistance in Darfur and Somalia. A brief outline of the conflicts is provided (with a focus on the nature of the parties to the conflict), followed by a description of the particular ways in which the delivery of humanitarian assistance is restricted in each case.

6 Abby Stoddard, Adele Harmer and Victoria DiDomenico, *Providing Aid in Insecure Environments: 2009 Update*, HPG Humanitarian Policy Brief No. 34, Overseas Development Institute, April 2009, p. 1, available at <http://www.odi.org.uk/resources/download/3250.pdf> (last visited 3 June 2009).

7 *Ibid.*

8 *Ibid.*

Background to the conflicts

The conflict in Darfur

The current conflict in Darfur broke out in 2003, when rebel groups scaled up their attacks on Sudanese police and military targets, and the government responded with a counter-insurgency operation, employing militias drawn from Arab tribes now commonly referred to as the Janjaweed.⁹ The term ‘Janjaweed’ is described by the International Commission of Inquiry on Darfur (‘the Commission of Inquiry’) as ‘a generic term to describe Arab militia acting under the authority, with the support, complicity or tolerance of the Sudanese State authorities, and who benefit from impunity for their actions’.¹⁰ The rebel movement in the early stages of the conflict consisted of two major groups, the Sudanese Liberation Movement/Army (SLM/A) and the Justice and Equality Movement.¹¹

In May 2006 the Government of Sudan and a faction of the SLM/A entered into the Darfur Peace Agreement (DPA), which provided, among other things, for power sharing, wealth sharing and disarmament of the Janjaweed militia and rebel forces.¹² However, the agreement was opposed by two of the three rebel delegations involved in the peace negotiations, and failed to curb the violence.¹³ The period following the signing of the DPA saw increasing fragmentation amongst rebel groups, and by 2008 there were more than 20 domestic armed groups operating in Darfur.¹⁴ In November 2008 the Panel of Experts on the Sudan (‘Panel of Experts’) reported that the parties to the conflict were ‘no longer easy to delineate’,¹⁵ and that most of the rebel groups were ‘small splinter factions with limited military presence or political influence’,¹⁶ with a ‘lack [of] clear command and possess[ing] only a limited number of vehicles and weapons’.¹⁷

In spite of a rapidly deteriorating human security situation, the international community struggled to define an entry point for intervention in Darfur, and until mid-2007 it was left to the African Union (AU) to monitor the ceasefire agreement, provide a secure environment for the delivery of humanitarian relief and (within capacity) protect civilians.¹⁸

9 *Report of the High-Level Mission on the Situation of Human Rights in Darfur pursuant to Human Rights Council Decision S-4/101*, UN HRC, 4th sess., prov. agenda item 2, UN Doc. A/HRC/4/80 (2007).

10 International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur pursuant to the United Nations Secretary General pursuant to Security Council Resolution 1564 of 18 September 2004*, January 2005, p. 31.

11 *Ibid.* p. 22.

12 International Crisis Group, *Darfur’s Fragile Peace Agreement*, Africa Briefing No. 39, June 2006, p. 2.

13 International Crisis Group, *Darfur’s New Security Reality*, Africa Report No. 134, November 2007, p. 1.

14 Panel of Experts on the Sudan, *Report of the Panel of Experts Established Pursuant to Resolution 1591 (2005) Concerning the Sudan*, UN Doc. S/2008/647 (2008), p. 13.

15 *Ibid.*, p. 16.

16 *Ibid.*, p. 51.

17 *Ibid.*, p. 53.

18 The initial authorization for the deployment of the African Union (AU) mission in Darfur was set out in the *Communiqué of the Solemn Launching of the 10th Meeting of the Peace and Security Council*, AU Peace and Security Council, 10th meeting, AU Doc. PSC/AHG/Comm (X) (2004). The Darfur Peace

However, the AU was constrained from the outset by a lack of financial and human resources, and failed to provide meaningful protection to civilians in Darfur.¹⁹ In July 2007, the Government of Sudan consented to the deployment of a hybrid UN/AU mission (UNAMID), authorized by the Security Council to, *inter alia*, contribute to the restoration of security for the safe provision of humanitarian assistance, facilitate humanitarian access and contribute to the protection of civilians under imminent threat of physical violence.²⁰ The initial UNAMID deployment took place in January 2008, but the mission faced the same problems of resources and capacity that had plagued the AU mission.²¹ In 2008, the Panel of Experts reported that ‘ten months into its deployment, the new force has continued to be attacked in the same way as its predecessor and has proven so far to be incapable of defending itself or the civilian population of Darfur’.²²

The conflict in Somalia

Somalia has been without a functional national government since 1991. In 2004, international negotiations led by the Intergovernmental Authority on Development culminated in the signing of the Transitional Federal Charter, which established the Transitional Federal Government (TFG) as a ‘decentralised system of administration based on federalism.’²³ The TFG was beset with problems from its inception – crippled by internal power struggles, challenged by Islamic opposition groups and seen by most Somalis as illegitimate.²⁴ 2006 saw a significant increase in civil strife in Somalia, with the Union of Islamic Courts (UIC) increasing their authority throughout the country. In December 2006, Ethiopian forces intervened in defence of the TFG and overthrew the UIC in much of South Central Somalia, but their successes were undermined by the inability of the TFG to consolidate its authority, and by the rise to power of the UIC’s militant wing, Al-Shabab.²⁵

Agreement stipulated additional responsibilities for AMIS, and in June 2006 the AU’s Military Staff Committee recommended that AMIS’s mandate be reviewed to include the ‘protection of civilians, including women and children, under imminent threat within capabilities and resources’: *Report of the Chairperson of the Commission on the Situation in Darfur*, AU AU Peace and Security Council, 58th meeting, AU Doc. PSC/MIN/2 (LVIII) (2006), para. 33(b). The ‘additional tasks and the new mandate’ were approved by the AU Peace and Security Council in June 2006.

19 Panel of Experts on the Sudan, above note 14, p. 17.

20 *Report of the Secretary-General and the Chairperson of the African Union Commission on the Hybrid Operation in Darfur*, UN Doc. S/2007/307/Rev.1 (2007), paras 54–5. The Chapter VII authorization for the deployment of UNAMID is found in *Resolution on Sudan*, SC Res. 1769, UN SCOR, 5727th meeting, UN Doc. S/Res./1769 (2007), para. 15(a). Resolution 1769 also stipulates that the mandate of UNAMID shall be as set out in the report of the Secretary General and the Chairperson of the African Union Commission of 5 June 2007.

21 Panel of Experts on the Sudan, above note 14, p. 85.

22 *Ibid.*, p. 3.

23 Transitional Federal Charter of the Somali Republic (2004), Art. 11(1).

24 International Crisis Group, *Somalia: To Move Beyond the Failed State*, Africa Report No. 147, 23 December 2008, p. 2.

25 *Ibid.*, p. 1.

In October 2007, a collection of former representatives of the UIC, members of parliament and members of the Somali diaspora established the Alliance for the Re-liberation of Somalia (ARS), which in June 2008 entered into peace negotiations with the TFG. The peace talks led to the signing of a ceasefire agreement ('the Djibouti Agreement'), which provided for the cessation of armed confrontation, the withdrawal of Ethiopian troops and the deployment of a multinational stabilization force.²⁶ The Djibouti Agreement was opposed by all groups with substantial control over territory in Somalia, however, and succeeded only in escalating the violence.²⁷ Further peace negotiations in late 2008 led to an agreement between the ARS and the TFG to establish a government of national unity,²⁸ but the agreement has done little to increase support for the TFG, or to enhance its capacity to challenge armed opposition groups.²⁹ In early 2009, the Ethiopians withdrew their forces from Somalia, enabling Al-Shabab to further expand its territorial control.³⁰ The TFG currently retains control of just 'a few city blocks' in Mogadishu.³¹ A takeover by Islamic opposition groups of the entire south of the country is widely seen as almost inevitable.³²

The AU Mission in Somalia (AMISOM) is mandated by the UN Security Council to take all necessary measures to, *inter alia*, provide protection to the Transitional Federal Institutions, provide security for key infrastructure, and contribute to the creation of the necessary security conditions for the provision of humanitarian assistance.³³ The AMISOM deployment has never reached full capacity, however, due in part to the reluctance of AU member states to send their troops into a situation where leaders of the insurgency are calling upon their groups to target peacekeepers.³⁴ At the end of 2008, AMISOM had just 3450 troops

26 Agreement between the Transitional Federal Government of Somalia and the Alliance for the Re-liberation of Somalia, opened for signature 9 June 2008, entered into force 18 August 2008 ('Djibouti Agreement').

27 International Crisis Group, *Somalia: To Move Beyond the Failed State*, above note 24, p. i.

28 See Integrated Regional Information Network (IRIN), 'Somalia: Power-sharing Deal Reached in Djibouti as TFG Split Widens' (Press Release, 26 November 2008), available at www.alertnet.org/thenews/newsdesk/IRIN/2910ccff0cea26e0d2e02359eb47540.htm (last visited 1 March 2008).

29 Michael Weistein, 'Somalia: Situation Brief No. 3: Analysis', *Garoweonline*, 14 April 2009, available at www.garoweonline.com/artman2/publish/Analysis/Somalia_Situation_Brief_3_Analysis.shtml (last visited 15 April 2009).

30 Mohammed Ibrahim and Alan Cowell, 'Islamists Overrun Somalia City as Ethiopians Leave', *New York Times*, 26 January 2009, p. A6.

31 *Ibid.*

32 International Crisis Group, *Somalia: To Move Beyond the Failed State*, above note 24, p. i.

33 The AU mission in Somalia took place initially pursuant to the Communiqué of the AU Peace and Security Council, January 2007, for the purpose of contributing to the initial stabilization phase in Somalia. The mission was then formally endorsed by the UN Security Council under Chapter VII of the UN Charter in *Resolution on Somalia*, SC Res. 1744, UN SCOR, 5633th meeting, UN Doc. S/Res./1744 (2007). The mission was extended in August 2007 in *Resolution on Somalia*, SC Res. 1772, UN SCOR, 5732nd meeting, UN Doc. S/Res./1772 (2007), and then again in February 2008 (*Resolution on Somalia*, SC Res. 1801, UN SCOR, 4842nd meeting, UN Doc. S/Res./1801 (2008)) and January 2009 (*Resolution on Somalia*, SC Res. 1863, UN SCOR, 6068th meeting, UN Doc. S/Res./1863 (2009)).

34 International Crisis Group, *Somalia: To Move Beyond the Failed State*, above note 24, p. 20.

in Somalia, with capacity to secure only the airport, seaport and a road junction in Mogadishu.³⁵

Restrictions on humanitarian assistance

Restricted humanitarian assistance in Darfur

The restrictions placed on humanitarian assistance in Darfur came to a head in March 2009, when the Government of Sudan expelled 13 international NGOs and revoked the licences of three national NGOs operating in Darfur. The expulsion came shortly after the International Criminal Court issued an arrest warrant for Sudanese President Omar Al-Bashir, charged with war crimes and crimes against humanity. Throughout Northern Sudan (including Darfur), 7610 aid workers were affected by the expulsions.³⁶

Restrictions on humanitarian assistance are not new to Darfur. Prior to the expulsions Darfur had been described as one of the most difficult and frustrating places to work in the world, with humanitarian access severely curtailed by general insecurity, targeted attacks on humanitarian personnel and their assets, and the harassment of (and bureaucratic restrictions imposed upon) humanitarian organizations and their staff.³⁷

Targeted attacks against humanitarian personnel in Darfur – including physical and sexual assaults, hijackings and abductions – increased dramatically in the years leading up to the expulsions. In November 2008, Under-Secretary-General for Humanitarian Affairs John Holmes reported that attacks on humanitarians had reached ‘unprecedented levels’,³⁸ with 11 staff killed, 189 staff abducted, 261 vehicles hijacked, 172 assaults on humanitarian premises and 35 ambushes and lootings of convoys in 2008 alone.³⁹ Holmes noted that in most cases it was the rebel movements that appeared to be responsible for the attacks,⁴⁰ but as one well-known Darfur commentator pointed out, ‘assaults on ... humanitarians, their vehicles, compounds, and equipment must be understood for what they are: actions that are the clear responsibility of the Khartoum regime ... [i]n areas

35 UN Secretary General, *Report of the Secretary General on the Situation in Somalia*, UN Doc. S/2008/709 (2008) p. 7.

36 Sara Pantuliano, Susanne Jaspars and Deepayan Basu Ray, *Where to Now? Agency Expulsions in Sudan: Consequences and Next Steps*, ALNAP/HPG Lessons Paper, Overseas Development Institute, March 2009, p. 3, available at <http://www.odi.org.uk/resources/download/3198.pdf> (last visited 3 June 2009).

37 Office of Deputy Special Representative of the UN Secretary-General for Sudan; UN Resident and Humanitarian Co-ordinator, ‘Darfur Humanitarian Profile No 33’, October 2008.

38 John Holmes, UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, ‘Briefing to the Security Council on the situation in Chad and Sudan’, 3 December 2008, available at www.reliefweb.int/rw/rwb.nsf/db900SID/EDIS-7LYTBD?OpenDocument (last visited 23 January 2008).

39 UN Office for the Co-ordination of Humanitarian Affairs, ‘UN Humanitarian Chief Calls for Continued Co-operation in Sudan’, Press Release, 30 November 2008, available at www.reliefweb.int/rw/rwb.nsf/db900SID/RMOI-7LVMUD?OpenDocument&RSS20=02-P (last visited 24 January 2008).

40 *Ibid.*

controlled by Khartoum nothing happens that is not implicitly or explicitly sanctioned by the regime.⁴¹

Humanitarian assistance in Darfur is complicated by a complex array of bureaucratic restrictions. In a statement issued in 2006, the UN Office for the Co-ordination of Humanitarian Affairs (OCHA) listed the following issues as particularly affecting the ability of humanitarian agencies to carry out their work: a complicated and lengthy visa regime; the requirement for humanitarian workers to obtain permits for travel between states within Darfur and sometimes for travel to particular areas within states; and excessive delays in the processing of travel permits and visas (including exit visas).⁴² The cumbersome visa and travel permit regime means that it can take months for staff to obtain an initial visa for work in Sudan, and that even after arrival in Sudan, staff can be held up in Khartoum prior to obtaining authorization to travel to Darfur. Once in Darfur, many staff are prevented from carrying out their work due to an inability to obtain travel permits, and delays in processing visas mean that staff are often not free to return home when they wish to do so.

On a number of occasions prior to the 2009 expulsions, agencies and their staff perceived to be not following the rules had been ordered to leave. The Norwegian Refugee Council, responsible for the co-ordination of humanitarian assistance in Kalma camp – the largest camp for Internally Displaced Persons (IDPs) in Darfur – was instructed in early 2006 to cease all operations in Darfur.⁴³ At around the same time, a Sudanese NGO was ordered to cease operations on grounds of unspecified violations of the Humanitarian Aid Commission Act.⁴⁴ In November 2007, the head of OCHA in South Darfur was expelled for unspecified violations of the ‘rules of humanitarian action.’⁴⁵

The recent expulsions have left an estimated 1.1 million people without food, 1.5 million without healthcare and more than a million without drinking water.⁴⁶ Initial estimates indicate that the UN and the Government of Sudan might

41 Eric Reeves, ‘Humanitarian Efforts in Darfur Face Escalating War by Khartoum’, 28 October 2008, available at www.sudanreeves.org/Article227.html (last visited 20 January 2008).

42 UN Office for the Co-ordination of Humanitarian Affairs, ‘Fact Sheet on Access Restrictions in Darfur and Other Areas of Sudan’, 20 April 2006, available at www.ochaonline.un.org/OchaLinkClick.aspx?link=ocha&DocId=1004494 (last visited 20 January 2008).

43 *Ibid.*

44 Amnesty International, ‘Sudan: Continuing Blockade of Humanitarian Aid’, Public Statement, AI Index AFR 54/010/2006 (Public), 4 April 2006, available at www.asiapacific.amnesty.org/library/Index/ENGAFR540102006?open&of=ENG-393 (last visited 26 January 2009). The Humanitarian Aid Commission Act 1995 was promulgated by President Omer el-Bashir in 2005, and in February 2006 was replaced by the Organisation of Humanitarian and Voluntary Work Act 2006. Both Acts have been heavily criticized by humanitarian and human rights organizations as imposing undue restrictions on the ability of humanitarian organizations to operate in Sudan.

45 Patrick Worsnip, ‘South Darfur Authorities Expel UN Aid Official: UN’, Reuters, 7 November 2007, available at www.reuters.com/article/worldNews/idUSN0757142620071107 (last visited 25 January 2008).

46 IRIN, *Sudan: We Will Fill the Gaps, Government Insists*, Press Release, 10 March 2009, available at www.irinnews.org/Report.aspx?ReportId=83398 (last visited 15 April 2009).

be able to cover 20–30% of the shortfall.⁴⁷ The Government of Sudan has said that the remaining gaps will be filled by national organizations, but the UN and international NGOs have expressed doubt as to the capacity of national organizations to take on the large and complex programmes managed by the expelled agencies.⁴⁸ Shortly after the expulsion, Holmes said that ‘we do not, as the UN system, the NGOs do not ... and the [Sudanese] government does not have the capacity to replace all the activities that have been going on, certainly not on any short or medium term basis.’⁴⁹ The expulsions are feared to have particularly severe consequences for water supply in many of the IDP camps, including in Kalma camp, where 63,000 people depended on Oxfam Great Britain (one of the expellees) for water.⁵⁰ In the immediate aftermath of the expulsions, the UN’s World Food Program (WFP) distributed two months’ worth of food in areas formerly covered by the expelled NGOs,⁵¹ but an assessment conducted by UN and Sudanese government officials warned that ‘by the beginning of May, as the hunger gap approaches, ... unless WFP has found partners able to take on the mammoth distribution task, these people will not receive their rations.’⁵² Just one month after the expulsion, Oxfam Great Britain’s international programs director said that:

‘we have already been told that water pumps in some Darfur camps have stopped pumping, and there are growing fears about the potential for outbreaks of disease in the rainy season ... The expulsion is already affecting the lives of hundreds of thousands of the very poorest and most vulnerable Sudanese people.’⁵³

Restricted humanitarian assistance in Somalia

Somalia has been described as the most dangerous place in the world to be an aid worker.⁵⁴ The Somalia NGO Safety and Preparedness Support Program reported that in 2008 there were a total of 146 incidents directly involving humanitarian agencies or their personnel, with 36 humanitarian staff killed, 17 injured and 28

47 Pantuliano, Jaspars and Ray. above note 36, p. 3.

48 IRIN, *Sudan: Lost Aid Expertise Hard to Replace – UN*, Press Release, 25 March 2009, available at www.irinnews.org/Report.aspx?ReportId=83635 (last visited 15 April 2009).

49 IRIN, *Sudan: We Will Fill the Gaps, Government Insists*, above note 46.

50 Pantuliano, Jaspars and Ray, above note 36, p. 4.

51 IRIN, *Sudan: Hungry People are Desperate People*, Press Release, 23 March 2009, available at www.irinnews.org/Report.aspx?ReportId=83587 (last visited 15 April 2009).

52 IRIN, *Sudan: Lost Aid Expertise Hard to Replace – UN*, above note 48.

53 IRIN, *Sudan: Oxfam Appeals against Expulsion*, Press Release, 15 April 2009, available at www.irinnews.org/report.aspx?ReportID=83933 (last visited 16 April 2009).

54 UN News Centre, *Somalia Now World’s Most Dangerous Place for Aid Workers, Says UN Official*, Press Release, 24 April 2007, available at www.un.org/apps/news/story.asp?NewsID=22334&Cr=somalia&Cr1 (last visited 24 January 2008).

abducted.⁵⁵ A World Vision security assessment report carried out in December 2008 reported that:

‘[t]hreats against humanitarian workers, once overt and understandable ... have been gradually, but consistently replaced over the past twenty-four months by more covert threats which now deliberately ... target both international and local humanitarian staff. These include staff intimidation, staff detention and interrogation, staff kidnapping, staff assassination, listed death threats and improvised explosive device targeting.’⁵⁶

The ability of humanitarian agencies to carry out activities is further restricted by illegal checkpoints, roadblocks and extortion by local authorities and armed groups. In August 2008, the UN reported that there were at least 325 roadblocks throughout Somalia, most of them staffed by the TFG or clan militia, and almost all of them demanding payment of fees or protection money.⁵⁷ As in the case of Darfur, agencies are vulnerable to orders to withdraw – although in Somalia it is not so much a case of being seen not to follow the rules, but of being seen to be associated with a group other than the one exercising control in the area. In October 2008, Al-Shabab issued a statement ordering two aid agencies to cease operations in areas in South Central Somalia under Al-Shabab control. One of the agencies had been supporting health facilities, supplementary feeding centres and out-patient therapeutic programmes, benefiting approximately 30,000 people.⁵⁸

Humanitarian personnel in Somalia are targeted by all parties to the conflict, and in many cases the identities and the affiliations of the perpetrators are unclear. As in Darfur, humanitarian assistance is restricted by general insecurity and random violence, with the possibility of aid workers being caught in the wrong place at the wrong time. However, according to a study conducted by Amnesty International (AI) into the killing of aid workers and members of Somali civil society organizations in 2008, the majority of the victims were killed in targeted attacks.⁵⁹ AI found that the majority of the killings were attributable to members of armed opposition groups, including Al-Shabab and the ARS.⁶⁰ Primary motivations for the attacks included financial gain, and a desire on the part of opposition groups to eliminate people seen to be acting as spies for the TFG or for the Ethiopian military.⁶¹ A third possible motive is the desire on the part of armed

55 Somalia NGO Security Preparedness and Support Program, *Somalia Report*, No. 50/08, December 2008.

56 RMI Somalia, *Report on Review of World Vision Operational Procedures in Somalia*, World Vision Somalia, 2008, p. 6.

57 Amnesty International, *Fatal Insecurity: Attacks on Aid Workers and Rights Defenders in Somalia*, AI Index AFR 52/016/2008, 6 November 2008, p. 17.

58 UN Office for the Coordination of Humanitarian Affairs, *Somalia: Situation Report No. 50*, 19 December 2008.

59 Amnesty International, *Fatal Insecurity*, above note 57, p. 14.

60 Amnesty International, *Millions at Risk in Somalia as Attacks on Aid Workers Escalate*, Press Release, 6 November 2008, available at www.amnesty.org/en/news-and-updates/report/millions-risk-somalia-attacks-aid-workers-escalate-20081106 (last visited 24 January 2008).

61 Amnesty International, *Fatal Insecurity*, above note 57.

groups seeking to expand their territorial control to undermine the authority of groups currently in control of particular areas – by exposing the latter’s inability to provide adequate security.

The general level of insecurity, combined with targeted attacks on humanitarian agencies and their personnel, severely restricts the delivery of humanitarian assistance in a country in which 3.25 million people – 43% of the population – require humanitarian assistance.⁶² In a joint statement in October 2008, 52 NGOs operating in Somalia said that national and international agencies were ‘prevented from responding effectively to the needs of ordinary Somalis because of violence and severely limited access,’ and that South and Central Somalia was ‘almost entirely off limits to international staff of aid agencies.’⁶³ A number of agencies have been forced to suspend programmes and evacuate staff, and the consequent disruption to emergency food, shelter and essential medical services has been one of the leading factors contributing to widespread malnutrition and death from starvation or preventable disease.⁶⁴

The legal framework for the protection of humanitarian assistance

The provision of humanitarian assistance is protected to varying degrees by international humanitarian and human rights law. International humanitarian law applies in times of armed conflict, and sets out the rights of civilians affected by conflict as well as the obligations of parties to the conflict. International human rights law applies in times of peace as well as in times of war,⁶⁵ and imposes obligations on states party to international human rights instruments to respect, protect and fulfil the rights of those within their territory or subject to their jurisdiction. The following discussion considers the regulation of humanitarian assistance under each of these legal regimes.

Humanitarian assistance in international humanitarian law

The rules of international humanitarian law applicable to the protection of humanitarian assistance in armed conflict vary depending on the nature of the conflict in question, the nature of the parties to the conflict, and the question of who has control over territory. In the case of international armed conflicts (including

62 *Statement by 52 NGOs Working in Somalia on the Rapidly Deteriorating Humanitarian Crisis in the Country*, 6 October 2008, available at www.somali-civilsociety.org/index.php?option=com_content&task=view&id=125&Itemid=1 (last visited 20 January 2008).

63 *Ibid.*

64 Amnesty International, *Fatal Insecurity*, above note 57.

65 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 105(2)(E); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, para. 106; ICJ, *Case Concerning Armed Activities on the Territory of the Congo*, ICJ Reports 2005, p. 116.

military occupation), the provision of humanitarian assistance is regulated by the Fourth Geneva Convention and Protocol I. The obligations set out in these instruments will be discussed below, but suffice to say here that the legal protection of humanitarian assistance enshrined within these instruments is robust, and many of the relevant provisions are seen as representing customary international law. In the case of non-international armed conflicts, humanitarian assistance is regulated by Common Article 3 of the Geneva Conventions and Protocol II.

The conflict in Somalia, despite the involvement of Ethiopian forces until early 2009, has generally been regarded as a non-international armed conflict: the Ethiopian forces were viewed internationally as acting in coalition with the TFG, and as such the conflict was not one that pitted the armed forces of one state against the armed forces of another.⁶⁶ The conflict in Darfur has also been regarded as a non-international armed conflict, although there are – increasingly – elements that could potentially support a classification of the conflict as international in character.⁶⁷ In 2008, the Panel of Experts on Sudan noted that the Darfur conflict had expanded into the wider region, and that the governments of both the Sudan and Chad were engaged in a ‘well-established practice of supplying arms, ammunition, vehicles and training to the armed groups opposing each other.’⁶⁸ The Panel concluded that ‘it is undeniable that a proxy war is being carried out by the Sudan and Chad through non-state actors in and around Darfur’.⁶⁹

The circumstances in which a *prima facie* internal armed conflict may come to be regarded as international in character were considered by the International Criminal Tribunal for Yugoslavia (ICTY) in the case of *Prosecutor v. Tadic*.⁷⁰ It was said in this case that a conflict could be considered international if paramilitary units ‘belong to’ a State other than the one against which they are fighting.⁷¹ As for the meaning of ‘belongs to’, it was held that ‘control over [irregular combatants] by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance to [those combatants] *vis-a-vis* that Party to the conflict’ was required.⁷² Whether the conflict in Darfur could be regarded as international in character would thus depend on the extent of control exercised by the governments of Sudan and Chad over armed opposition groups operating in each other’s territory and fighting against government forces. While the Government of Sudan has accused Chad of providing supplies and equipment to rebel forces operating in Darfur,⁷³ it is unlikely that the rebel forces

66 Human Rights Watch, *So Much to Fear: War Crimes and the Devastation of Somalia*, December 2008, pp. 26–27, available at <http://www.hrw.org/en/reports/2008/12/08/so-much-fear-0> (last visited 2 June 2009).

67 Program on Humanitarian Policy and Conflict Research, *IHL Resource Page: Darfur 2007*, available at www.ihl.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid=844 (last visited 7 February 2008).

68 Panel of Experts on the Sudan, above note 14, p. 49.

69 *Ibid.*, p. 3.

70 ICTY, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999.

71 *Ibid.*, para. 92.

72 *Ibid.*, para. 94.

73 See Andrew Heavens, ‘Sudan and Chad Accuse Each Other of Helping Rebels’, *International Herald Tribune*, 29 January 2009.

could be regarded as being within the control of Chad for the purposes of classifying the conflict as international in character. The conflicts in both Somalia and Darfur are therefore governed by the legal regimes regulating non-international armed conflicts, although it is conceivable that in the future the conflict in Darfur may come to be regarded as falling within the scope of the law of international armed conflict. The protection of humanitarian assistance in both international and non-international armed conflicts is described below.

Humanitarian assistance in international armed conflicts

The Fourth Geneva Convention provides that when protected persons do not benefit from the activities of a Protecting Power, the Detaining Power shall request a neutral state or organization to carry out the functions of the Protecting Power, or if this cannot be arranged, 'shall request or shall accept ... the offer of the services of a humanitarian organisation ... to assume the humanitarian functions performed by the protecting powers.'⁷⁴ Humanitarian organizations are to be granted 'all facilities' for the purpose of providing humanitarian assistance.⁷⁵ In short, states have a duty to request and to facilitate the delivery of humanitarian assistance to persons not of their nationality but within their effective control.⁷⁶

The above provisions relating to protected persons are of limited relevance to today's threats to humanitarian assistance, because only in a small minority of conflicts can it be said that one state has effective control over the territory of another. Article 23 of the Fourth Geneva Convention, however, applies more broadly to 'the whole of the populations of the countries in conflict',⁷⁷ and obliges each party to allow the free passage of 'all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another high contracting party', as well as 'essential foodstuffs, clothing and tonics intended for children under 15, expectant mothers and maternity cases.'⁷⁸

Protocol I is even more explicit in its protection of humanitarian assistance, providing that:

'If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with [food and supplies essential to survival] ... relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be

74 GC IV, Art. 11.

75 GC IV, Art. 30.

76 ICTY, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 579, where the ICTY held, regarding the definition of a protected person, that this 'is not restricted to situations in which the individual civilian is physically in the hands of a Party or Occupying Power', but that rather, persons will be considered to be in the hands of a party if they are 'in territory effectively occupied by a party to the conflict'.

77 GC IV, Art. 13.

78 GC IV, Art. 23.

undertaken, subject to the agreement of the Parties concerned in such relief actions.⁷⁹

The Protocol goes on to state that relief personnel must be protected and assisted to the fullest extent practicable, although the participation of such personnel is subject to the approval of the party in whose territory that relief is being carried out. Only in the case of imperative military necessity may the activities of relief personnel be limited or their movements temporarily restricted.⁸⁰

In short, in the case of international armed conflict, there is a strong foundation in international law on which humanitarian actors can rely to demand that humanitarian assistance be facilitated. Unfortunately this is of limited application to today's conflicts, the vast majority of which (including the current conflicts in Somalia and Darfur, as has been shown above) are non-international in character.⁸¹

Common Article 2(2) of the Geneva Conventions provides that the laws of armed conflict 'shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party'. In the case of occupied territories, the Fourth Geneva Convention provides that '[i]f the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes ... and ... facilitate them by all the means at its disposal.'⁸² The ICRC notes that the obligation to facilitate relief schemes is 'unconditional', and that occupying authorities must 'co-operate wholeheartedly in the rapid and scrupulous execution of these schemes.'⁸³ In short, occupying powers must not only consent to but must seek out and actively facilitate humanitarian assistance.

There is some support for the proposition that where the requirements set out in the Hague Regulations are met (effective control on the part of the occupying power and lack of consent on the part of the sovereign state),⁸⁴ the law of occupation may apply even in circumstances 'other than a state of war or armed conflict between or among High Contracting parties' – that is, in both international and non-international armed conflicts (and, potentially, in times of peace).⁸⁵ The possibility has significance for the protection of humanitarian assistance in Darfur and Somalia, for it could mean that the full suite of occupiers'

79 AP I, Art. 70(1).

80 API, Art. 71.

81 Human Security Centre, *The Human Security Report 2005: War and Peace in the 21st Century*, Oxford University Press, Oxford, 2005, p. 34.

82 GC IV, Art. 59.

83 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV, International Committee of the Red Cross, Geneva, 1958, p. 320.

84 Hague Regulations Concerning the Laws and Customs of War on Land, adopted 18 October 1907, entered into force 26 January 1910, Art. 42: 'Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'

85 See, for example, Michael J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations*, International Humanitarian Law Series, Vol. 2, Martinus Nijhoff Publishers, 1999, p. 151; Adam Roberts, 'What is a Military Occupation', *British Yearbook of International Law*, Vol. 55, 1985, p. 253.

obligations concerning the provision of humanitarian assistance could be said to apply to armed opposition groups who control vast amounts of territory throughout Darfur and Somalia without the sovereign state's consent. However, this approach has not been supported by the International Court of Justice (ICJ), which held that Article 2(2) of the Geneva Conventions ought to be read as meaning that where an international armed conflict exists, the Conventions may also apply 'in any territory occupied in the course of the conflict by one of the contracting parties'.⁸⁶

Humanitarian assistance in non-international armed conflicts

Humanitarian assistance in non-international armed conflicts is protected by Common Article 3 of the Geneva Conventions and by Protocol II, as well as by customary international law. Non-international armed conflict is not defined by Common Article 3, but has been defined by the ICTY as 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'.⁸⁷ The situations in both Somalia and Darfur fall within this definition, and in both cases the required level of intensity is well-established.⁸⁸

Common Article 3 of the Geneva Conventions sets out minimum standards of humanity binding upon parties to a non-international armed conflict: persons not taking part in hostilities shall be treated humanely, violence to life and outrages upon personal dignity shall be prohibited, and the wounded and sick shall be cared for. It is arguable that this encompasses an obligation to consent to and facilitate humanitarian assistance, where failure to do so would threaten the survival of a civilian population (under the prohibition on 'violence to life').⁸⁹ Article 3(2) provides that 'an impartial humanitarian body may offer its services to the Parties to the conflict' – but does not oblige the state on whose territory the humanitarian crisis is taking place to accept the offer.

Protocol II provides more explicit protection for humanitarian assistance in non-international armed conflicts, although it has a higher threshold of application than Common Article 3.⁹⁰ Article 18 provides that:

'If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief

86 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, above note 66, para. 95.

87 ICTY, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

88 For Somalia, see Human Rights Watch, above note 66, pp. 26–27. In the case of Darfur, the International Commission of Inquiry said that: 'the requirements of (i) existence of organised armed groups fighting against the central authorities; (ii) control by rebels over part of the territory; and (iii) protracted fighting, in order for this situation to be considered an internal armed conflict ... are met' – International Commission of Inquiry on Darfur, above note 10, p. 26.

89 Ruth Abril Stoffels, 'Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps', *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 519–520.

90 See AP II, Art. 1.

actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.’

Underlying this provision is the principle of subsidiarity – that is, ‘that States are primarily responsible for organising relief’, and that ‘relief societies ... are called upon to play an auxiliary role by assisting the authorities in their task’.⁹¹ In other words, as recently affirmed by Rohan Perera of the International Law Commission, ‘humanitarian assistance should be a subsidiary action which is never taken unilaterally’.⁹²

There is an obvious tension here between the words ‘shall be undertaken’ and ‘subject to the consent of’ – that is, the requirement for a humanitarian agency to obtain authorization from the state concerned and the obligation on the part of the state to grant it. In its commentary on the Additional Protocols, the ICRC notes that ‘the fact that consent is required does not mean that the decision is left to the discretion of the parties,’ and that ‘if the survival of the population is threatened and a humanitarian organisation fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place.’⁹³ The ICRC goes on to state that refusing relief without proper grounds would be tantamount to violating Article 14 of Protocol II prohibiting the use of starvation as a method of combat.⁹⁴ At a minimum, then, Article 18 (read with Article 14) encompasses an obligation on the part of states to accept humanitarian relief if the situation is such that to refuse relief might lead to starvation or otherwise threaten the survival of a civilian population. Except in these circumstances, a strict reading of Article 18 does not suggest the existence of an obligation on the part of a state to accept or facilitate humanitarian relief.

Somalia is not a party to Protocol II; thus humanitarian assistance in Somalia is protected only by the minimum standards set out in Common Article 3. Sudan is a party to Protocol II; humanitarian assistance in Darfur is thus protected by Common Article 3 and Article 18, provided it can be shown that armed groups within the control of the state are in conflict with other armed groups which, under responsible command, exercise control over territory sufficient to carry out sustained and concerted military operations and to implement Protocol II.⁹⁵

In 2008, the Panel of Experts on Sudan noted that the majority of Darfur’s rebel splinter groups lacked clear command and control structures.⁹⁶ Nevertheless, in light of the finding of the Commission of Inquiry that since 2003 the rebel

91 Yves Sandoz *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, 1987, p. 1477.

92 Rohan Perera, *Statement at the 60th Session of the International Law Commission*, Geneva, 18 July 2008, available at www.lankamission.org/content/view/579/ (last visited 28 May 2008).

93 Sandoz *et al.*, above note 91, p. 1479.

94 *Ibid.*

95 In terms of APII, Art. 1.

96 Panel of Experts on the Sudan, above note 14, p. 53.

groups have exercised *de facto* control over some areas of Darfur,⁹⁷ it is probable that at least the major rebel groups could be regarded as possessing sufficient command and control for the conflict to fall within the scope of Protocol II. With regards to the Janjaweed militia, the findings by the Commission of Inquiry of ‘clear links between the State and militias’,⁹⁸ and that the Janjaweed received weapons and ammunition from senior civilian authorities and the Government’s own armed forces,⁹⁹ suggest that the Janjaweed could almost certainly be regarded as ‘within the overall control’ of the state – thus satisfying the threshold criteria for the application of Protocol II. Thus the parties to the conflict in Darfur are at a minimum bound by Common Article 3 of the Geneva Conventions, and insofar as the conflict comprises organized armed groups in conflict with the armed forces of the state, also by Protocol II. In both cases, as has been shown above, the obligation to consent to and facilitate humanitarian assistance is limited to situations in which the failure to do so may threaten the survival of a civilian population.

In addition to Common Article 3 and Protocol II, the regulation of humanitarian assistance in non-international armed is also covered by customary international law. Specifically, the obligation to respect and protect humanitarian relief personnel and objects, and the obligation to allow and facilitate the rapid and unimpeded passage of humanitarian relief which is impartial in character and conducted without any adverse distinction (subject to the state’s right of control) are regarded by the ICRC as rules of customary international law applying in all conflicts.¹⁰⁰ With regards to the obligation to respect and protect humanitarian relief personnel, the ICRC stated in its 2005 study on the rules of customary international humanitarian law that this obligation is a ‘corollary of the prohibition of starvation, ... as well as the rule that the wounded and sick must be collected and cared for’, because the security of humanitarian relief personnel and objects is an ‘indispensable condition for the delivery of humanitarian relief to civilian populations in need threatened with starvation.’¹⁰¹

As to the issue of consent to humanitarian assistance, the ICRC study notes that:

‘consent must not be refused on arbitrary grounds. If it is established that a civilian population is threatened with starvation and a humanitarian organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent.’¹⁰²

This then takes us back to much the same position as Protocol II (as interpreted by the ICRC) – that is, that states are obliged to consent to humanitarian

97 International Commission of Inquiry on Darfur, above note 10, p. 26.

98 *Ibid.*, p. 33.

99 *Ibid.*, p. 36.

100 Henckaerts and Doswald-Beck, above note 5, pp. 105, 193.

101 *Ibid.*, p. 105.

102 *Ibid.*, p. 197.

relief if the situation is such that withholding consent might lead to starvation or otherwise threaten the survival of the population.

The following discussion considers whether the legal regulation of humanitarian assistance has been further strengthened by international consensus in recent years – as reflected in state practice, General Assembly and Security Council resolutions – such that customary international law now encompasses an obligation to consent to and facilitate humanitarian assistance, regardless of whether the denial of that assistance may threaten a civilian population with starvation.

For a legal principle to acquire the status of customary international law, it has traditionally been required that there be a consistent and general practice among states of adherence to the rule, and that there be evidence that the practice has been carried out in the belief that the practice is obligatory (the principle of *opinio juris*).¹⁰³ Following the decision of the ICJ in the case of *Military and Paramilitary Activities in and against Nicaragua* ('*Nicaragua*'), evidence of *opinio juris* may be gleaned from treaties as well as from non-binding instruments such as declarations and General Assembly resolutions.¹⁰⁴ The ICJ affirmed in that case that 'the effect of consent to the text of such resolutions ... may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution'.¹⁰⁵

If *opinio juris* may indeed be inferred from the acceptance of General Assembly resolutions and non-binding declarations, can it be argued that there is sufficient evidence to support the existence of a new rule of customary international law requiring states to consent to and facilitate humanitarian assistance, whether or not the denial of such assistance may threaten a civilian population with starvation?

In 1991 the General Assembly established the following 'guiding principles' for the co-ordination of humanitarian assistance:

3. The sovereignty ... of States must be fully respected ... humanitarian assistance should be provided with the consent of the affected country ...
4. Each State has the responsibility first and foremost to take care of the victims of ... emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, co-ordination, and implementation of humanitarian assistance within its territory.
6. States whose populations are in need of humanitarian assistance are called upon to facilitate the work of these organizations in implementing humanitarian assistance ...¹⁰⁶

103 ICJ, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, Judgment, ICJ Reports 1969, para. 77.

104 ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, ICJ Reports 1986, para. 188.

105 *Ibid.* The ICJ regarded the parties' acceptance of the resolutions and declarations as evidence of *opinio juris* sufficient to support the existence of a rule of customary international law.

106 *Resolution on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res. 46/182 (1991), Annex.

These guiding principles have been ‘recalled’ in successive General Assembly resolutions on the co-ordination of humanitarian assistance and the safety and security of humanitarian personnel. It is interesting to note, however, that with the exception of Resolution 51/194 (1996),¹⁰⁷ the need for consent on the part of the concerned state has not been explicitly reaffirmed. The resolutions repeatedly condemn acts and failures to act which prevent humanitarian personnel from discharging their humanitarian functions, and call upon states and other parties to co-operate with humanitarian agencies and to ensure the safe and unhindered access of humanitarian personnel and the delivery of supplies and equipment.¹⁰⁸ It is possible to surmise that while the General Assembly has not gone so far as to reverse the requirement that consent on the part of the host state be obtained, the requirement of consent has diminished in importance relative to the other competing principles espoused in 1991 (the responsibility of the state to protect victims, and the importance of facilitating the work of humanitarian organizations).

The Security Council has taken a somewhat stronger approach to the obligation on the part of states to facilitate humanitarian assistance – in non-international as well as international armed conflicts. In 1996, the Security Council passed a succession of resolutions on Liberia, condemning attacks on international organizations and agencies delivering humanitarian assistance, and demanding ‘the freedom of movement of ... international organisations and the safe delivery of humanitarian assistance.’¹⁰⁹ In more recent years, the Security Council has passed resolutions demanding complete and unhindered humanitarian access and assistance in Somalia,¹¹⁰ stressing the importance of ensuring safe and unhindered access of humanitarian workers in Afghanistan,¹¹¹ calling upon all parties in Sudan to ‘support, protect and facilitate all humanitarian operations and personnel’,¹¹² and in the case of Iraq, urging ‘all those concerned as set forth in international

107 *Resolution on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res. 51/194 (1996).

108 See, e.g., *Resolution on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res. 47/168 (1992) (‘stressing the need for adequate protection of personnel involved in humanitarian operations, in accordance with relevant norms and principles of international law’); *Resolution on the Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res. 51/194 (1996) (emphasizing ‘the urgent need to ensure, respect and promote international humanitarian law, principles and norms, the safety of humanitarian personnel and the need for States whose populations are in need of humanitarian assistance to facilitate the work of humanitarian organisations in implementing humanitarian assistance’) and *Resolution on the Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel*, GA Res. 62/95 (2007) (calling upon ‘all States and parties in complex humanitarian emergencies ... in countries in which humanitarian personnel are operating, ... to cooperate fully with ... humanitarian agencies ... to ensure the safe and unhindered access of humanitarian personnel as well as delivery of supplies and equipment’).

109 *Resolution on Liberia*, SC Res. 104 (1996); *Resolution on Liberia*, SC Res. 1059 (1996); *Resolution on Liberia*, SC Res. 1071 (1996); *Resolution on Liberia*, SC Res. 1083 (1996).

110 *Resolution on Somalia*, SC Res. 1744 (2007); *Resolution on Somalia*, SC Res. 1772 (2007); *Resolution on Somalia*, SC Res. 1801 (2008); *Resolution on Somalia*, SC Res. 1814 (2008); *Resolution on Somalia*, SC Res. 1844 (2008); *Resolution on Somalia*, SC Res. 1863 (2009); *Resolution on Somalia*, SC Res. 1872 (2009).

111 *Resolution on Afghanistan*, SC Res. 1806 (2008); *Resolution on Afghanistan*, SC Res. 1868 (2009).

112 *Resolution on Sudan*, SC Res. 1870 (2009).

humanitarian law ... to allow full unimpeded access by humanitarian personnel to all people in need of assistance, and to make available, as far as possible, all necessary facilities for their operations'.¹¹³ While the resolutions continue to reaffirm the sovereignty and territorial integrity of the state concerned, the Security Council nevertheless seems to have taken the position that consent is not an absolute requirement for the carrying out of humanitarian relief, and that the states concerned are obliged to do all within their power to facilitate such relief. The demand for unhindered humanitarian access has not explicitly been limited to situations in which the denial of such assistance would lead to starvation or otherwise threaten the survival of the civilian population.

Can it be said, then, that the General Assembly and Security Council resolutions, together with the conduct of states and other official statements,¹¹⁴ provide evidence of a rule of customary international law requiring states to facilitate humanitarian assistance, whether or not such refusal would lead to starvation or otherwise threaten the survival of a civilian population? It is certainly reasonable to argue that the adoption by states of successive resolutions demanding humanitarian access (and in the case of Iraq, impliedly recognizing that full and unimpeded access by humanitarian personnel is required by international humanitarian law)¹¹⁵ represents the *opinio juris* necessary to support such a claim.

More difficult, however, is the requirement that the conduct of states be in conformity with the alleged rule. States that have been the subject of resolutions calling for the safe and unimpeded delivery of humanitarian assistance have been less than consistent in their adherence. The parties, movements and factions in Somalia have not taken all measures necessary to facilitate the provision of humanitarian assistance following recent Security Council resolutions; humanitarian access to populations in need of assistance in Afghanistan has been anything but safe and unhindered since the passing of resolutions in 2008–2009; and the humanitarian agencies expelled from Darfur in early 2009 have not been granted permission to recommence operations. However, non-compliance is not necessarily detrimental to a claim that a rule has the status of customary international law.¹¹⁶ In *Nicaragua*, the ICJ held that:

'[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should

113 *Resolution on Iraq*, SC Res. 1770 (2007).

114 The ICRC study notes that the obligation to allow the free passage of relief supplies has also been included in military manuals and other official statements and practice applicable to both international and non-international armed conflict – see Henckaerts and Doswald-Beck, above note 5, p. 195 (citing the military manuals of Columbia, Germany, Italy and Kenya, and referring to official statements made by Germany, Nigeria, US and Yugoslavia).

115 *Resolution on Iraq*, SC Res. 1770 (2007).

116 See Theodor Meron, 'Revival of Customary Humanitarian Law', *American Journal of International Law*, Vol. 99, No. 4, October 2005, p. 817.

generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.¹¹⁷

With regard to the obligation to ‘allow and facilitate rapid and unimpeded passage of humanitarian relief ... subject to [the host state’s] right of control’, the ICRC study found that ‘contrary practice has generally been condemned with respect to both international and non-international armed conflicts’.¹¹⁸ International condemnation of contrary practice has continued in recent years, as illustrated by the Security Council resolutions referred to above, and explicitly in Resolution 1844 on Somalia, in which the Security Council imposed sanctions on, *inter alia*, individuals and entities ‘designated by [the Security Council] as ... obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia.’¹¹⁹ Thus it is reasonable to assert that the obstruction of humanitarian assistance – whether or not this has threatened the survival of a civilian population – has generally been regarded as a violation of international humanitarian law.

It may be argued, then, that there is sufficient *opinio juris* and state practice to support the claim that there is an obligation in customary international law to consent to and facilitate humanitarian assistance, in both international and non-international armed conflicts, whether or not the denial of that assistance may lead to starvation or otherwise threaten the survival of a civilian population.

Humanitarian assistance in international human rights law

The parallel application of human rights and humanitarian law has been reflected in multiple resolutions of the Security Council, the Commission on Human Rights and the Human Rights Council, all urging parties to conflicts to respect, promote and comply with their obligations under both human rights and international humanitarian law.¹²⁰ The ICJ has also affirmed that human rights provisions continue to apply in times of armed conflict unless a party has lawfully derogated from them on the grounds of national emergency.¹²¹

It was not until the ICJ’s *Wall* case in 2004, however, that the application of human rights law in times of armed conflict was explicitly recognized as encompassing the obligations of governments with regards to economic, social and cultural rights. The ICJ declared in that case that Israel’s construction of a security

117 ICJ, *Military and Paramilitary Activities in and Against Nicaragua*, above note 104, para. 186.

118 Henckaerts and Doswald-Beck, above note 5, p. 195.

119 *Resolution on Somalia*, SC Res. 1844 (2008).

120 See Rebecca Barber, ‘Protecting the Right to Housing in the Aftermath of Natural Disaster: Standards in International Human Rights Law’, *International Journal of Refugee Law*, Vol. 20, No. 3, October 2008, pp. 436–7 for a list of resolutions of the Security Council, Commission on Human Rights and the Human Rights Council reaffirming the parallel application of international human rights and humanitarian law in times of armed conflict.

121 See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 65.

barrier in the Occupied Palestinian Territories constituted a breach of its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), specifically the obligation to respect the right to an adequate standard of living. The Court held that Israel was not entitled to derogate from the provisions of the ICESCR, because ‘the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind found in Article 4 of the International Covenant on Civil and Political Rights’ (ICCPR).¹²² Thus in situations of armed conflict, states are bound to abide by the entire suite of their obligations under international human rights law, including with respect to economic, social and cultural rights.

International human rights law contains a number of provisions relevant to the protection of humanitarian assistance. The ICCPR and the African Charter on Human and Peoples’ Rights (‘African Charter’) protect the right to life,¹²³ while the Convention on the Rights of the Child (CRC) protects the child’s right to life and provides that states shall ensure to the maximum extent possible the survival and development of the child.¹²⁴ The Committee on Civil and Political Rights has said that the right to life ‘cannot properly be understood in a restrictive manner’, and that the protection of the right requires states to ‘adopt positive measures.’¹²⁵ States party to these conventions (Sudan and Somalia are both party to the ICCPR and the African Charter, and Sudan is also a party to the CRC) thus have an obligation to accept, and probably also to actively facilitate, humanitarian relief if the situation is such that not doing so might threaten the survival of those within their territory or subject to their jurisdiction. This is comparable to the obligation under Article 18 of Protocol II and customary international humanitarian law that states must consent to humanitarian relief if withholding consent might lead to starvation or otherwise threaten the survival of the population.

The provisions in the ICESCR (to which both Sudan and Somalia are party) and in the African Charter relating to economic, social and cultural rights provide – arguably – a more expansive protection of humanitarian assistance. The ICESCR recognizes ‘the right of everyone to an adequate standard of living ... including adequate food, clothing and housing’,¹²⁶ and the right to freedom from hunger.¹²⁷ Both the ICESCR and the African Charter also recognize the right to enjoy the highest attainable standard of physical and mental health.¹²⁸

122 *Ibid.*, para. 106.

123 International Covenant on Civil and Political Rights (ICCPR), opened for signature 16 December 1966, entered into force 23 March 1976, Art. 6; African Charter of Human and Peoples’ Rights (African Charter), opened for signature 27 June 1981, entered into force 21 October 1986.

124 Convention on the Rights of the Child (CRC), opened for signature 20 November 1989, entered into force 2 September 1990, Art. 6.

125 Committee on Civil and Political Rights, *General Comment No. 6: The Right to Life (Article 6 of the Covenant)*, CCPR, 60th sess., UN Doc. HRI/Gen/1/Rev.7 (1982), para. 5.

126 International Covenant on Economic, Social and Cultural Rights (ICESCR), opened for signature 16 December 1966, entered into force 3 January 1976, Art. 11(1).

127 ICESCR Art. 11(2).

128 ICESCR Art. 12; African Charter, Art 16.

Unlike the ICCPR, the CRC and most of the provisions in the African Charter, which impose immediate obligations on states parties to ensure full realization of the rights enshrined in the respective covenants, the ICESCR provides for progressive realization of rights to the maximum of a state's available resources.¹²⁹ Art 2(1) of the ICESCR obliges states to:

'take steps, individually and through international assistance and co-operation, ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means ...'

The reference in Article 16 of the African Charter to the 'best attainable' state of physical and mental health implies that this obligation should be interpreted in similar terms.¹³⁰

However, the Committee on Economic, Social and Cultural Rights (CESCR) has clarified that while the ICESCR allows generally for the progressive realization of rights, states parties are under an immediate obligation to ensure the satisfaction of 'minimum essential levels' of each of the rights enshrined in the Covenant:

'[t]hus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. ... [and] must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'¹³¹

The phrase 'to the maximum of its available resources' refers to the resources existing within a state as well as to 'those available from the international community through international co-operation and assistance.'¹³² Thus, where a state party to the ICESCR fails to provide essential foodstuffs, essential primary health care, basic shelter and housing or basic education, that state will be considered to be in breach of its obligations unless it can demonstrate that it has made every effort to use all resources at its disposal – including international assistance – in an effort to satisfy its obligations. The minimum core obligations arising from the right to adequate food and to water are discussed below as an illustration of the

129 Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 3: The Nature of States Parties Obligations (Art 2(1) of the Covenant)*, UN ESCOR, Comm. Economic, Social and Cultural Rights, 5th sess., Annex 3, UN Doc. E/1991/23 (1990), para. 1.

130 Chidi Anselm Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights', *Human Rights Quarterly*, Vol. 23, May 2001, p. 327, at p. 349.

131 CESCR, *General Comment No. 3*, above note 129.

132 *Ibid.*, para. 13.

importance of state obligations with regards to economic, social and cultural rights for the protection of humanitarian assistance.

The right to adequate food 'is realized when every man, woman and child ... has physical and economic access at all times to adequate food or means for its procurement'.¹³³ While it is recognized that the right to food must be realized progressively, the CESCR has affirmed that states have a 'core obligation to take the necessary action to mitigate and alleviate hunger ... even in times of natural or other disasters'.¹³⁴ To satisfy this core obligation, governments must ensure that everyone within their jurisdiction has 'access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger'.¹³⁵ In determining whether the actions or omissions of a government amount to a violation of the right to food, the CESCR notes that:

'it is important to distinguish the inability from the unwillingness of a State party to comply. ... A State claiming that it is unable to carry out its obligation ... has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food'.¹³⁶

Actions such as the hijacking of food convoys, demands for extortion, the holding up in customs of food intended for distribution to the civilian population, or any other form of harassment or restriction imposed on international agencies engaged in food or nutrition programmes – insofar as those actions can be attributed to the government – represent clear violations of the minimum core obligations as regards the right to food. Moreover, where a population does not have access to the minimum essential food to ensure its freedom from hunger, such as is the case in both Somalia and Darfur (one in six children in Somalia are acutely malnourished;¹³⁷ just less than one in six children in Darfur are malnourished¹³⁸), the government concerned may be considered to be in breach of its obligations unless it can demonstrate that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of food.

The human right to water has also been recognized by the CESCR as falling within the protection offered by Article 11(1) of the ICESCR, because 'the right to water clearly falls within the category of guarantees essential for securing an

133 CESCR, *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, UN ESCOR, CESCR, 20th sess., UN Doc. E/C.12/1999/5 (1999), para. 6.

134 *Ibid.*, para. 6.

135 *Ibid.*, para. 14.

136 *Ibid.*, para. 17.

137 Food Security Analysis Unit Somalia, *Food Security & Nutrition: Special Brief – Post Deyr '08/09 Analysis*, 11 February 2009, p. 11, available at [http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/JBRN-7P6GW3-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/JBRN-7P6GW3-full_report.pdf/$File/full_report.pdf) (last visited 3 June 2009).

138 UN News Centre, *New UN Survey Reveals Alarming Malnutrition Rates Among Darfur's Children*, Press Release, 28 December 2007, available at www.un.org/apps/news/story.asp?NewsID=25178&Cr=sudan&Cr1 (last visited 24 February 2009).

adequate standard of living.¹³⁹ The right to water means the right to ‘sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.’¹⁴⁰ As with the right to food, it is recognized that realization of the right to water is subject to a state’s available resources, and as such, the right may be realized progressively.¹⁴¹ Nevertheless, the CESCR has identified a number of minimum core obligations with regard to water that are of immediate effect,¹⁴² noting that these are ‘non-derogable’, and that as such, non-compliance (for example on the basis of lack of available resources) cannot be justified.¹⁴³

As with the right to food, the CESCR has noted that in determining whether there has been a violation of the right to water, it is relevant to distinguish between the inability and unwillingness of a state to comply with its obligations.¹⁴⁴ Where a state is unable to provide sufficient, safe, acceptable, physically accessible and affordable water, it will be considered to be in violation of its obligations unless it can demonstrate that it has made every effort to use all resources at its disposal to meet its obligations.¹⁴⁵ If any ‘deliberately retrogressive measures’ are taken to restrict the right to water, states will have the burden of proving that such measures are ‘duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources.’¹⁴⁶ Again, any sort of attacks, harassment or restrictions imposed on humanitarian agencies or personnel engaged in the provision of water to people whose rights to water are not yet fully realized – insofar as that conduct can be attributed to a state party to ICESCR – constitute a violation of that state’s obligation to take steps to achieve progressively the full realization of the right to water.

It can thus be said that international human rights law, and particularly the protections of economic, social and cultural rights enshrined in the ICESCR, provides a more substantive protection of humanitarian assistance than does international humanitarian law, in situations where the restrictions to humanitarian assistance are attributable to state parties to ICESCR (where humanitarian assistance is obstructed by non-state actors, the applicability of international human rights law is more uncertain). States parties to ICESCR are bound to use the maximum of their available resources, including international assistance, to progressively realize the right to an adequate standard of living and to the highest attainable standard of health, and are bound to ensure – immediately – the prescribed minimum essential levels of those rights. States must move as

139 CESCR, *General Comment No. 15: The Right to Water (Arts 11 and 12 of the Covenant)*, UN ESCOR, CESCR, 29th sess., Agenda Item 3, UN Doc. E/C.12/2002/1 (2002), para. 3.

140 *Ibid.*, para. 2.

141 *Ibid.*, para. 17.

142 These include: the obligation to ensure access to the minimum essential amount of water sufficient and safe for personal and domestic use to prevent disease; the obligation to ensure physical access to facilities or services that provide sufficient, safe and regular water, at a reasonable distance and without prohibitive waiting times; and the obligation to ensure access to adequate sanitation. *Ibid.*, para. 37.

143 *Ibid.*, para. 40.

144 *Ibid.*, para. 41.

145 *Ibid.*

146 *Ibid.*, para. 19.

‘expeditiously and effectively as possible’ towards the realization of the rights,¹⁴⁷ must justify any deliberately retrogressive measures,¹⁴⁸ and in the event of a *prima facie* violation, must prove that they made every effort to use all available resources to satisfy their obligations.¹⁴⁹ The obligations apply in international and non-international armed conflicts as well as in times of peace, and cannot be derogated from on the basis of armed conflict or public emergency.¹⁵⁰

Conclusion

In 2001, the International Commission on Intervention and State Sovereignty (ICISS), in a study commissioned by the Canadian government, wrote that state sovereignty carries with it a responsibility ‘for the functions of protecting the safety and lives of citizens and promotion of their welfare’.¹⁵¹ The ICISS called this the ‘responsibility to protect’ – the minimum substance of which is ‘the provision of life-supporting protection and assistance to populations at risk’.¹⁵² While it is a responsibility that lies first and foremost with the state, the international community has a ‘residual responsibility’ to protect – ‘activated when a particular state is clearly either unwilling or unable to fulfil its responsibility to protect or is itself the perpetrator of crimes or atrocities’.¹⁵³ The ICISS said that in situations of large-scale loss of life or ethnic cleansing, ‘the principle of non-intervention yields to the international responsibility to protect’, such that military intervention may be warranted.¹⁵⁴ The ‘responsibility to protect’ has subsequently been endorsed by the General Assembly and the Security Council,¹⁵⁵ and has frequently been referred to as an emerging norm of customary international law.¹⁵⁶

The focus of this paper has been the legal framework for the protection of humanitarian assistance, rather than the question of whether and in what circumstances the international community may forcibly intervene in another

147 CESCR, *General Comment No. 3*, above note 129, para. 9.

148 *Ibid.*

149 CESCR, *General Comment No. 12*, above note 133, para. 17; CESCR, *General Comment No. 15*, above note 139, para. 41; CESCR, *General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, UN ESCOR, Comm. Economic, Social and Cultural Rights, 22nd sess., UN Doc. E/C.12/2000/4 (2000), para. 47.

150 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 65, para. 106.

151 International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001, p. 13.

152 *Ibid.*

153 *Ibid.*

154 *Ibid.*

155 *World Summit Outcome*, GA Res. 60/1 (2005); *Resolution on Protection of Civilians in Armed Conflicts*, SC Res. 1674 (2006).

156 e.g. ICISS, above note 151, p. 15 (referring to the responsibility to protect as an ‘emerging guiding principle’); UN Secretary-General’s High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 2004, para. 202, available at <http://www.un.org/secureworld/report2.pdf> (last visited 3 June 2009), endorsing the ‘collective international responsibility to protect’ as an emerging norm.

state for the purposes of delivering such assistance. The discussions around the ‘responsibility to protect’ have focused on situations of massive human rights violations – specifically situations of genocide, war crimes, ethnic cleansing or crimes against humanity – and on the criteria that must be satisfied in order to justify military intervention for humanitarian protection purposes. Nevertheless, the degree of support for ‘responsibility to protect’ – and most importantly, for the underlying principle that sovereignty implies responsibility – has considerably strengthened the claim that customary international law recognizes an obligation on the part of states to consent to and actively facilitate humanitarian assistance. It is an obligation that is recognized, as has been shown above, in customary international humanitarian law as well as in international human rights law – which recognizes *inter alia* the obligation of states to use the maximum of their available resources, including international assistance, to ensure the realization of the economic, social and cultural rights of all those within their territory. It is an obligation reflected in the recognition that state sovereignty encompasses a responsibility to safeguard and promote the welfare of a population, including where necessary through the active facilitation of international humanitarian assistance.