



# Humanitarian Access

in situations of armed conflict

## Handbook on the Normative Framework

Version 1.0



Schweizerische Eidgenossenschaft  
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# Background and Purpose

In light of the challenges in securing and sustaining humanitarian access and the central role access plays in contributing to the protection of civilians, Switzerland launched an initiative in 2009 to develop two practical resources on humanitarian access in situations of armed conflict: this **Handbook on the normative framework** on humanitarian access and an accompanying **Field Manual**. These products contribute directly to the fulfillment of the objectives of the Swiss Federal Department of Foreign Affairs (FDFA) Strategy on the Protection of Civilians in Armed Conflict (2009–2012) pertaining to humanitarian access.

The purpose of this Handbook is to **lay out the existing normative framework** regulating humanitarian access in situations of armed conflict. It is hoped that it serves as a useful reference source for humanitarian practitioners and therefore enhances better access to civilian populations in need.

The Handbook on the normative framework on humanitarian access was elaborated by the FDFA, the International Committee of the Red Cross (ICRC), the UN Office for the Coordination of Humanitarian Affairs (OCHA) and Conflict Dynamics International.

The companion **Field Manual** provides a structured approach and practical guidance for humanitarian practitioners on humanitarian access in situations of armed conflict.

# Contents

<b>Executive Summary</b> .....	6
<b>1 Introduction</b> .....	8
1.1 Purpose of the Handbook .....	8
1.2 Why the normative framework matters.....	8
1.3 Terminology .....	10
<b>2 General international law</b> .....	11
2.1 State sovereignty and non-interference.....	12
2.2 United Nations practice.....	13
2.3 Conclusion .....	15
<b>3 International humanitarian law</b> .....	16
3.1 International armed conflict, other than occupation.....	17
3.1.1 Responsibility for meeting the basic needs of affected populations as well as humanitarian assistance and access .....	18
3.1.2 Practical rules on humanitarian assistance and access.....	20
3.2 Occupation.....	22
3.2.1 Responsibility for meeting the basic needs of affected populations as well as humanitarian assistance and access .....	23
3.2.2 Practical rules on humanitarian assistance and access.....	24
3.3 Non-international armed conflict .....	25
3.3.1 Responsibility for meeting the basic needs of affected populations as well as humanitarian assistance and access .....	26
3.3.2 Practical rules on humanitarian assistance and access.....	27
3.4 Conclusion .....	28

<b>4</b>	<b>International human rights law</b> .....	29
4.1	Specific rules on humanitarian assistance and access.....	30
4.2	Right to life.....	32
4.3	Prohibition of torture and other cruel, inhuman or degrading treatment or punishment.....	33
4.4	Economic, social and cultural rights .....	34
4.4.1	Rights to food and water .....	36
4.4.2	Right to health.....	37
4.5	Conclusion .....	38
<b>5</b>	<b>International criminal law</b> .....	39
5.1	War crimes .....	39
5.1.1	Starvation .....	40
5.1.2	Attacks against persons involved in humanitarian assistance.....	41
5.2	Crimes against humanity .....	42
5.3	Genocide.....	43
5.4	Conclusion .....	43
	<b>Annex: Important rules pertaining to humanitarian access</b> .....	44

# Executive Summary

In light of the challenges in securing and sustaining humanitarian access and the central role access plays in contributing to the protection of civilians, Switzerland launched an initiative in 2009 to develop practical resources on humanitarian access in situations of armed conflict. This Handbook on the normative framework on humanitarian access and an accompanying Field Manual are the two resources developed under the project. These resources contribute directly to the fulfillment of the objectives of the Swiss Federal Department of Foreign Affairs (FDFA) Strategy on the Protection of Civilians in Armed Conflict (2009–2012) pertaining to humanitarian access.

The purpose of this Handbook is to lay out the existing normative framework regulating humanitarian access in situations of armed conflict. It is hoped that it serves as a useful reference source for humanitarian practitioners and therefore enhances better access to civilian populations in need.

The Handbook on the normative framework on humanitarian access was elaborated by the FDFA, the International Committee of the Red Cross (ICRC), the UN Office for the Coordination of Humanitarian Affairs (OCHA) and Conflict Dynamics International (CDI).

The main findings are:

## **General international law**

States bear the primary responsibility for ensuring the basic needs of civilian populations under their control. International law prohibits States from interfering directly or indirectly in the internal or external affairs of any other State where such interference threatens that State's sovereignty or political independence. To avoid being deemed unlawful interference in a State's internal affairs, humanitarian assistance must be provided exclusively on humanitarian grounds and in accordance with humanitarian principles. A State is responsible for violations of international humanitarian law and international human rights law where the violations are attributable to the State. The United Nations Security Council has, on many occasions, demanded and called upon States as well as other relevant actors to grant immediate, full and unimpeded humanitarian access to protect civilians and meet their basic needs.

## **International humanitarian Law**

Legal obligations related to humanitarian access under international humanitarian law differ according to the situation in which the operation has to be carried out. In occupied territories, there is a clear obligation for the Occupying Power to ensure adequate supplies to the population or to agree to and facilitate relief actions, if the whole or part of the population is inadequately supplied. In territories other than occupied territories, humanitarian operations are subject to the consent of the parties concerned.

The legal challenge of humanitarian access in armed conflicts, other than occupation, is therefore to determine in each specific case whether concerned States may invoke valid reasons to refuse relief actions on their territories. In other words, it must be established under which criteria the refusal may be considered as arbitrary, and therefore contrary to relevant provisions of international humanitarian law. In extreme situations, where the lack of relief would amount to starvation, there is no valid reason justifying a refusal.

## **International human rights law**

International human rights law and international humanitarian law both apply in situations of armed conflict. The major human rights law instruments do not – with a few exceptions – expressly refer to humanitarian assistance and access. However, human rights treaties offer a legal framework indirectly, through certain key rights, such as the right to life, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the right to food, the right to water and the right to health. States must respect, protect and fulfil these rights.

Shortage or lack of essentials such as food, water or health is often closely linked to a lack of protection of corresponding human rights. Therefore, humanitarian assistance cannot be regarded exclusively as an action to provide relief to lessen the needs of a civilian population, but also to protect socio-economic human rights.

A State that claims that it is unable to fulfil its legal obligations for reasons beyond its control must show that it has made every effort to use all resources at its disposal in an effort to satisfy those minimum obligations. In determining whether a State is truly unable to fulfil its obligations under human rights law, it is necessary to consider both the resources existing within a State and those available from the international community.

## **International criminal law**

The denial of humanitarian assistance and access may constitute a crime under international criminal law. Relevant examples include the war crimes of starvation and of launching attacks against persons involved in humanitarian assistance. Responsible individuals can be prosecuted in national and international courts.

# 1. Introduction

Obtaining and maintaining humanitarian access has been a constant challenge since the birth of modern humanitarianism. A wide range of constraints on humanitarian access exist, including ongoing hostilities or an otherwise insecure environment, destruction of infrastructure, often onerous bureaucratic requirements and attempts by parties to armed conflict to intentionally block access. The difficulties these constraints present to humanitarians are frequently compounded by a lack of familiarity – among States, non-State armed groups and humanitarian relief organizations – with the normative framework pertaining to humanitarian access in situations of armed conflict.

## 1.1 Purpose of the Handbook

In light of the challenges in securing and sustaining humanitarian access and the central role access plays in contributing to the protection of civilians, Switzerland launched an initiative in 2009 to develop practical resources on humanitarian access in situations of armed conflict. This Handbook on the normative framework on humanitarian access and an accompanying Field Manual are the two resources developed under the project. These resources contribute directly to the fulfillment of the objectives of the Swiss Federal Department of Foreign Affairs (FDFA) Strategy on the Protection of Civilians in Armed Conflict (2009–2012) pertaining to humanitarian access.

The Handbook on the normative framework on humanitarian access was elaborated by the FDFA, the International Committee of the Red Cross (ICRC), the UN Office for the Coordination of Humanitarian Affairs (OCHA) and Conflict Dynamics International (CDI). The purpose of the Handbook is to lay out the existing normative framework regulating humanitarian access in situations of armed conflict. The provisions of general international law (chapter 2), international humanitarian law (chapter 3), international human rights law (chapter 4) and international criminal law (chapter 5) regulating humanitarian access are presented. This publication is aimed for a broad audience including States and other parties to an armed conflict, international organizations and humanitarian organizations.



## 1.2 Why the normative framework matters

It is important to be familiar with the provisions and scope of the normative framework and what these provisions mean in practice because:

- The normative framework specifies the duties and obligations of parties to armed conflict (States and non-State armed groups), States not participating in the conflict, humanitarian actors, and others concerning humanitarian access.
- The normative framework specifies – sometimes in general terms – the criteria for humanitarian access in a particular situation.
- The normative framework identifies conditions under which humanitarian actors can access those not participating in hostilities who may be in need of assistance and protection, as well as the conditions under which humanitarian actors may not access those persons.
- Humanitarian practitioners frequently need to negotiate humanitarian access with parties to armed conflict or other actors. The normative framework is an important tool for humanitarian negotiators to: (i) define boundaries within which to seek agreement on humanitarian access; (ii) assist in generating options for operationalizing humanitarian access; and (iii) provide incentives for parties to armed conflict and others to negotiate humanitarian access.
- The normative framework provides a common, objective set of rules to which different actors can each or jointly refer to assist in securing and sustaining access.

For all of these reasons, the normative framework is key to developing a structured and practical approach to humanitarian access.

## 1.3 Terminology

The terms “humanitarian access” and “humanitarian assistance” are not defined in international law. “Humanitarian assistance” is often used interchangeably with the terms “humanitarian aid”, “relief action”, “humanitarian relief”, “relief assistance” and a variety of other broader notions such as “humanitarian action”. Yet, depending on its usage in practice and interpretation, the term “humanitarian assistance” can encompass a very wide range of activities, from short-term relief to longer term capacity-building and post-conflict reconstruction. The provision of material aid, for instance, may cover a variety of activities that go beyond the provision of goods required to ensure survival such as basic foodstuffs and medical supplies. It may involve demining, programmes of return and reintegration of refugees and/or internally displaced persons (IDPs) and short- or long-term psychological assistance. A narrower interpretation of the term “humanitarian assistance” may refer to activities and resources that seek to provide only goods and services essential for meeting the basic needs of persons in situations of armed conflict.

In this Handbook, humanitarian access to and by the people in need is understood as a precondition for the effective delivery of humanitarian assistance which requires, to the extent discussed hereafter, the consent of the State or entity controlling a territory. Where the need for such assistance is sustained over a period of time, the term should encompass not only access to enable goods and services to swiftly reach the intended beneficiaries, but also the maintenance of such access as long as is deemed necessary.

## 2. General international law

International law has three principal and interrelated sources: international treaties (written), custom (unwritten) and general principles of law (unwritten).<sup>1</sup>

International treaties are legally binding on States that are party to them.<sup>2</sup> Put differently, under the law of treaties, only a State that has expressed its consent to a treaty is bound by it.<sup>3</sup> One consequence of this rule is that different States involved in an armed conflict may be subject to different international law treaty rules.

The existence of a rule of international customary law requires the presence of two elements, namely State practice and a belief that such practice is required, prohibited or allowed (depending on the nature of the rule), as a matter of law (this is known as *opinio juris*).<sup>4</sup> Customary law is important because States that are not party to a treaty may nonetheless be bound by some or all of its contents under customary law.

The relationship between treaty and customary law is multifaceted. Treaties can be a written manifestation of existing customary law or they can give rise to the emergence of a parallel rule of customary law – not necessarily identical and both with an existence of their own. The Charter of the United Nations (UN) and the Geneva Conventions (GC) are important examples of treaties whose provisions have attained customary law status.

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<sup>1</sup> Statute of the International Court of Justice (ICJ), Art. 38. Judicial decisions and teachings may be applied as subsidiary means for the determination of rules of law.

<sup>2</sup> Vienna Convention on the Law of Treaties (VCLT), Art. 26: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

<sup>3</sup> VCLT, Art. 11: "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

<sup>4</sup> Henckaerts J.-M., Doswald-Beck L., Customary International Humanitarian Law, International Committee of the Red Cross (ICRC), Cambridge, 2005, Volume I, p. xxxii.

Lastly, it is useful to highlight that UN Security Council (UNSC) resolutions may also be legally binding.<sup>5</sup> On the other hand, soft law (e.g. UN General Assembly [UNGA]) resolutions, guiding principles, declarations, resolutions of institutes of international law) is not legally binding. However, soft law can inform the treaty-making process and may contribute to the development of customary law. For example, the Universal Declaration of Human Rights of 1948 – a UNGA resolution – provided the basis for the Human Rights Covenants of 1966.

## 2.1 State sovereignty and non-interference

Under international law States bear the primary responsibility for ensuring the basic needs of civilian populations under their control. This is a consequence of the principle of sovereignty<sup>6</sup> and has been confirmed in international practice. For example, the UN General Assembly resolution 46/182 (1991) (Guiding Principles on Humanitarian Assistance) confirms that “[e]ach State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory.”<sup>7</sup>

International law prohibits States from interfering directly or indirectly in the internal or external affairs of any other State where such interference threatens that State’s sovereignty or political independence. The clearest manifestation of the principle of non-intervention is Article 2(4) of the UN Charter which prohibits Member States from using force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.<sup>8</sup> The UN General Assembly’s Declaration of Principles of International Law concerning Friendly Relations and Cooperation between States provides an authoritative interpretation of that prohibition and other forms of intervention by States as follows: “No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of another State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against

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<sup>5</sup> Art. 25 of the UN Charter provides that “Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

<sup>6</sup> Charter of the United Nations, Art. 2(1).

<sup>7</sup> Annex, para. 4; see also UNGA Res. 43/131 (1988); UNGA Res. 45/100 (1990); UNSC Res. 1706 (2006), para. 12; UNSC Res. 1814 (2008), para. 17; UNSC Res. 1894 (2009), preambular para. 5 and 6; UNSC Res. 1906 (2009), para. 3; UNSC Res. 1910 (2010), preambular para. 16; UNSC Res. 1923 (2010), para. 2 and UNSC Res. 1970 (2011), preambular para. 9.

<sup>8</sup> See also the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty, UNGA Res. 2131 (XX) (1965) and the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UNGA Res. 42/22 (1987), Annex, para. 6.

its political, economic and cultural elements, are in violation of international law.”<sup>9</sup> To avoid being considered unlawful interference in a State’s internal affairs, humanitarian assistance must be provided exclusively on humanitarian grounds and in accordance with humanitarian principles.<sup>10</sup> The International Court of Justice (ICJ) noted that “[t] here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.”<sup>11</sup> Insofar as humanitarian organisations respect the principles of humanity, impartiality and non-discrimination, offers of relief action cannot be considered as foreign intervention in the receiving State’s internal affairs.<sup>12</sup>

## 2.2 United Nations practice

The UN Security Council has, on many occasions, demanded and called upon States as well as other relevant actors to grant immediate, full and unimpeded humanitarian access.<sup>13</sup> In thematic resolutions on the protection of civilians in armed conflict, the Security Council reaffirmed “its condemnation in the strongest terms of all acts of violence or abuses committed against civilians in situations of armed conflict in violation of applicable international obligations with respect in particular to [...] the intentional denial of humanitarian assistance, and demands that all parties put an end to such practices”<sup>14</sup> and stressed “the importance for all parties to armed conflict to cooperate with humanitarian personnel in order to allow and facilitate access to civilian populations affected by armed conflict.”<sup>15</sup>

<sup>9</sup> Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV) (1970), para 1; see also ICJ, *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. The United States of America Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgement, ICJ Reports, 1986, paras. 202–214 and 227–238; *DRC v. Uganda*, Judgement of 19 December 2005, para. 165.

<sup>10</sup> UNGA Res. 46/182 (1991), Annex, para. 2.

<sup>11</sup> ICJ, *Nicaragua v. The United States of America, Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgement, ICJ Reports, 1986, para. 242. The Court further noted that humanitarian aid is permitted if it involves “the provision of food, clothing, medicine and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death.” *Ibid.*, para. 97.

<sup>12</sup> See chapter on international humanitarian law. Art. 3 common to the GC; GC IV, Art. 10; Additional Protocol (AP) I, Art. 70(1).

<sup>13</sup> See for example, UNSC Res. 2002 (2011) on humanitarian access in Somalia: “Demands that all parties ensure full, safe and unhindered access for the timely delivery of humanitarian aid to persons in need of assistance across Somalia, underlines its grave concern at the worsening humanitarian situation in Somalia [...] and expresses its readiness to apply targeted sanctions against [...] individuals and entities [...]”, para. 5. Other recent examples include UNSC Res. 1973 (2011) on Libya, para. 3; UNSC Res. 1910 (2010) on Somalia, para. 17; UNSC Res. 1917 (2010) on Afghanistan, preamble; UNSC Res. 1923 (2010) on Chad-CAR, para. 22; UNSC Res. 1935 (2010) on Darfur, para. 10; UNSC Res. 1936 (2010) on Iraq, preambular para. 14. See also Aide Memoire for the consideration of issues pertaining to the protection of civilians in armed conflict, adopted by presidential statement S/PRST/2010/25 of 22 November 2010.

<sup>14</sup> UNSC Res. 1674 (2006), para. 5.

<sup>15</sup> UNSC Res. 1894 (2009), para. 14. Already in 1999, the Security Council underlined the importance of safe and unhindered access of humanitarian personnel to civilians in armed conflict. It further expressed 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.” UNSC Res. 1265 (1999), para. 7 and 10.

The UN Security Council has also frequently urged “all those concerned [...] to promote the safety, security and freedom of movement of humanitarian personnel and United Nations and its associated personnel and their assets”<sup>16</sup> and has strongly condemned “attacks on objects protected under international law” and called on all parties “to put an end to such practices”.<sup>17</sup>

For its part, the UN General Assembly has adopted numerous resolutions on humanitarian assistance.<sup>18</sup> Its landmark resolution 46/182 of 1991<sup>19</sup> called upon States whose populations are in need of humanitarian assistance to facilitate the work of international organisations and NGOs in implementing such assistance “for which access to victims is essential.”<sup>20</sup> The UN General Assembly has also urged “all States to take the necessary measures to ensure the safety and security of humanitarian personnel and United Nations and associated personnel”,<sup>21</sup> emphasizing “the need to pay particular attention to the safety and security of locally recruited humanitarian personnel, who are particularly vulnerable to attacks and who account for the majority of casualties”.<sup>22</sup>

The UN Secretary-General has suggested that, if a State is unable to fulfill its obligation to ensure that the civilian population based on its territory is adequately supplied, “the international community has a responsibility to ensure that humanitarian aid is provided” (emphasis added).<sup>23</sup>

The role and responsibility of UN forces in relation to humanitarian access also merits mention. In 1999, the UN Secretary-General adopted an internal administrative document reaffirming and clarifying the UN forces’ obligations under international humanitarian law.<sup>24</sup> This instrument provides that these forces “shall facilitate the work of

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<sup>16</sup> UN Security Council, “Protection of United Nations personnel, associated personnel and humanitarian personnel in conflict zones”, UNSC Res. 1502 (2003), para. 4. The UN Security Council has also recently expressed its intention to: “(a) Consistently condemn and call for the immediate cessation of all acts of violence and other forms of intimidation deliberately directed against humanitarian personnel, (b) Call on parties to armed conflict to comply with the obligations applicable to them under international humanitarian law to respect and protect humanitarian personnel and consignments used for humanitarian relief operations”, UNSC Res. 1894 (2009), para. 16. See also UNSC Res. 1296 (2000), para. 12; UNSC Res. 1674 (2006), paras. 21–22.

<sup>17</sup> UNSC Res. 1265 (1999), para 2.

<sup>18</sup> See for example, UNGA Res. 58/114 (2003), preamble and para. 7–10; UNGA Res. 59/141 (2004), paras. 11, 18; UNGA Res. 59/171 (2004), para. 3; UNGA Res. 59/211 (2004), para. 4; UNGA Res. 60/123 (2005), para. 4; UNGA Res. 61/134 (2006), preamble and paras. 5, 20; UNGA Res. 62/94 (2007), preamble and paras. 6, 24; UNGA Res. 62/95 (2007), preamble and para. 4.

<sup>19</sup> See especially Principles 5, 6, and 7 of UNGA Res. 46/182 (1991) “Strengthening of the coordination of humanitarian emergency assistance of the United Nations”.

<sup>20</sup> Principle 6 of the UNGA Res. 46/182. See also Reference Guide on Normative Developments on the Coordination of Humanitarian Assistance in the General Assembly, the Economic and Social Council and the Security Council since the adoption of General Assembly resolution 46/182, OCHA, Policy and Studies Series, Vol. I, No.2, 2009 (Phase I) and Vol. I, No.3, 2011 (Phase II).

<sup>21</sup> UNGA Res. 62/95 (2007), para. 3.

<sup>22</sup> UNGA Res. 62/95 (2007), para. 18. See also UNGA resolutions on safety and security of humanitarian personnel and protection of United Nations personnel, UNGA Res. 59/211 (2004); UNGA Res. 59/192 (2004); UNGA Res. 60/161 (2005); UNGA Res. 62/152 (2007).

<sup>23</sup> UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957 (1999), para. 51, as reiterated a decade later in the Secretary-General’s report on the same topic of 2009, S/2009/277 (2009), para. 7; see also S/2001/331, para. 51 and S/2004/431, para. 24.

<sup>24</sup> UN Secretary-General, Bulletin on the Observance by United Nations forces of international humanitarian law, ST/SGB/1999/13 (1999).

relief operations which are humanitarian and impartial in character”.<sup>25</sup> The UN Security Council has also recently expressed its intention to continue to mandate “UN peacekeeping and other relevant missions, where appropriate, to assist in creating conditions conducive to safe, timely and unimpeded humanitarian assistance.”<sup>26</sup>

## 2.3 Conclusion

States bear the primary responsibility for ensuring the basic needs of civilian populations under their control. International law prohibits States from interfering directly or indirectly in the internal or external affairs of any other State where such interference threatens that State’s sovereignty or political independence. To avoid being deemed unlawful interference in a State’s internal affairs, humanitarian assistance must be provided exclusively on humanitarian grounds and in accordance with humanitarian principles. A State is responsible for violations of international humanitarian law and international human rights law where the violations are attributable to the State. The United Nations Security Council has, on many occasions, demanded and called upon States as well as other relevant actors to grant immediate, full and unimpeded humanitarian access to protect civilians and meet their basic needs.

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<sup>25</sup> Section 9.9.

<sup>26</sup> UNSC Res. 1894 (2009), para. 15. See also UNSC Res 2000 (2011), para. 7; UNSC Res. 1996 (2011), para. 3; UNSC Res. 1990 (2011), para. 2; UNSC Res. 1861 (2009), para. 7; UNSC Res. 1565 (2004), para. 5; UNSC Res. 1270 (1999), para. 8.

# 3. International humanitarian law

International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in hostilities and restricts the means and methods of warfare. It is also known as the law of war or the law of armed conflict. International humanitarian law regulates the behaviour of parties to armed conflicts. It is binding both on State armed forces and non-State armed groups.<sup>27</sup> It does not regulate whether a State may actually use force; this is governed by a distinct part of international law, which is mainly based on the UN Charter. International humanitarian law does not apply in situations of violence which do not amount to armed conflict (such as internal disturbances and tensions, riots, isolated and sporadic acts of violence).

International humanitarian law contains rules on humanitarian assistance and access to civilian populations affected by armed conflicts. In treaty law, the basic rules are laid down in the Fourth Geneva Convention of 1949 on the protection of civilian persons in time of war.<sup>28</sup> The 1977 Protocols Additional to the 1949 Geneva Conventions complement and reinforce these rules. They regulate all situations where civilian populations lack adequate supplies in time of armed conflict, both international (Protocol I) and non-international (Protocol II).

In addition to treaty law, some obligations have also crystallized into customary international humanitarian law and are binding all parties to armed conflicts. At the request of the international community, the International Committee of the Red Cross (ICRC) undertook an extensive study of State practice and *opinio juris* in order to identify rules

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<sup>27</sup> An armed conflict can only exist between parties that are sufficiently organized to confront each other with military means. While State armed forces are presumed to satisfy this criterion, non-State armed groups are only regarded a party to the conflict if they show a certain level of organization. See International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Ramush Haradinaj et al.*, Judgement, IT-04-84-T, 3 April 2008, para. 60.

<sup>28</sup> These provisions regulate situations such as siege warfare (Article 17), free passage of certain goods to certain beneficiaries (Article 23), aliens in the territory of a party to the conflict (Article 38) or situations of occupation (Article 59).



of customary international humanitarian law.<sup>29</sup> The results of this study were published in 2005: 161 rules were identified, applicable to international and/or non-international armed conflicts.<sup>30</sup>

International humanitarian law distinguishes between three different situations: a) international armed conflict, other than occupation; b) occupation; c) non-international armed conflict. For each of these situations, international humanitarian law establishes the obligation of the party with control over the population to meet its basic needs and the possibility for humanitarian organisations to undertake relief actions, if civilian populations nonetheless suffer from lack of adequate supplies. It also defines the conditions under which operations must be conducted. Whether civilian populations have a right to receive humanitarian assistance is an evolving issue.<sup>31</sup>

## 3.1 International armed conflict, other than occupation

An international armed conflict exists whenever there is resort to armed force between two or more States.<sup>32</sup> In international armed conflicts, specific rules exist that regulate the provision of basic relief supplies to civilians in territories under the control of a party to the conflict, other than occupied territories. These rules can be found mainly in Articles 70<sup>33</sup> and 71 of Additional Protocol I of 1977 (AP I).

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<sup>29</sup> In December 1995, the 26th International Conference of the Red Cross and Red Crescent officially mandated the ICRC to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts, Resolution 1, International humanitarian law: From law to action.

<sup>30</sup> Henckaerts J.-M., Doswald-Beck L., Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge, 2005. For online access to the study, see <http://www.icrc.org/customary-ihl/eng/docs/home>.

<sup>31</sup> The International Red Cross and Red Crescent Movement considers it “a fundamental right of all people to both offer and receive humanitarian assistance”. See the Principles and Rules for Red Cross and Red Crescent Disaster Relief, 2.1, adopted by the XXIst International Conference of the Red Cross (Istanbul, 1969) – revised by the XXIInd, XXIIIrd, XXIVth, XXVth and XXVIth International Conferences – Tehran (1973), Bucharest (1977), Manila (1981), Geneva (1986) and Geneva (1995). This document has been adopted by the States parties to the Geneva Conventions. The obligations related to humanitarian access may amount to rights – not amounting to enforceable entitlements – which remain subject to the agreement of the parties to the conflict concerned. See H. Spieker, “The Right to Give and Receive Humanitarian Assistance”, in Hans-Joachim Heintze and Andrej Zwitter (ed.), International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism, Berlin/Heidelberg, 2011, p. 28.

<sup>32</sup> Common Art. 2 to the Geneva Conventions of 1949. See International Criminal Tribunal for the former Yugoslavia (ICTY), The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70; ICRC, “How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law?”, Opinion Paper, March 2008.

<sup>33</sup> Art. 70(1) of AP I applies to territories under the control of a party to the conflict other than occupied territories, when the civilian population is not adequately provided with the supplies essential to its survival. Territories envisaged in Art. 70(1) are mainly the territories of the parties to the conflict, which are not under the effective control of a foreign enemy power. In other words, territories in which the parties to the conflict are able to exercise their own sovereignty.

Parties to international armed conflicts are also bound by international customary law. Based on a systematic analysis of State practice and *opinio juris*, the ICRC came to the conclusion that parties to international armed conflicts have an obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction.<sup>34</sup> This obligation is subject to the parties' right of control.<sup>35</sup>

### 3.1.1 Responsibility for meeting the basic needs of affected populations as well as humanitarian assistance and access

The primary responsibility for meeting the basic needs of affected populations lies with States who have control over them.<sup>36</sup> The needs of the civilian population must be assessed on the basis of the particular circumstances of each case.<sup>37</sup> If populations remain in need, third States or humanitarian organisations can offer humanitarian assistance.<sup>38</sup> This is subject to two requirements: The State in whose territory the operations will be carried out must agree to the action and the action must be exclusively humanitarian, impartial and conducted without any adverse distinction (non-discrimination). Article 70(1) of Additional Protocol I states that such offers must not be regarded as "interference in the armed conflict or as unfriendly acts". Article 10 of the Fourth Geneva Convention confers on the ICRC or any other impartial humanitarian organisations a right to offer services.

Relief actions are subject to the consent of the parties concerned. To what extent is a State obliged to accept relief? The draft versions of the Additional Protocols of 1973 contained an obligation to accept relief, if the relief met certain requirements such as impartiality and humanity.<sup>39</sup> In order to protect the sovereignty of the State accepting relief, the requirement of consent was added during the diplomatic conference of 1974–1977, while clearly stating that this condition did not imply that the affected

<sup>34</sup> ICRC Study on Customary International Humanitarian Law, Rule 55: "The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control". The findings on humanitarian access are uncontroversial.

<sup>35</sup> The commentary indicates that "[b]oth Additional Protocols I and II require the consent of the parties concerned for relief actions to take place. Most of the practice collected does not mention this requirement. It is nonetheless self-evident that a humanitarian organisation cannot operate without the consent of the party concerned. However, such consent must not be refused on arbitrary grounds." ICRC Study on Customary International Humanitarian Law, Volume I, p. 196.

<sup>36</sup> See chapter on general international law.

<sup>37</sup> There are also rules in international humanitarian law on humanitarian assistance to combatants when they are wounded, sick, shipwrecked or captured. See e.g. First Geneva Convention (GC I), Art. 12 and 15; Second Geneva Convention (GC II), Art. 12 and 18; Third Geneva Convention (GC III), Art. 25 ff; Fourth Geneva Convention (GC IV), Art. 16.

<sup>38</sup> AP I, Art. 70(1).

<sup>39</sup> Art. 62(1) of Draft Additional Protocol I and Art. 33(1) of Draft Additional Protocol II to the Geneva Conventions of August 12, 1949 (1973).

Parties had absolute and unlimited freedom to refuse their agreement to relief actions.<sup>40</sup> As a minimum, consent cannot be refused on arbitrary grounds.<sup>41</sup> A refusal must be based on valid reasons.

In short, if an offer meets a clear need for humanitarian assistance and the humanitarian principles are respected, the affected State must possess valid reasons for choosing not giving its consent. If it withholds its consent without such reasons, a State may be considered to have done so “arbitrarily”. Whether a decision not to accept assistance is arbitrary depends on the circumstances and should be determined on a case-by-case basis.<sup>42</sup> In extreme situations, where the lack of relief would amount to starvation, it should be considered that there is no valid reason justifying a refusal.<sup>43</sup> Starvation is understood as “causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies.”<sup>44</sup>

Relief actions must be exclusively humanitarian. Their starting point must be human suffering and they must be exclusively dedicated to addressing humanitarian needs.<sup>45</sup> They must not be used as a means to reach other goals. The principle of impartiality requires that persons participating in the operation do not take side for reasons of interest, prejudice or personal sympathy.<sup>46</sup> The principle of non-discrimination prohibits distinctions made to the detriment of certain persons “for the sole reason that they belong to some

<sup>40</sup> Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1974–1977, CDDH/II/SR.87, paras. 27–30.

<sup>41</sup> This view is confirmed in soft law instruments. The Guiding Principles on Internal Displacement confirm that consent to assistance provided by humanitarian organizations and other appropriate actors “shall not be arbitrarily withheld [by national authorities], particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance [...]” (Principle 25). In 1998, the UN Secretary-General stated that “[h]umanitarian access is, inter alia, a right of refugees, displaced persons and other civilians in conflict situations and should not be seen as a concession to be granted to humanitarian organizations on an arbitrary basis” (emphasis added), UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflict situations, UN Doc. S/1998/883 (1998), para. 15.

<sup>42</sup> International Law Commission, Fourth report on the protection of persons in the event of disasters, A/CN.4/643, para. 72. Several experts attempted to give examples of the meaning of “arbitrary” in the context of a duty to admit humanitarian assistance without drawing up an exhaustive list. For instance, State sovereignty, internal legal order, national pride and/or interests, political orientation and interests of the regime in power should not prevail if assistance is really necessary for saving lives, see Yearbook of the Institute of International Law, Vol. 70, Part I, p. 563.

<sup>43</sup> The Institute of International Law, Resolution of the Institute of International Law on Humanitarian Assistance, Bruges Session 2003, Art. VIII.1 concludes that “Affected States are under the obligation not arbitrarily and unjustifiably to reject a bona fide offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare.”

<sup>44</sup> Sandoz Y. et al. (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, 1987, para. 2089. Article 54 of Additional Protocol I, which prohibits starvation of civilians as a method of warfare, gives support to the argument that starvation is also prohibited when used by a State party against its own population. See more on this issue in the chapter on international criminal law.

<sup>45</sup> Pictet J., The Fundamental Principles of the Red Cross, Geneva, 1979, p. 38. See also *Ibid.*, pp. 18–36. In its resolution 1894 (2009), the Security Council stresses the importance to respect the humanitarian principles of humanity, neutrality, impartiality and independence, para. 13. Soft law instruments also reflect these humanitarian principles. For example, the Guiding Principles on Humanitarian Assistance adopted by the UN General Assembly in 1991 provide that “[h]umanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality” (Principle 2). The Guiding Principles on Internal Displacement also confirm that “[a]ll humanitarian assistance shall be carried out in accordance with the principles of humanity and impartiality and without discrimination” (Principle 24).

<sup>46</sup> Pictet J., The Fundamental Principles of the Red Cross, pp. 48ff.

specific category”<sup>47</sup> based on criteria such as race, religion or political opinion.<sup>48</sup> While impartiality sets aside subjective distinctions between individuals, non-discrimination focuses on objective criteria. However, the principle of non-discrimination does not exclude positive actions in favour of particularly vulnerable groups of the population. Article 70(1) of AP I only prohibits “adverse” distinctions and explicitly requires that persons with specific needs receive privileged treatment or special protection, such as children, expectant mothers, maternity cases and nursing mothers. This list is not exhaustive and other categories of people may need special treatment according to each situation. These include for example wounded, sick or aged civilians, persons with disabilities or persons deprived of their liberty.<sup>49</sup>

### 3.1.2 Practical rules on humanitarian assistance and access

In territories other than occupied territories, specific rules aim to ensure the rapid and unimpeded passage of all relief personnel and objects to civilian populations in need of humanitarian assistance. These include Articles 17 and 23 of the Fourth Geneva Convention, as well as Articles 54, 70 and 71 of Additional Protocol I.<sup>50</sup> Customary international humanitarian law rules are also applicable.<sup>51</sup>

Article 17 of the Fourth Geneva Convention applies to besieged or encircled areas. It aims to ensure that specific categories of civilians are allowed to leave the areas in order to avoid the negative consequences of the restrictions on available supplies. This provision does not provide special protection to all civilians, but only to those considered as particularly vulnerable (wounded, sick, infirm, aged persons, children and maternity cases). Article 17 also recommends that agreements between the parties to the conflict be reached to authorize the passage of religious and medical personnel, as well as medical equipment to the concerned areas.

Article 23(1) of the Fourth Geneva Convention requires States to “allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship” intended only for civilians, as well as “the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases”.<sup>52</sup> In this situation too, relief intended for the civilian population in general is limited to particular types of goods. Consignments are confined to medical and religious objects. The obligation to allow free passage of other supplies,

<sup>47</sup> Pictet J., *The Fundamental Principles of the Red Cross*, p. 38.

<sup>48</sup> Fourth Geneva Convention, Art. 27.

<sup>49</sup> Sandoz Y. et al. (eds.), *Commentary on the Additional Protocols*, para. 2821.

<sup>50</sup> AP I, Art. 54 also relates to the other direction of access: access by civilians to objects indispensable to the survival of the civilian population.

<sup>51</sup> ICRC Study on Customary International Humanitarian Law, Rules 31, 32, 55 and 56.

<sup>52</sup> This provision originally addresses the humanitarian consequences of a blockade.

such as food or clothing, is only for the benefit of particularly vulnerable civilians. These two provisions of the Fourth Geneva Convention have been complemented and reinforced through the development of international humanitarian law, both treaty and customary law.

Article 54(1) of Additional Protocol I provides that “starvation of civilians as a method of warfare is prohibited”. Therefore, a siege or blockade intended to starve the population is prohibited under this provision. This rule is also of a customary nature, thus applying to all States parties to international armed conflicts.<sup>53</sup>

Article 70(2) of Additional Protocol I provides that all States (i.e. not only the belligerents) must “allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel, [...] even if such assistance is destined for the civilian population of the adverse Party”.<sup>54</sup> This provision expands existing rules of the Fourth Geneva Convention in two main ways. First, it applies to the whole civilian population, and not only to vulnerable groups; second, relief consignments include all supplies essential to the survival of the population, and not uniquely some specific categories of goods.

Under Article 70(3) of Additional Protocol I, parties to the conflict and other States parties to the Protocol must not “divert relief consignments from the purpose for which they are intended nor delay their forwarding”. Exceptions are permitted only in cases of urgent necessity and if this is in the interest of the population concerned.<sup>55</sup> This means that the delay can only be justified if it is impossible for reasons of security to enter the territory where the receiving population is situated, or to cross some part of the territory of the Party allowing the transit, particularly if this is a Party to the conflict. As regards diverting relief consignments, this would be allowed particularly when there is a delay in the transport of perishable foodstuffs, always provided that they are replaced by fresh provisions as soon as normal conditions are restored. It might also be justifiable in the case that a disaster – such as an earthquake, epidemic etc. – affected the Party through whose territory the relief consignment was passing, so that the provisions were even more necessary for the victims of this disaster than for those for whom they had initially been intended. However, in this case the consignment should only be diverted with the agreement of the donor.<sup>56</sup>

<sup>53</sup> ICRC Study on Customary International Humanitarian Law, Rule 53.

<sup>54</sup> International practice gives examples supporting this rule. The Guiding Principles on Humanitarian Assistance adopted by the UN General Assembly in 1991 confirm that “States in proximity to emergencies are urged to participate closely with the affected countries in international efforts, with a view to facilitating, to the extent possible, the transit of humanitarian assistance”, UNGA Res. 46/182 (1991), Annex, para. 7. This was reiterated for instance in UNGA Res. 59/141 (2004), preamble. The parties to the Convention for the Safety of UN and Associated Personnel have the duty to facilitate the unimpeded transit of United Nations and associated personnel and their equipment to and from the host State. Convention for the Safety of UN and Associated Personnel, Art. 5.

<sup>55</sup> AP I, Art. 70(3)(c). The Guiding Principles on Internal Displacement also provide that “[h]umanitarian assistance to internally displaced persons shall not be diverted, in particular for political or military reasons”, Principle 24(2).

<sup>56</sup> See Sandoz Y. et al. (eds.), *Commentary on the Additional Protocols*, paras. 2845–2847.

Parties to the conflict have an obligation to take positive action to protect relief consignments and facilitate their rapid distribution.<sup>57</sup> Furthermore, parties to the conflict and each High Contracting Party concerned have a duty to “encourage and facilitate effective international coordination of the relief actions”.<sup>58</sup> UN bodies have insisted on this obligation on several occasions.<sup>59</sup> However, the passage of such assistance may be subject to certain conditions. Parties to the conflict and other States parties to Additional Protocol I have the right to prescribe technical arrangements, such as determined times and routes.<sup>60</sup> They are also allowed to control the consignments or ask for the local supervision of the relief action by a Protecting Power or an impartial humanitarian organisation.<sup>61</sup>

Article 71 of Additional Protocol I requires that relief personnel must be respected, protected and assisted, to the fullest extent practicable, in carrying out their mission. However, Article 71(4) of Additional Protocol I provides that relief personnel may not exceed the terms of their mission under any circumstances. They must respect security requirements imposed by the States in whose territory they are working. The mission of those who do not respect these conditions may be terminated. Customary international humanitarian law also requires humanitarian relief personnel and objects to be respected and protected<sup>62</sup> and parties to the conflict to ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted.<sup>63</sup>

## 3.2 Occupation

Under international humanitarian law, a territory is occupied “when it is actually placed under the authority of the hostile army”.<sup>64</sup> This means that two conditions must be fulfilled: “First, that the former government has been rendered incapable of publicly exercising its authority in that area; second, that the occupying power is in a position to substitute its own authority for that of the former government”.<sup>65</sup> Military occupation is a form of international armed conflict.

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<sup>57</sup> AP I, Art. 70(4).

<sup>58</sup> AP I, Art. 70(5).

<sup>59</sup> The UN General Assembly has called for instance upon “all Governments and parties in complex humanitarian emergencies, in particular in armed conflicts and in post-conflicts situations, [...] to cooperate fully with the United Nations and other humanitarian agencies and organizations [...]” (emphasis added), UNGA Res. 54/192 (1999), para. 3.

<sup>60</sup> AP I, Art. 70(3)(a). See also GC IV, Art. 23.

<sup>61</sup> AP I, Art. 70(3)(b). See also GC IV, Art. 23. A Protecting Power is a State which represents the interests of the protected State’s citizens in the hands of the other belligerent.

<sup>62</sup> ICRC Study on Customary International Humanitarian Law, Rules 31 and 32.

<sup>63</sup> ICRC Study on Customary International Humanitarian Law, Rule 56.

<sup>64</sup> Hague Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Art. 42.

<sup>65</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), point 11.3, p. 275. See also International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 19 December 2005, para. 173.

Relevant rules regulating military occupation are set forth primarily in three international treaties: the Hague Regulations concerning the laws and customs of war on land (1907), the Fourth Geneva Convention relative to the protection of civilian persons in time of war (1949) and the Protocol additional to the Geneva Conventions 1949 relating to the protection of victims of international armed conflicts (Additional Protocol I) (1977). Most of these rules are also customary in nature.

### 3.2.1 Responsibility for meeting the basic needs of affected populations as well as humanitarian assistance and access

Under the law of occupation, there is a clear obligation for the Occupying Power to ensure that the basic needs of the population under its control are met. Article 55(1) of the Fourth Geneva Convention provides that the Occupying Power has the duty, to the fullest extent of the means available to it, to ensure the food and medical supplies of the civilian population. Article 69(1) of Additional Protocol I further stipulates that the Occupying Power must ensure without adverse distinction the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population, as well as objects necessary for religious worship. These obligations may be considered a logical consequence of the Occupying Power's general duty to take all feasible measures to restore and ensure adequate conditions of life for the civilian population.<sup>66</sup> This must be read in conjunction with Article 56 of the Fourth Geneva Convention which requires the Occupying Power to ensure and maintain "the medical and hospital establishments and services, public health and hygiene in the occupied territory".

While imposing clear obligations, the Fourth Geneva Convention and Additional Protocol I do not, however, ignore the material difficulties that the Occupying Power may face in practice. These instruments provide that the Occupying Power must meet these needs "[t]o the fullest extent of the means available to it".<sup>67</sup> Financial constraints or transport problems, for instance, may seriously affect the concerned authorities' capabilities to meet their obligations.<sup>68</sup> However, this limitation must not be used by authorities to avoid their responsibilities. If the Occupying Power is not in a position to fulfil its duty to provide the civilian population under its control with essential supplies, it must agree to relief schemes on behalf of this population.<sup>69</sup> In occupied territories, this obligation is unconditional.<sup>70</sup> The Occupying Power must either ensure that the civilian population receives essential supplies or agree to relief actions.

<sup>66</sup> Hague Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Art. 43.

<sup>67</sup> GC IV, Art. 55(1); AP I, Art. 69(1).

<sup>68</sup> Pictet J. et al. (eds.), *Commentary on the Geneva Convention IV*, p. 310.

<sup>69</sup> GC IV, Art. 59(1).

<sup>70</sup> Pictet J. et al. (eds.), *Commentary on the Geneva Convention IV*, p. 320.

The Fourth Geneva Convention provides that relief action in occupied territories may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross.<sup>71</sup>

### 3.2.2 Practical rules on humanitarian assistance and access

The Fourth Geneva Convention contains a series of rules aimed at ensuring the free passage of relief consignments to civilian populations in need of humanitarian assistance.<sup>72</sup> In particular, the Occupying Power has the obligation to facilitate relief actions by all the means at its disposal.<sup>73</sup>

The Occupying Power must abstain from taking any action which might impede or affect the achievement of such operations. In particular, it must not divert relief consignments from the purpose for which they are intended. Exceptions to this rule are allowed in cases of urgent necessity only and if this is in the interest of the occupied population and with the consent of the Protecting Power.<sup>74</sup> Relief consignments must be exempt from all charges, taxes or customs duties except if they are necessary for the economy of the occupied territory.<sup>75</sup> The Occupying Powers must also “facilitate the rapid distribution” of relief consignments.<sup>76</sup>

In addition, the Fourth Geneva Convention lays down obligations for third States, including, most notably, those on whose territory relief consignments must transit. All States must permit the free passage of such consignments and guarantee their protection.<sup>77</sup> However, authorities granting the authorization are allowed to check the consignments to satisfy themselves that the operation is strictly humanitarian and may regulate their passage according to prescribed times and routes.<sup>78</sup>

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<sup>71</sup> GC IV, Art. 59 (2).

<sup>72</sup> GC IV, Arts. 59, 60, 61.

<sup>73</sup> GC IV, Art. 59(1).

<sup>74</sup> GC IV, Art. 60. On urgent necessity see comments under part 3.1.2 above.

<sup>75</sup> GC IV, Art. 61(2).

<sup>76</sup> GC IV, Art. 61(2).

<sup>77</sup> GC IV, Art. 59(3). This obligation also binds States imposing a blockade on occupied territories. Relief consignments for the population must be allowed to pass through the blockade. See San Remo Manual on International Law Applicable to Armed Conflicts at Sea, ed. Louise Doswald-Beck, Cambridge, 1995, para. 103, which is widely recognized to reflect international customary law.

<sup>78</sup> GC IV, Art. 59(4). These obligations have been reaffirmed on several occasions. For instance, the UN General Assembly has regularly stressed “the importance of ensuring the free passage of aid to the Palestinian people and the free movement of persons and goods”. UNGA Res. 56/111 (2002), para. 9. See also UNGA Res. 58/113 (2003), para. 10; UNGA Res. 59/56 (2004), para. 10; UNGA Res. 60/126 (2005), para. 11; UNGA Res. 62/93 (2008), para. 12.



Article 71 of Additional Protocol I on the rights and duties of relief personnel also applies in times of occupation.<sup>79</sup> Under this provision, relief personnel must be respected, protected and assisted, to the fullest extent practicable, in carrying out their mission. It is also provided that relief personnel must comply with the terms of their mission. The obligation to respect and protect relief personnel is a specific manifestation of the obligation to respect and protect civilians. Occupying Powers must take positive measures to assist relief personnel in their activities. Adequate measures must be identified on a case by case basis. They might include, for instance, the simplification of administrative formalities or the provision of logistical support. Exceptions are allowed when rendered absolutely necessary by military operations.<sup>80</sup>

### 3.3 Non-international armed conflict

Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more non-State armed groups, or between such groups, arising on the territory of a State party to the Geneva Conventions. In order to be considered a non-international armed conflict, such confrontations must meet two conditions: a) they must reach a minimum level of intensity and duration; b) the parties involved must show a minimum of organisation.<sup>81</sup> Rules of international humanitarian law applicable in non-international armed conflicts are mainly found in Article 3 common to the four Geneva Conventions of 1949, Protocol II Additional to the Geneva Conventions of 1949 (AP II) and customary international humanitarian law.

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<sup>79</sup> AP I, Art. 69(2).

<sup>80</sup> AP I, Art. 71(3).

<sup>81</sup> See ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70; ICRC, "How is the Term "Armed Conflict" Defined in International Humanitarian Law?", Opinion Paper, March 2008. Factors helping to determine the level of intensity include: the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones, see ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgment, 3 April 2008, para. 49. Furthermore, the ICTY considered the following factors to be relevant for the assessment of the minimum level of organization: the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords, see ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgment, 3 April 2008, para. 60.

### 3.3.1 Responsibility for meeting the basic needs of affected populations as well as humanitarian assistance and access

Article 3 common to the four Geneva Conventions regulates all forms of non-international armed conflicts. The issue of humanitarian assistance and access is not expressly addressed in Article 3. However, it contains the general principle that persons taking no active part in the hostilities must be treated humanely, without any adverse distinction. The principle of humane treatment includes the obligation not to intentionally subject civilian populations to situations where their human dignity is threatened through lack of essential supplies and which might result in serious mental or physical suffering.<sup>82</sup> Article 3 common to the four Geneva Conventions of 1949 further provides that any “impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict”. Such services may include the provision of humanitarian relief. This article establishes the right of impartial humanitarian organisations to offer their services to the parties to non-international armed conflicts. Such an offer should not be considered as interference in domestic affairs or an unfriendly act.<sup>83</sup> It is an offer that the parties to the conflict must take into consideration, but they are not bound to accept.<sup>84</sup>

Article 18(2) of Additional Protocol II explicitly addresses the issue of humanitarian assistance and access and provides that relief actions shall be undertaken subject to the consent of the affected State, “if the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival”. Its scope of application, however, does not cover all forms of non-international armed conflicts. Additional Protocol II only applies to non-international armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.<sup>85</sup> Two limitations result from the scope of application of Additional Protocol II: a) this instrument applies to non-international armed conflict in which non-State armed groups actually exercise control over part of the territory; b) Additional Protocol II only governs armed conflicts between such groups and governmental armed forces, thus excluding confrontations between non-State armed groups only. In practice, however, it does not appear that States make a distinction between non-international armed conflict falling within the scope of Additional Protocol II and other non-international armed conflicts.

<sup>82</sup> ICTY, the Prosecutor v. Zejnil Delalic et al., Case No IT-96-21-T, Judgment, 16 November 1998, para. 543: “In sum, the Trial Chamber finds that inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity”.

<sup>83</sup> Pictet J. et al. (eds.), Commentary on the Geneva Convention I, p. 58.

<sup>84</sup> Pictet J. et al. (eds.), Commentary on the Geneva Convention I, p. 57.

<sup>85</sup> AP II, Art. 1(1).

As confirmed by State practice and *opinio juris* the obligation to allow humanitarian relief applies to all types of non-international armed conflicts.<sup>86</sup>

A similarity between Additional Protocol II and Additional Protocol I is that a balance has to be found between the rule stipulating that relief actions “shall be undertaken” and the requirement of the consent of the State concerned. In both cases, it must be decided on a case by case basis whether the refusal of consent can be considered arbitrary. In non-international armed conflicts, as in international armed conflicts, where the lack of relief would lead to starvation, no valid reason can be invoked to justify a refusal. This results from Article 14 of Additional Protocol II, which prohibits starvation of civilians as a method of warfare. As in international armed conflicts, relief actions in non-international armed conflicts must be humanitarian, impartial and conducted without any adverse distinction. This obligation is found both in treaty and customary law.<sup>87</sup> These notions have to be understood here in the same manner both in international armed conflicts, other than occupations, and in non-international armed conflicts.

### 3.3.2 Practical rules on humanitarian assistance and access

There is no express rule in treaty international humanitarian law regulating the practical provision of humanitarian relief in non-international armed conflicts. However, the ICRC study on customary international humanitarian law has concluded that parties to non-international armed conflicts “must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control”.<sup>88</sup> In addition, they must respect and protect humanitarian relief personnel and objects<sup>89</sup> as well as “ensure the freedom of movement of authorized humanitarian relief personnel. Only in case of imperative military necessity may their movements be temporarily restricted”.<sup>90</sup> International practice in this regard is extensive.<sup>91</sup> The UN Security Council demanded, for instance, in a resolution concerning the situation in the Democratic Republic of the Congo, “that all parties concerned grant immediate, full and unimpeded access by humanitarian personnel to all persons in need of assistance, as provided for in applicable international law”.<sup>92</sup> In a resolution on the situation in Liberia, the UN Security Council called upon “the Government of Liberia and all parties, particularly the LURD and other armed rebel groups, to ensure unimpeded and safe movement for the personnel

<sup>86</sup> See commentary to rule 55 with various references to State practice in ICRC Study on Customary International Humanitarian Law, Volume I, p. 194.

<sup>87</sup> AP II, Art. 18(2); ICRC Study on Customary International Humanitarian Law, Rule 55.

<sup>88</sup> ICRC Study on Customary International Humanitarian Law, Rule 55.

<sup>89</sup> ICRC Study on Customary International Humanitarian Law, Rules 31 and 32.

<sup>90</sup> ICRC Study on Customary International Humanitarian Law, Rule 56.

<sup>91</sup> ICRC Study on Customary International Humanitarian Law, Volume II: Practice, Part 1, pp. 1174–1235.

<sup>92</sup> UNSC Res. 1794 (2007), para. 17.

of United Nations humanitarian agencies and non-governmental organizations”.<sup>93</sup> The UN General Assembly has also called on various occasions parties to non-international armed conflicts “to ensure the safe and unhindered access of humanitarian personnel in order to allow them to perform efficiently their tasks of assisting the affected civilian population”.<sup>94</sup>

### 3.4 Conclusion

The primary responsibility for meeting the basic needs of affected populations lies with the parties to the conflict who have control over them. Relief actions must be humanitarian, impartial and conducted without any adverse distinction. Legal obligations related to humanitarian access under international humanitarian law differ according to the situation in which the operation has to be carried out. In occupied territories, there is a clear obligation for the Occupying Power to ensure adequate supplies to the population or to agree to and facilitate relief actions, if the whole or part of the population is inadequately supplied. In territories other than occupied territories, humanitarian operations are subject to the consent of the parties concerned.

The legal challenge of humanitarian access in armed conflicts, other than occupation, is therefore to determine in each specific case whether concerned States may invoke valid reasons to refuse relief actions on their territories. In other words, it must be established under which criteria the refusal may be considered as arbitrary, and therefore contrary to relevant provisions of international humanitarian law. In extreme situations, where the lack of relief would amount to starvation, there is no valid reason justifying a refusal.

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<sup>93</sup> UNSC Res. 1478 (2003), para. 8. See also UNSC Res. 1674 (2006), para. 22; UNSC Res. 1936 (2010), preambular para 14.

<sup>94</sup> UNGA Res. 54/192 (1999), para. 3.

## 4. International human rights law

International human rights law regulates the obligations of States towards individuals. It applies at all times. Thus, it continues to apply, alongside international humanitarian law, in times of armed conflict, whether of an international or of a non-international character. International humanitarian law and human rights law both share the common goal of preserving the dignity and humanity of all. They are complementary and not mutually exclusive.<sup>95</sup> By contrast with international humanitarian law, some human rights may be derogated in times of emergency, which means that the State may in certain conditions suspend, for a limited period, full respect of a number of rights.<sup>96</sup>

The primary responsibility for meeting the basic needs of affected populations lies with the parties to the conflict who have control over them. In order to trigger the extraterritorial applicability of human rights, a foreign State must wield a certain degree of control over the territory of another State.<sup>97</sup> Whether international human rights law is

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<sup>95</sup> The International Court of Justice has identified three possible approaches to the interaction between international humanitarian law and international human rights law: "As regards the relationship between international humanitarian law and human rights law, there are thus three possible solutions: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law". Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, 9 July 2004, para. 106. See also Report of the International Commission of Inquiry on Darfur to the UN Secretary-General (2005), para. 143; UN Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13 (2004), para. 11.

<sup>96</sup> International Covenant on Civil and Political Rights (ICCPR) (1966), Art. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950), Art. 15; American Convention on Human Rights (ACHR) (1969), Art. 27. Derogation clauses aim at striking a balance between protection of individual human rights and the protection of national needs in times of crisis by placing reasonable limits on emergency powers. See generally, the Siracusa Principles (1984), the Paris Minimum Standards for Human Rights Norms in States of Emergency (1984), the Queensland Guidelines for Bodies Monitoring Human Rights in Emergencies (1990) and the Turku/Abo Declaration of Minimum Humanitarian Standards (1990).

<sup>97</sup> International human rights law applies to all territories under a State's jurisdiction and generally protects all people, regardless of nationality or how the control is exercised. A State's human rights obligations apply extraterritorially, such as when it is engaged in hostilities in another country or an occupying power. This has been affirmed by various human rights bodies and courts, even though some States reject this extraterritorial applicability. See for the position of the Government of Israel, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, 9 July 2004, paras. 102 and 110. For the United States see Bellinger, Legal Issues in the War on Terrorism – A Reply to Silja N. U. Vöneky, 8 German Law Journal, 2007, p. 887.

also binding on non-State armed groups is controversial. The UN Security Council has addressed human rights violations by non-State armed groups on numerous occasions.<sup>98</sup> The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) is innovative in that it refers specifically to armed groups.<sup>99</sup> The treaty states inter alia that members of armed groups are prohibited from impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons.<sup>100</sup> From a practical point of view, the consent of relevant non-State armed groups controlling or operating in the territory in question is necessary for relief actions to be carried out.<sup>101</sup>

## 4.1 Specific rules on humanitarian assistance and access

The major human rights law instruments generally do not refer expressly to humanitarian assistance and access. However, some general references are found in the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).

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<sup>98</sup> For example, in a resolution on the crisis in Guinea-Bissau, the Security Council called “upon all concerned, including the Government and the Self-Proclaimed Military Junta, to respect strictly relevant provisions of international law, including humanitarian and human rights law, and to ensure safe and unimpeded access by international humanitarian organizations to persons in need of assistance as a result of the conflict.” UNSC Res. 1216 (1998), para 5. See also UNSC Res. 1649 (2005) on the situation concerning the Democratic Republic of Congo, preambular paras. 4 and 5.

<sup>99</sup> According to Art. 1(d) of the Convention, “‘Armed Groups’ means dissident armed forces or other organized armed groups that are distinct from the armed forces of the state”. This treaty has not yet entered into force as binding international law. To come into force, the Convention needs to be ratified by 15 African Union Member States.

<sup>100</sup> Kampala Convention, Art. 7(5)(g). It is important to note that this African Union treaty includes disclaimers to avoid the treaty ever being used as proof of legitimacy for the groups addressed. Thus, Art. 7(1) states that: “The provisions of this Article shall not, in any way whatsoever, be construed as affording legal status or legitimizing or recognizing armed groups and are without prejudice to the individual criminal responsibility of the members of such groups under domestic or international criminal law”.

<sup>101</sup> From a legal point of view, the recognition of the legal status of these actors is far from resolved. To ask a non-State armed group for its consent to the provision of humanitarian assistance does not constitute recognition nor does it confer any legal status upon that actor. See for example, common Art. 3(4) to the Geneva Conventions.

Article 22(1) of the Convention on the Rights of the Child provides that “States Parties shall take appropriate measures to ensure that a child [...] shall [...] receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”

Article 23(1) of the African Charter on the Rights and Welfare of the Child states with respect to refugee children that “States Parties to the present Charter shall take all appropriate measures to ensure that a child [...] shall [...] receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.”

The Kampala Convention provides that “States Parties shall provide sufficient protection and assistance to internally displaced persons, and where available resources are inadequate to enable them to do so, they shall cooperate in seeking the assistance of international organizations and humanitarian agencies, civil society organizations and other relevant actors. Such organizations may offer their services to all those in need.”<sup>102</sup> Further, “States Parties shall take necessary steps to effectively organize, relief action that is humanitarian, and impartial in character, and guarantee security. States Parties shall allow rapid and unimpeded passage of all relief consignments, equipment and personnel to internally displaced persons. States Parties shall also enable and facilitate the role of local and international organizations and humanitarian agencies, civil society organizations and other relevant actors, to provide protection and assistance to internally displaced persons. States Parties shall have the right to prescribe the technical arrangements under which such passage is permitted.”<sup>103</sup> Finally, it prohibits Members of armed groups from hampering the provision of protection and assistance to internally displaced persons and from impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons.”<sup>104</sup>

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<sup>102</sup> Kampala Convention, Art. 5(6).

<sup>103</sup> Kampala Convention, Art. 5(7).

<sup>104</sup> Kampala Convention, Art. 7(5b and 5g).

Although specific references in human rights treaties pertaining to humanitarian assistance and access are limited, a number of basic human rights are of relevance, including the right to life,<sup>105</sup> the prohibition of torture and other cruel, inhuman or degrading treatment or punishment,<sup>106</sup> the right to food,<sup>107</sup> the right to water,<sup>108</sup> the right to health,<sup>109</sup> the right to shelter,<sup>110</sup> the right to clothing,<sup>111</sup> the right to livelihood<sup>112</sup> and the principle of non-discrimination.<sup>113</sup> The most pertinent human rights, and how they relate to humanitarian access, are discussed in detail below.

## 4.2 Right to life

The right to life is the most fundamental human right. It is a non-derogable right and continues to apply in situations of armed conflict, where its application should be interpreted in accordance with the rules of international humanitarian law, including those relating to the conduct of hostilities.<sup>114</sup> Respect for the right to life does not only entail an obligation to abstain from any arbitrary deprivation of life, it also imposes a positive obligation to protect and safeguard life.<sup>115</sup> Where an affected population is in urgent need of assistance to avoid starvation, severe malnutrition or disease that might threaten their lives and the State is unable to respond effectively to those needs, arguably a refusal by that State to accept humanitarian assistance could constitute a violation of the right to life.<sup>116</sup>

<sup>105</sup> Universal Declaration of Human Rights (UDHR), Art. 3; International Covenant on Civil and Political Rights (ICCPR), Art. 6(1); Convention on the Rights of the Child (CRC), Art. 6(1); Convention for the Protection of All Persons from Enforced Disappearance, Art. 2; American Convention on Human Rights (ACHR), Art. 4; European Convention on Human Rights (ECHR), Art. 2(1); African Charter on Human and Peoples' Rights (AfCHPR), Art. 4.

<sup>106</sup> UDHR, Art. 5; UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); ICCPR, Art. 7 and 10(1); CRC, Art. 37; ECHR, Art. 3; AfCHPR, Art. 5; European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, Inter-American Convention to Prevent and Punish Torture.

<sup>107</sup> UDHR, Art. 25; International Covenant on Economic Social and Cultural Rights (ICESCR), Art. 11(1) and (2); CRC, Art. 24(2)(c) and 27(1); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Art. 12(2) and 14(2); Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, Art. 12.

<sup>108</sup> ICESCR, Art. 11(1); CRC, Arts. 24(2)(c) and 27(1); CEDAW, Arts. 12(2) and 14(2); Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, Art. 12; AfCHPR, Art. 14(2)(c).

<sup>109</sup> UDHR, Art. 25; ICESCR, Art. 12; CRC, Art. 24(1); AfCHPR, Art. 16(1); Protocol of San Salvador, Art. 10.

<sup>110</sup> UDHR, Art. 25(1); ICESCR, Art. 11(1); CEDAW, Art. 2 and 14(2)(h); CRC, Art. 27(3); European Social Charter, Art. 16 and 19(4)(c); AfCHPR, Art. 14, 16 and 18(1).

<sup>111</sup> UDHR, Art. 25; ICESCR, Art. 11(1); CRC, Art. 27(3).

<sup>112</sup> UDHR, Art. 25; ICESCR, Art. 6.

<sup>113</sup> ICCPR, Art. 2(1); ICESCR, Art. 2(2); International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

<sup>114</sup> ECHR, Art. 15(2): "No derogation from [the right to life], except in respect of deaths resulting from lawful acts of war, [...] shall be made under this provision."

<sup>115</sup> See e.g. Human Rights Committee, General Comment No. 6, para. 5.

<sup>116</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3, para. 10.



### 4.3 Prohibition of torture and other cruel, inhuman or degrading treatment or punishment

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment is another non-derogable right of particular relevance to humanitarian access. According to Article 5 of the Universal Declaration of Human Rights, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” This principle has been endorsed in Article 7 of the 1966 International Covenant on Civil and Political Rights and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against torture). This prohibition of ill-treatment is also found in numerous regional treaties although the precise ambit and scope of “torture”, “cruel treatment”, “inhuman treatment” and “degrading treatment” vary and have been subject of extensive jurisprudence.<sup>117</sup> The most comprehensive definition of torture is found in the Convention against torture.<sup>118</sup> According to the UN Special Rapporteur, torture differs from cruel, inhuman or degrading treatment, “not necessarily by the intensity of the pain or suffering inflicted, but by the specific purpose of the act”.<sup>119</sup> Thus, torture implies not only a sufficient intensity in terms of the suffering inflicted but also commission of the act for a specific purpose such as extracting information or a confession from individuals.<sup>120</sup> Consequently, the prohibition of torture is less likely to be relevant to a denial of humanitarian access to civilians in armed conflict than other forms of ill treatment, since it would be difficult to assert that the suffering was inflicted for a specific purpose required to constitute torture.

<sup>117</sup> The first regional human rights convention prohibiting torture and other related mistreatments is the 1950 European Convention on Human Rights. According to its Art. 3, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Since then, this principle has been endorsed in all regional instruments (Art. 5 of the 1969 American Convention on Human Rights; Art. 5 of the 1981 African Charter on Human and Peoples’ Rights; Art. 8 of the 1994 revised Arab Charter on Human Rights). See also the entry “Torture”, in S. Marks and A. Clapham, *International Human Rights Lexicon*, Oxford, 2005, pp. 366 et seq. citing a decision by the European Court on Human Rights, *Selmouni v. France*, Judgment, European Court of Human Rights, 28 July 1999, para. 101.

<sup>118</sup> According to the definition contained in its Art. 1(1), the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

<sup>119</sup> The Special Rapporteur on Torture has noted that at least four essential elements are reflected in this definition, as distinguished from other forms of cruel, inhuman or degrading treatment. First, an act inflicting severe pain or suffering, whether physical or mental; second, the element of intent; third, the specific purpose; and fourth, the involvement of a State official, at least by acquiescence. M. Nowak, UN doc. A/HRC/13/39/Add.5 (2010), paras. 13 and 34–35.

<sup>120</sup> On the definition of the prohibited conducts, the UN Human Rights Committee does not draw up a specific list of prohibited acts or establish sharp distinctions between the different kinds of punishment or treatment. The Committee underlines that “the distinctions depend on the nature, purpose and severity of the treatment applied. The prohibition in Art. 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim”. General Comment No. 20, paras. 4–5.

Therefore, other forms of ill-treatment including cruel, inhuman or degrading treatment are more relevant to humanitarian assistance and access. These forms of suffering need not be inflicted for a specific purpose as it is the case for torture. The mere fact of denying essential services and goods to the population may constitute cruel, inhuman or degrading treatment. Attention should therefore be paid to whether refusal of assistance would amount to unlawful ill-treatment of the civilian population by depriving them of their means of subsistence. The European Court of Human Rights (ECHR) has defined inhuman treatment as measures that cause “if not actual bodily injury, at least intense physical and mental suffering.”<sup>121</sup> It is safe to assert that the lack of food and other supplies essential to the survival of the civilian population can cause intense physical and mental suffering. Conclusions about whether or not the level of severity of the suffering falls within the scope of the prohibition of inhuman treatment require a relative assessment and depend on all circumstances of the situation.<sup>122</sup>

## 4.4 Economic, social and cultural rights

States have an obligation to ensure the satisfaction of the minimum essential levels of all economic, social and cultural rights and to take the necessary action even in situations of armed conflict.<sup>123</sup> This reflects the idea of a “core content” or “minimum core content” of human rights generally and of economic, social and cultural rights in particular. The meaning of this minimum core content is found in the general concepts of “subsistence rights” or “survival rights”.<sup>124</sup> In determining the contents, the UN Committee on Economic, Social and Cultural Rights (CESCR) has often referred to essential food, essential primary health care, basic shelter and housing.<sup>125</sup>

<sup>121</sup> ECHR, *Ireland v. The United Kingdom*, 1978, Series A, No. 25, para. 167.

<sup>122</sup> ECHR, *Soering v. The United Kingdom*, 1989, Series A, No. 161, para. 100. The European Court of Human Rights decided that deprivation of food and drink, as part of interrogation techniques, amounted to inhuman treatment. See ECHR, *Ireland v. The United Kingdom*, 1978, Series A No. 25, para. 167. Similarly, the Human Rights Committee has decided on several occasions that deprivation of food and drink for several days after arrest falls into the category of inhuman treatment. See *Tshisekedi v. Zaire*, No. 242/1987, para. 13 b; *Mika Miha v. Equatorial Guinea*, No. 414/1990, para. 6.4; *Mukong v. Cameroon*, No. 458/1991, para. 9.4. Although the mentioned case law refer mostly to situations of arrest and detention, denying humanitarian access that would for instance starve the civilian population is likely to infringe the rules prohibiting inhuman treatment.

<sup>123</sup> These rights need to be fulfilled during all times and the ICESCR does not allow for derogation in times of public emergency. The general nature of State obligations in the realisation of these rights is found in Art. 2(1) ICESCR: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to progressively achieving the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” See also CESCR, General Comment No. 3; Y. Klerk, “Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights”, *Human Rights Quarterly*, Vol. 9 (1987), p. 263; M. Craven, *The International Covenant on Economic, Social and Cultural Rights, A Perspective on its Development*, pp. 181–182 and 192–193.

<sup>124</sup> E. Riedel, “The International Covenant on Economic, Social and Cultural Rights”, in *Max Planck Encyclopedia of Public International Law*, Oxford, 2007, pp. 137–138.

<sup>125</sup> CESCR, General Comment No. 3, para. 10; General Comment No. 12, paras. 8–13. Similarly, Principle 18(2) of the UN Guiding Principles on Internal Displacement provides that: At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to (a) Essential food and potable water; (b) Basic shelter and housing; (c) Appropriate clothing; and (d) Essential medical services and sanitation.

According to the generally accepted scope of obligations, States must respect, protect and fulfil these rights.<sup>126</sup>

The duty to respect requires that States refrain from interfering directly or indirectly with the enjoyment of economic, social and cultural rights, for instance by preventing humanitarian access to the civilian population in need.<sup>127</sup>

The duty to protect requires States to prevent third parties from interfering with the enjoyment of economic, social and cultural rights.

The duty to fulfil entails an active role by States in adopting the necessary measures directed to the full realisation of these rights, for instance through the provision of basic medical service or essential food to the population.

Article 2(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR) obliges each State Party to take steps, individually and through international assistance and co-operation (especially economic and technical) to fulfil their obligations. For example, with respect to the fundamental right of everyone to be free from hunger, Article 11(2) of the ICESCR provides explicitly that States parties must take the required measures "individually and through international cooperation". Likewise, with regard to the right to health, "States have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons."<sup>128</sup>

The duty of States to seek international assistance indispensable for the survival and the fulfilment of a population's essential needs is implicit in the very purpose of human rights treaties and therefore applies generally and not only to States parties to the International Covenant on Economic Social and Cultural Rights.<sup>129</sup> A State that claims that it is unable to fulfil its legal obligations for reasons beyond its control must show that it has made "every effort to use all resources that are at its disposition in an effort to satisfy,

<sup>126</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22–26 January 1997, para. 6; B; H. Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy*, Princeton, NJ, 1980; A. Eide, *The Right to Adequate Food as a Human Rights*, UN Commission on Human Rights, Special Rapporteur, UN Doc., C/CN.4/Sub.2/1987/23 (1987); CESCR, General Comment No. 12 on the right to adequate food; No. 13 on the right to education; No. 15 on the right to water.

<sup>127</sup> In Sri Lanka, the Government imposed restrictions on access to the Vanni region in the north of the country during the hostilities in 2006, which led the UN Representative of the Secretary-General on the human rights of internally displaced persons to assert that, "[s]erious and legitimate security concerns may occasionally dictate temporary restrictions on access, but such restrictions should be the exception and not the rule." UN doc. A/HRC/8/6/Add.4, para. 68.

<sup>128</sup> CESCR, General Comment No. 14, para. 40.

<sup>129</sup> Institute of International Law, *Resolution of the Institute of International Law on Humanitarian Assistance*, Bruges Session 2003, Art. III.3. See also for example Kampala Convention, Art. 5(6). See also chapter 2 on general international law.

as a matter of priority, those minimum obligations".<sup>130</sup> In determining whether a State is truly unable to fulfil its obligations under human rights law, it is necessary to consider both the resources existing within a State and those available from the international community.<sup>131</sup>

#### 4.4.1 Rights to food and water

The right to food is laid down in Article 11 of the ICESCR.<sup>132</sup> The minimum core obligations inherent to the right to food includes at least the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture as well as the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.<sup>133</sup> The UN Committee on Economic, Social and Cultural Rights stated that the "obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly."<sup>134</sup>

Water is not explicitly mentioned in Article 11. The word "including" in Article 11 has been interpreted by the UN Committee on Economic, Social and Cultural Rights as indicating that the rights enumerated there were not intended to be exhaustive.<sup>135</sup> This provision might also be interpreted as extending to other basic needs. Water is as important as food and it is well known that lack of water can cause death before lack of food. Therefore, as the Committee has stressed, "the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival".<sup>136</sup>

<sup>130</sup> CESCR, General Comment No. 3, para. 10; CESCR, General Comment No. 12, para. 17. See also Statement of the CESCR, An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant, UN Doc. E/C.12/2007/1 (2007), para. 4.

<sup>131</sup> CESCR, General Comment No. 3, para. 13.

<sup>132</sup> ICESCR, Art. 11: "1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent" (emphasis added).

<sup>133</sup> CESCR, General Comment No. 12, para. 8.

<sup>134</sup> CESCR, General Comment No. 12, para. 15.

<sup>135</sup> CESCR, General Comment No. 15, para. 3. The right to water is explicitly recognized in Art. 14(2)(h) CEDAW and in Art. 24(2)(c) CRC.

<sup>136</sup> CESCR, General Comment No. 15, para. 3.

The right to water requires States to ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease; to ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups; to ensure personal security is not threatened when having to physically access to water and to ensure equitable distribution of all available water facilities and services.<sup>137</sup> The UN Committee on Economic, Social and Cultural Rights noted that during armed conflicts, emergency situations and natural disasters, the right to water includes the protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians have access to adequate water.<sup>138</sup>

#### 4.4.2 Right to health

The right to health is set out in Article 12 of the International Covenant on Economic Social and Cultural Rights.<sup>139</sup> According to the UN Committee on Economic, Social and Cultural Rights, the minimum core obligations inherent to the right to health requires States at least “to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups; to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; to provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs; to ensure equitable distribution of all health facilities, goods and services.”<sup>140</sup> States should refrain from limiting access to health services as a punitive measure, e.g. during armed conflicts.<sup>141</sup>

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<sup>137</sup> CESCR, General Comment No. 15, para. 37.

<sup>138</sup> CESCR, General Comment No. 15, para. 22. In the context of the armed conflict in the Sudanese Darfur region in 2003 and onwards, the African Commission on Human and People's Rights ruled that the “poisoning of water sources, such as wells” amounts to a violation of the right to water as contained in the broader right to highest attainable standard of health. ACHPR, Centre on Housing Rights and Evictions (COHRE) v. Sudan, Communication 296/2005, 29 July 2010, para. 212.

<sup>139</sup> ICESCR, Art. 12: “1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

<sup>140</sup> CESCR, General Comment No. 14, para. 43.

<sup>141</sup> CESCR, General Comment No. 14, para. 34.

## 4.5 Conclusion

International human rights law and international humanitarian law both apply in situations of armed conflict. The major human rights law instruments do not – with a few exceptions – expressly refer to humanitarian assistance and access. However, human rights treaties offer a legal framework indirectly, through certain key rights, such as the right to life, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the right to food, the right to water and the right to health. States must respect, protect and fulfil these rights.

Shortage or lack of essentials such as food, water or health is often closely linked to a lack of protection of corresponding human rights. Therefore, humanitarian assistance cannot be regarded exclusively as an action to provide relief to lessen the needs of a civilian population, but also to protect socio-economic human rights.

A State that claims that it is unable to fulfil its legal obligations for reasons beyond its control must show that it has made every effort to use all resources at its disposal in an effort to satisfy those minimum obligations. In determining whether a State is truly unable to fulfil its obligations under human rights law, it is necessary to consider both the resources existing within a State and those available from the international community.

# 5. International criminal law

International criminal law encompasses rules which prohibit certain conduct and make perpetrators accountable for violating these rules. The Nuremberg trials at the end of the Second World War affirmed for the first time in history that the violation of certain rules of international law entails individual criminal responsibility. International tribunals have recognized individual criminal responsibility both for State officials (including members of the armed forces and of the civilian administration) and members of non-State armed groups.<sup>142</sup> Today, international crimes include war crimes, crimes against humanity and genocide. International criminal law applies at all times. This body of law has been significantly developed through judicial practice of the ad hoc tribunals for Rwanda and the former Yugoslavia, and the adoption of the Rome Statute establishing the International Criminal Court (ICC) in 1998. Denial of humanitarian assistance and access could constitute the basis of several crimes under international criminal law.<sup>143</sup>

## 5.1 War crimes

A war crime is a serious and criminally punishable violation of international humanitarian law. War crimes may be committed by any person. The act concerned must be committed against a person protected under international humanitarian law and a nexus between the act and the armed conflict must be established.

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<sup>142</sup> Also personnel of private military and security companies are obliged to comply with applicable international humanitarian law. See Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (2008), para. 26.

<sup>143</sup> See Christa Rottensteiner, The denial of humanitarian assistance as a crime under international law, *International Review of the Red Cross*, No. 835 (1999), p. 555–582.

Aside from the war crimes that directly relate to denial of humanitarian assistance and access discussed below, the following acts that are prohibited as war crimes could involve the denial of humanitarian assistance and access: wilful killing or violence to life and person; torture or inhuman treatment; or, wilfully causing great suffering, or serious injury to body or health.<sup>144</sup>

### 5.1.1 Starvation

International humanitarian law prohibits the starvation of civilians as a method of warfare in both international and non-international armed conflict.<sup>145</sup> The Rome Statute of the International Criminal Court draws a distinction between international and non-international armed conflict as regards the starvation of civilians. In international armed conflict, Article 8(2)(b)(xxv) of the Statute prohibits the intentional starvation of civilians as a method of warfare through deprivation of objects indispensable to their survival, “including wilfully impeding relief supplies as provided for under the Geneva Conventions”.

In non-international armed conflict, starvation as a method of warfare does not constitute a war crime under the Rome Statute. However, starvation of civilians as a method of warfare constitutes a war crime under several national legislations<sup>146</sup> and States have denounced alleged instances of the use of starvation in non-international armed conflicts.<sup>147</sup> This could indicate the emergence of a customary criminalisation of starvation of the civilian population also in non-international armed conflicts.

Therefore, the denial of humanitarian assistance and access to civilians may under certain conditions constitute the war crime of starvation.

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<sup>144</sup> For a complete list of the acts prohibited as war crimes, see Art. 8 of the Rome Statute which streamlines the punishable violations of international humanitarian law.

<sup>145</sup> AP I, Art. 54; AP II, Art. 14. ICRC Study on Customary International Humanitarian Law, Rule 53: “The use of starvation of the civilian population as a method of warfare is prohibited.”

<sup>146</sup> ICRC Study on Customary International Humanitarian Law, Volume II: Practice, Part 1, pp. 1174–1235.

<sup>147</sup> ICRC Study on Customary International Humanitarian Law, Volume II: Practice, Part 1, pp. 1130–1131. The Croatian District Court of Zadar convicted several persons of war crimes, based inter alia on violations of the prohibition to use starvation of civilians as a method of warfare as contained in Article 14 of Additional Protocol II. See District Court of Zadar, Perisic and Others case, Judgement, 24 April 1997, found in: ICRC Study on Customary International Humanitarian Law, Volume II: Practice, Part 1, p. 1129.



## 5.1.2 Attacks against persons involved in humanitarian assistance

The UN Secretary-General has identified violence against humanitarian personnel as among the most severe and prevalent constraints to humanitarian access.<sup>148</sup> Attacking persons or objects involved in the provision of humanitarian assistance (provided that they are not directly taking part in hostilities) is a war crime according to the Rome Statute, if such attacks take place during, and in connection with, an international or non-international armed conflict.<sup>149</sup>

The Special Court for Sierra Leone convicted three militia leaders of war crimes for having directly targeted humanitarian workers and peacekeepers.<sup>150</sup>

The 1994 UN Convention on the Safety of United Nations and Associated Personnel and its Optional Protocol create a regime of compulsory trial or extradition for trial for certain offences against persons carrying out activities in support of UN operations (from emergency humanitarian assistance to peace-building and the delivery of humanitarian, political and development assistance).<sup>151</sup> The Convention and its Protocol also requires States to include these crimes in their national criminal legislation.<sup>152</sup>

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<sup>148</sup> UNSG, Report of the Secretary-General on the protection of civilians in armed conflict, S/2009/277 (2009), Annex I, II and III.

<sup>149</sup> The Rome Statute defines it as follows in Art. 8(2)(b)(iii) and (e)(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."

<sup>150</sup> Prosecutor v. Sesay, Kallon and Gbao, RUF Case, February 2009; Art. 4(b) of the Statute of the Special Court for Sierra Leone.

<sup>151</sup> The Convention defines the crimes as follows, Art. 9(1): "The intentional commission of: (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel; (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty; (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act; (d) An attempt to commit any such attack; and (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organising or ordering others to commit such attack".

<sup>152</sup> UN bodies have also regularly stated the importance of enacting appropriate national legislation to hold accountable those who threaten to or commit any act of violence against humanitarian personnel and UN and associated personnel. See for example UNSC Res. 1674 (2006); UNSC Res. 1894 (2009); UNGA Res. 52/167 (1997), para. 3; UNGA Res. 53/87 (1998), para. 10; UNGA Res. 54/192 (1999), para. 3; UNGA Res. 55/175 (2000), paras. 4 and 5; UNGA Res. 57/155 (2002), paras. 5 and 6; UNGA Res. 59/141 (2004), para. 17. In relation to armed non-State actors see UNGA Res. 57/155 (2002), para. 4; UNGA Res. 55/175 (2000), para. 9. In case of violations of international humanitarian law by members of the military personnel of a United Nations force, they are subject to prosecution in their national courts. See Observance by United Nations Forces of International Humanitarian Law, Secretary-General's Bulletin, UN Secretariat, UN Doc. ST/SGB/1999/13, 6 August 1999, para. 4.

## 5.2 Crimes against humanity

Crimes against humanity are gross violations of human rights committed as part of a widespread or systematic attack directed against any civilian population. Such crimes may be committed during armed conflict or in other situations. Since its creation in the Charter of the International Military Tribunal at Nuremberg, the notion of “crimes against humanity” as an international crime has been incorporated into the statutes of various ad hoc tribunals established by the UN Security Council, in particular the International Criminal Tribunal for the former Yugoslavia (1993), the International Criminal Tribunal for Rwanda (1994) and the Special Court for Sierra Leone (2000). The most comprehensive definition is the one found in the Rome Statute (1998).<sup>153</sup>

Various acts constituting crimes against humanity could include the denial of humanitarian assistance and access when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. They include murder, extermination, torture, persecution and other inhumane acts. If civilians die as a clear result of the unlawful denial of humanitarian assistance and access, then it is arguable that the denial constitutes murder if the other conditions are fulfilled.

The Rome Statute defines the crime against humanity of “extermination” as including “the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”.<sup>154</sup> The International Criminal Tribunal for the former Yugoslavia found that blocking aid convoys was part of the “creation of a humanitarian crisis as a prelude to the forcible transfer of the Bosnian Muslim civilians”.<sup>155</sup> This conduct incurred individual criminal responsibility for inhumane acts and persecution as crimes against humanity.<sup>156</sup>

Therefore, the denial of humanitarian assistance and access might, under certain circumstances, constitute crimes against humanity including murder, extermination, torture or other inhumane acts or persecution.

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<sup>153</sup> Rome Statute, Art. 7(1): “[A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...] or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

<sup>154</sup> Rome Statute, Art. 7(1)(b) and Art. 7(2)(b).

<sup>155</sup> Prosecutor v. Radislav Krstic, Case No. IT-98-33, Judgement, 2 August 2001, para. 615.

<sup>156</sup> Ibid., paras. 618 and 653.

## 5.3 Genocide

In Article 2 of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (the substance of which is reproduced in Article 6 of the Rome Statute) genocide means "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; [...]." A significant difference between the definition of genocide and that of crimes against humanity is that the crime of genocide requires proving a specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Genocide may be committed during armed conflict or in other situations. For the denial of humanitarian assistance and access to constitute genocide, the denial must amount to one of the enumerated acts and must be directed against one the mentioned groups. In addition, the perpetrator must have the intent to destroy the group in whole or in part. In extreme cases, the denial of humanitarian assistance and access might therefore constitute genocide.

## 5.4 Conclusion

The denial of humanitarian assistance and access may constitute a crime under international criminal law. Relevant examples include the war crimes of starvation and of launching attacks against persons involved in humanitarian assistance. Responsible individuals can be prosecuted in national and international courts.

# Annex: Important rules

## General international law

*Charter of the United Nations*

### **Article 1, Paragraph 3 UN Charter**

The Purposes of the United Nations are: to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

### **Article 2 UN Charter**

The Organisation and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

1. The Organisation is based on the principle of the sovereign equality of all its Members.  
[...]
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.  
[...]
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

## **Article 26 VCLOT**

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

## **International humanitarian law**

### **Common Article 3 of the four Geneva Conventions**

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b) taking of hostages;
- c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

**Article 10 GC IV**

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.

**Article 17 GC IV**

The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

**Article 23 GC IV**

Each High Contracting Party shall 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, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

**Article 55 GC IV**

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.

**Article 56 GC IV**

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities,

the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.

If new hospitals are set up in occupied territory and if the competent organs of the occupied State are not operating there, the occupying authorities shall, if necessary, grant them the recognition provided for in Article 18. In similar circumstances, the occupying authorities shall also grant recognition to hospital personnel and transport vehicles under the provisions of Articles 20 and 21.

In adopting measures of health and hygiene and in their implementation, the Occupying Power shall take into consideration the moral and ethical susceptibilities of the population of the occupied territory.

#### **Article 59 GC IV**

If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.

A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.

#### **Article 60 GC IV**

Relief consignments shall in no way relieve the Occupying Power of any of its responsibilities under Articles 55, 56 and 59. The Occupying Power shall in no way whatsoever divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power.

## **Article 61 GC IV**

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

Such consignments shall be exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory. The Occupying Power shall facilitate the rapid distribution of these consignments.

All Contracting Parties shall endeavour to permit the transit and transport, free of charge, of such relief consignments on their way to occupied territories.

### *Additional Protocol I*

## **Article 54 AP I**

Protection of objects indispensable to the survival of the civilian population

- 1 Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

## **Article 69 AP I**

Basic needs in occupied territories

1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.
2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59, 60, 61, 62, 108, 109, 110 and 111 of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay.



## **Article 70 AP I**

### Relief actions

1. 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 the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.
2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.
3. The Parties to the conflict and each High Contracting Party which allow the passage of relief consignments, equipment and personnel in accordance with paragraph 2:
  - (a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;
  - (b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;
  - (c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.
4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.
5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1.

## **Article 71 AP I**

### Personnel participating in relief actions

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.
2. Such personnel shall be respected and protected.
3. Each Party in receipt of relief consignments shall, to the fullest extent practicable,

assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

#### *Additional Protocol II*

#### **Article 14 AP II**

Protection of objects indispensable to the survival of the civilian population

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.

#### **Article 18 AP II**

Relief societies and relief actions

1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.
2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief 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.

**Rule 31 CIHL**

Humanitarian Relief Personnel

Humanitarian relief personnel must be respected and protected.

**Rule 32 CIHL**

Humanitarian Relief Objects

Objects used for humanitarian relief operations must be respected and protected.

**Rule 55 CIHL**

Access for humanitarian relief to civilians in need

The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.

**Rule 56 CIHL**

Freedom of Movement of Humanitarian Relief Personnel

The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted.

# International human rights law

*Convention on the Rights of the Child*

## **Article 22, Paragraph 1 CRC**

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

*African Charter on the Rights and Welfare of the Child*

## **Article 23, Paragraph 1 ACRWC**

States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties. [...]

*African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*

## **Article 5, Paragraph 6 Kampala Convention**

States Parties shall provide sufficient protection and assistance to internally displaced persons, and where available resources are inadequate to enable them to do so, they shall cooperate in seeking the assistance of international organizations and humanitarian agencies, civil society organizations and other relevant actors. Such organizations may offer their services to all those in need.

## **Article 5, Paragraph 7 Kampala Convention**

States Parties shall take necessary steps to effectively organize, relief action that is humanitarian, and impartial in character, and guarantee security. States Parties shall allow rapid and unimpeded passage of all relief consignments, equipment and personnel to internally displaced persons. States Parties shall also enable and facilitate

the role of local and international organizations and humanitarian agencies, civil society organizations and other relevant actors, to provide protection and assistance to internally displaced persons. States Parties shall have the right to prescribe the technical arrangements under which such passage is permitted.

### **Article 7, Paragraph 5 Kampala Convention**

Members of armed groups shall be prohibited from:

- (b) [...] Hampering the provision of protection and assistance to internally displaced persons under any circumstances;
- (g) [...] Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons.

*International Covenant on Civil and Political Rights*

### **Article 6, Paragraph 1 ICCPR**

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

### **Article 7 ICCPR**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

*International Covenant on Economical, Social and Cultural Rights*

### **Article 11 IESCR**

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
  - (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development

- and utilization of natural resources;
- (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

### **Article 12 IESCR**

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - (b) The improvement of all aspects of environmental and industrial hygiene;
  - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
  - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

## **International criminal law**

*Rome Statute of the International Criminal Court*

### **Article 6 Rome Statute**

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

## **Article 7, Paragraph 1 Rome Statute**

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:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

## **Article 8, Paragraph 2 Rome Statute**

2. 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) Torture or inhuman treatment, including biological experiments;
  - (iii) Wilfully causing great suffering, or serious injury to body or health;
  - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (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;

[...]

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(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:

[...]

(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;

[...].













# Contact



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