



Humanitarian Access in Situations of Armed Conflict

Handbook on the International Normative Framework

Version 2, December 2014



Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Federal Department of Foreign Affairs FDFA

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ACRONYMS AND ABBREVIATIONS

ACHR	American Convention on Human Rights (1969)	ICC	International Criminal Court
AfCHPR	African Charter on Human and Peoples' Rights (1981)	ICJ	International Court of Justice
AfCRC	African Charter on the Rights and Welfare of the Child (1990)	ICL	International Criminal Law
API	Additional Protocol I to the four Geneva Conventions of 12 August 1949	ICRC	International Committee of the Red Cross
APII	Additional Protocol II to the four Geneva Conventions of 12 August 1949	ICTY	International Criminal Tribunal for the Former Yugoslavia
CAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	IDPs	Internally Displaced Persons
CCPR	UN Committee on Civil and Political Rights	ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
CDI	Conflict Dynamics International	IHL	International Humanitarian Law
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women (1979)	IHRL	International Human Rights Law
CESCR	UN Committee on Economic, Social and Cultural Rights	(I)NGO	(International) Non-Governmental Organization
CRC	Convention on the Rights of the Child (1989)	NIAC	Non-International Armed Conflict
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)	NSAG	Non-State Armed Group
ECtHR	European Court of Human Rights	Rome Statute	Rome Statute of the International Criminal Court (1998)
GC	Geneva Conventions (I, II, III, IV) of 12 August 1949	RULAC	Rule of Law in armed conflict
FDFA	Swiss Federal Department of Foreign Affairs	UDHR	Universal Declaration of Human Rights (1948)
IAC	International Armed Conflict	UN	United Nations
ICCPR	International Covenant on Civil and Political Rights (1966)	UNGA	United Nations General Assembly
		UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
		UNSC	United Nations Security Council
		VCLOT	Vienna Convention on the Law of Treaties (1969)

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Executive Summary

In light of the challenges in securing and sustaining humanitarian access and the central role access plays in contributing to humanitarian assistance and protection, Switzerland launched an initiative in 2009 to develop practical resources on humanitarian access in situations of armed conflict. This Handbook on the international normative framework on humanitarian access and an accompanying Practitioners' Manual are the two resources developed in the frame of this initiative.¹

The purpose of this Handbook is to lay out the existing international normative framework pertaining to humanitarian access in situations of armed conflict. This publication is aimed for a broad audience, including States, non-State armed groups (NSAGs), international organizations, and humanitarian organizations. It is intended to serve as a reference and to enhance access to civilian populations in need.

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

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, its territorial integrity, or political independence.² Insofar as States provide relief assistance strictly respecting the principles of humanity, impartiality, and non-discrimination, offers of relief action cannot be considered an unlawful foreign intervention in the receiving State's internal affairs.

The United Nations Security Council (UNSC) 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. A State is responsible for violations of international humanitarian law (IHL) and international human rights law (IHRL) where the violations are attributable to that State.

1 These resources contribute directly to the fulfillment of the objectives of the Swiss Strategy on the Protection of Civilians in Armed Conflict.

2 The application of this principle is without prejudice to the application of other relevant provisions of the UN Charter, including its Chapter VII.

International humanitarian law (IHL)

IHL applies in situations of armed conflict. Legal obligations related to humanitarian access under this body of law differ according to the classification of the situation of armed conflict. Consent of the parties concerned is required in every type of conflict, whether international or non-international. In situations of occupation, which is a form of international armed conflict, there is, however, 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. Practically, humanitarian organizations need the consent of the parties concerned to operate.

The legal challenge of humanitarian access in armed conflicts is therefore to determine in each specific case whether concerned parties to armed conflict may invoke valid reasons to refuse relief actions in the territories they control. In other words, it must be established under which criteria the refusal may be considered arbitrary, and therefore contrary to relevant provisions of IHL. Where the lack of relief would amount to starvation (in particular when starvation is used as a method of warfare),³ no valid reason would justify a refusal. This is, however, not the only circumstance in which refusal could be considered arbitrary or lead to violations of IHL.

Under customary IHL, once relief action has been agreed to, parties to the conflict, whether international or non-international, 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. This is without prejudice to their right of control. Offers of relief actions shall not be regarded as interference in the armed conflict or as unfriendly acts.⁴

International human rights law (IHRL)

IHRL applies both in peacetime and 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 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.

3 Article 54§1 of Additional Protocol I (AP I) to the Geneva Conventions (GC) of 12 August 1949: "Starvation of civilians as a method of warfare is prohibited." See also rule 53, ICRC Customary IHL Database, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule53.

4 Article 70 (1) of AP I to the four GC of 1949.

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 (ICL)

International crimes include war crimes, crimes against humanity, genocide, and the crime of aggression. International criminal law (ICL) applies at all times, with the exception that war crimes can only be committed in times of armed conflict.

The denial of humanitarian assistance and access may constitute a crime under ICL and could, for example, in specific circumstances amount to the war crimes of starvation and of launching attacks against persons involved in humanitarian assistance. Responsible individuals shall be prosecuted in national or international courts.



Background and purpose of the Handbook

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Background and purpose of the Handbook

Obtaining and maintaining humanitarian access has been a constant challenge since the birth of modern humanitarianism. A wide range of constraints on humanitarian access exists, including ongoing hostilities or an otherwise insecure environment, destruction of infrastructure, 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, NSAGs, and humanitarian relief organizations – with the international normative framework pertaining to humanitarian access in situations of armed conflict.

In light of the challenges in securing and sustaining humanitarian access and the central role access plays in contributing to effective humanitarian assistance and protection, Switzerland launched an initiative in 2009 to develop practical resources on humanitarian access in situations of armed conflict. This Handbook on the international normative framework on humanitarian access and an accompanying Practitioners' Manual are the two resources developed under the project. These resources also contribute to the fulfillment of the objectives of the Swiss Strategy on the Protection of Civilians in Armed Conflict.⁵

This Handbook on the international normative framework on humanitarian access was elaborated by the Swiss Federal Department of Foreign Affairs (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 this Handbook is to lay out the existing international normative framework pertaining to humanitarian access in situations of armed conflict. The provisions of general international law (chapter 2), IHL (chapter 3), IHRL (chapter 4), and ICL (chapter 5) regulating humanitarian access are presented. International Refugee Law will, however, not be addressed in this Handbook.⁶

This publication is aimed for a broad audience, including States, NSAGs, international organizations, and humanitarian organizations.

5 http://www.eda.admin.ch/etc/medialib/downloads/edazen/doc/publi/phumig.Par.0007.File.tmp/PoC_Strategie_140109_Vollversion_DE_Web.pdf.

6 International Refugee Law is a set of rules that aims to protect persons seeking asylum from persecution and does not contain specific rules on humanitarian access. Refugees and internally displaced persons (IDPs) are civilians and are as such protected by international humanitarian law and international human rights law.

1.1

Relevance of the international normative framework

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

- The international normative framework specifies the duties and obligations concerning humanitarian access of parties to armed conflict (States and NSAGs), third States not party to the conflict, humanitarian actors, and others.
- The international normative framework identifies conditions under which humanitarian actors can access those not or no longer participating in hostilities that 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 international 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;
 - (iii) provide incentives for parties to armed conflict and others to negotiate humanitarian access.

The international normative framework provides a common, objective set of rules to which different actors can each or jointly refer.

In order to be respected, the international normative framework on humanitarian access must be widely known and disseminated, and both humanitarian actors and those who can grant and facilitate access need to be trained in this legal framework.⁷

This Handbook focuses on the international normative framework. This does not mean that national legislation is not relevant. On the contrary, it can be very useful to refer to national law in access negotiations with governments, for example. However, it is not possible to summarize the diversity of those laws in a single document. International law represents the minimum standards of humanitarian access. National laws cannot be less protective but can go beyond the provisions of international law.

⁷ On the issue of dissemination of international humanitarian law, see the four GC of 1949 (GCs) and their Additional Protocols (APs) of 1977: GC I, Art. 47; GC II, Art. 48; GC III, Art. 127; GC IV, 144; AP I, Art. 83; AP II, Art. 19.

1.2

Use of this Handbook

The following question should be asked when using this Handbook and trying to determine the applicable international legal framework in a given situation:

In what type of situation am I?

- If you know that you are in a situation of armed conflict, go to the IHL section (Chapter 3).
 - International armed conflict (IAC), other than occupation (Chapter 3.2)
 - Occupation (Chapter 3.3)
 - Non-international armed conflict (NIAC) (Chapter 3.4)
- If you are not in a situation of armed conflict, go to the human rights⁸ section, as IHL is not applicable in those situations (Chapter 4).
- If you do not know which situation you are in, ask for legal advice.⁹ However, the following customary law rule applies in all types of armed conflict: “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.”¹⁰

When is ICL applicable? ICL applies at all times, with the exception that war crimes can only be committed in times of armed conflict. The denial of humanitarian assistance and access may constitute a crime under ICL. For example, in specific circumstances, in the case of an armed conflict, it could amount to the war crimes of starvation and of launching attacks against persons involved in humanitarian assistance (Chapter 5).

⁸ International human rights law applies in peacetime and in situations of armed conflict.

⁹ In order to determine if a situation can be qualified as an armed conflict, one needs to use the definition and criteria mentioned in Chapter 3 of this Handbook. There is no entity that has the authority to determine if a given situation amounts to an armed conflict. For example, the Rule of Law in armed conflict (RULAC) database contains an analysis of the applicable international legal framework and therefore a legal qualification of the situation in all States can be consulted for indications: <http://www.geneva-academy.ch/RULAC/>. The legal qualification of the situations mentioned in the RULAC database does not necessarily reflect the position of the FDFA, ICRC, OCHA or CDI.

¹⁰ See Rule 55 of the ICRC *International Customary Law Study*: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55. For information on what is a customary rule, see Chapter 2.

1.3

Terminology

The terms “humanitarian access” and “humanitarian assistance” are not defined in international law.¹¹ “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, programs of return and reintegration of refugees and/or internally displaced persons (IDPs), or short- or long-term psychological assistance.

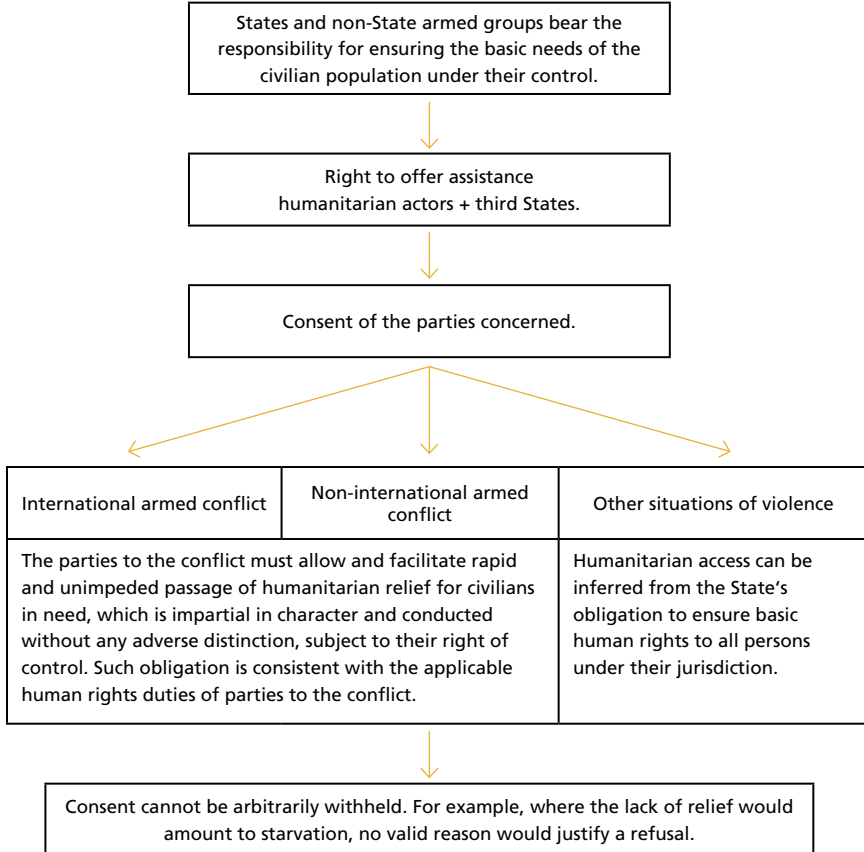
A narrower interpretation of the term “humanitarian assistance” may refer to activities and resources that seek to provide only goods and services essential for meeting the basic needs of persons in situations of armed conflict.

Within the scope of this Handbook, “humanitarian access” is understood as referring to both access by humanitarian actors to people in need of assistance and protection and access by those in need to the goods and services essential for their survival and health, in a manner consistent with core humanitarian principles. Humanitarian access is a precondition for the effective delivery of humanitarian assistance. 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 maintaining such access as long as the needs exist.

11 However, OCHA, the Global Protection Working Group, and many humanitarian actors use and promote a general definition of humanitarian access which encompasses the dual dimension of both humanitarian actors’ ability to reach affected people and of affected people’s ability to access humanitarian assistance and services. See OCHA on Message: Humanitarian Access, https://docs.unocha.org/sites/dms/Documents/OOM_HumAccess_English.pdf and Global Protection Cluster Working Group (PCWG), Handbook for the Protection of Internally Displaced Persons (Geneva: Global PCWG, December 2007), <http://www.humanitarianreform.org>.

1.4

Overview





General international law

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Summary

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, its territorial integrity, or political independence. Insofar as States provide relief assistance strictly respecting the principles of humanity, impartiality, and non-discrimination, offers of relief action cannot be considered as an unlawful foreign intervention in the receiving State's internal affairs.

The UNSC 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. Under general international law, a State is responsible for violations of IHL and IHRL where the violations are attributable to that State.

2.1

Introduction

International law has three principal and interrelated sources: international treaties (written), custom (unwritten), and general principles of law (unwritten).^{12, 13}

International treaties are legally binding on States that are party to them.¹⁴ One consequence of this rule is that different States involved in an armed conflict may be subject to different international law treaty rules. NSAGs cannot be party to international treaties. However, IHL provisions applicable during non-international armed conflicts (NIACs) are binding on both States and NSAGs.¹⁵

As for a rule of international customary law, its existence requires the presence of two elements, namely State practice and a belief that such practice is required as a matter of law (this is known as *opinio juris*).¹⁶ 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. Customary rules of IHL applicable during NIACs are also binding on NSAGs.

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.

Lastly, it is useful to highlight that UNSC resolutions are generally legally binding.¹⁷ On the other hand, UN General Assembly (UNGA) resolutions, guiding principles, and declarations of international organizations are not legally binding and therefore considered “soft law.”

12 The Statute of the International Court of Justice (ICJ) identifies a third source of international law “the general principles of law recognized by civilized nations” (Article 38 para 1 lit. c). These principles may arise either through national or international law, and many are procedural or evidential principles. One example is the principle of good faith.

13 Statute of the ICJ, Art. 38. Judicial decisions and teachings may be applied as subsidiary means for the determination of rules of law.

14 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”; 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.”

15 Art. 3 Common to the GC.

16 Henckaerts J.-M., Doswald-Beck L., *Customary International Humanitarian Law*, International Committee of the Red Cross (ICRC), Cambridge, 2005, Volume I, p. xxxviii.

17 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.”

2.2

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 sovereignty¹⁸ and has been confirmed in international practice. For example, **UNGA 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.”¹⁹

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 UN.²⁰

Insofar as States provide relief assistance strictly respecting the principles of humanity, impartiality, and non-discrimination, offers of relief action cannot be considered an unlawful foreign intervention in the receiving State’s internal affairs.²¹

18 Charter of the United Nations, Art. 2(1).

19 Annex, para. 4; see also United Nations General Assembly (UNGA) Resolution (Res.) 43/131 (1988); UNGA Res. 45/100 (1990); United Nations Security Council (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.

20 See also Art. 2 (7) of the UN Charter; the 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) ; 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.

21 See ICJ, *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgement of 27 June 1986, para. 242.

2.3

United Nations practice

The UNSC has, on many occasions, demanded and called upon States, as well as other relevant actors, to grant immediate, full, and unimpeded humanitarian access.²² In thematic resolutions on the protection of civilians in armed conflict, the UNSC 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”²³ 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.”²⁴ The UNSC 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”²⁵ and has strongly condemned “attacks on objects protected under international law” and called on all parties “to put an end to such practices.”²⁶

For its part, the UNGA has adopted numerous resolutions on humanitarian assis-

22 See for example, UNSC Res. 2067 (2012) on humanitarian access in Somalia: “Reiterates its demand that all parties ensure full, safe and unhindered access for the timely delivery of humanitarian aid to persons in need of assistance across Somalia, para. 19. Other recent examples include UNSC Res. 2109 (2013) on Sudan/South Sudan, para. 13; UNSC Res. 2096 (2013) on Afghanistan, para. 29; UNSC Res. 2085 (2012) on Mali, para. 16; UNSC Res. 1973 (2011) on Libya, para.3; UNSC Res. 1910 (2010) on Somalia, para. 17; 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.

23 UNSC Res. 1674 (2006), para. 5.

24 UNSC Res. 1894 (2009), para. 14. Already in 1999, the UNSC 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.

25 UNSC, “Protection of United Nations personnel, associated personnel and humanitarian personnel in conflict zones,” UNSC Res. 1502 (2003), para. 4. The UNSC 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.

26 UNSC Res. 1265 (1999), para 2.

tance.²⁷ Its landmark **resolution 46/182 of 1991**²⁸ called upon States whose populations are in need of humanitarian assistance to facilitate the work of international organizations and non-governmental organizations (NGOs) in implementing such assistance “for which access to victims is essential.”²⁹ The UNGA 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,”³⁰ 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.”³¹

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 IHL.³² This instrument provides that these forces “shall facilitate the work of relief operations which are humanitarian and impartial in character.”³³ The UNSC has also 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.”³⁴

27 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.

28 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.”

29 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).

30 UNGA Res. 62/95 (2007), para. 3.

31 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).

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

33 Section 9.9.

34 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.



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Summary

IHL applies in situations of armed conflict. Legal obligations related to humanitarian access under this body of law differ according to the classification of the situation in which the humanitarian operation has to be carried out. Consent of the parties concerned is required in every type of conflict, whether international or non-international. In situations of occupation, which is a form of IAC, there is, however, 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. Practically, humanitarian organizations need the consent of the parties concerned to operate.

The legal challenge of humanitarian access in armed conflict is, therefore, to determine in each specific case whether concerned parties to armed conflict 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 IHL. The use of starvation of the civilian population as a method of warfare is specifically prohibited in IHL. Therefore, where the lack of relief would amount to starvation (in particular when starvation is used as a method of warfare), no valid reason would justify a refusal.

3.1

Introduction

IHL is a set of rules that 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. IHL regulates the behaviour of parties to armed conflicts. It is binding on both State armed forces and NSAGs party to an armed conflict.³⁵ It does not regulate whether a State may actually use force; this is governed by a distinct body of international law that is mainly based on the UN Charter. IHL does not apply in situations of violence that do not amount to armed conflict (such as internal disturbances and tensions, riots, isolated and sporadic acts of violence).

IHL contains rules on humanitarian assistance and access to people affected by armed conflicts. In treaty law, the basic rules are laid down in the **Fourth GC of 1949 on the protection of civilian persons in time of war**.³⁶ The **1977 Additional Protocols to the 1949 GC** expand 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, many obligations have also crystallized into customary IHL and are binding for all parties to armed conflicts. At the request of the 26th International Conference of the Red Cross and Red Crescent, the International Committee of the Red Cross (ICRC) undertook an extensive study of State practice and *opinio juris* in order to identify rules of customary IHL.³⁷ The results of this study were published in 2005: 161 rules were identified, reflecting customary law for armed conflicts and obligations of all parties to an armed conflict.³⁸

Legal obligations related to humanitarian access under IHL differ according to the situation in which the humanitarian operation has to be carried out: a) IAC, other than occupation; b) occupation; and c) NIAC. For each of these situations, IHL establishes the obligations of each of the parties to the conflict to meet the basic

35 For the definition of a non-international armed conflict (NIAC), see chapter 3.4.

36 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). See Annex I.

37 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.

38 Out of the 161 rules identified in the study, 136 (and arguably 141) are applicable both in international and non-international armed conflict. 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>.

needs of the civilian population on the territories under its control and the possibility for humanitarian organizations 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.

3.2

International armed conflict, other than occupation

Definition

An IAC exists whenever there is resort to armed force between two or more States.³⁹

Applicable law

In IAC, specific rules exist that regulate the provision of basic relief supplies to civilians in territories under the control of a party to the conflict. These rules can be found mainly in **Articles 70⁴⁰ and 71 of Additional Protocol I of 1977 (AP I) and the Fourth GC**.

Parties to IAC are also bound by international customary law. Parties to IACs 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.⁴¹ This obligation is subject to the parties' right of control.⁴² Offers of relief actions shall not be regarded as interference in the armed conflict or as unfriendly acts.⁴³

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- 39 Common Art. 2 to the GC of 1949. See International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadić*, 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.
- 40 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.
- 41 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 of the ICRC study on humanitarian access have generally not been contested.
- 42 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.
- 43 AP I, Art. 70 (1).

3.2.1 Responsibility for meeting the basic needs of affected populations and access

The primary responsibility for meeting the basic needs of affected populations lies with States that have control over them.⁴⁴ If the populations remain in need, third States or humanitarian organizations can offer humanitarian assistance.⁴⁵ 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 and impartial in character and conducted without any adverse distinction (non-discrimination). **Article 70(1) of AP I** states that such offers must not be regarded as “interference in the armed conflict or as unfriendly acts.” **Article 10 of the Fourth GC** confers on the ICRC or any other impartial humanitarian organizations 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 contained an obligation to accept relief if the relief met certain requirements, such as impartiality and humanity.⁴⁶ 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 Parties had absolute and unlimited freedom to refuse their agreement to relief actions.⁴⁷ At a minimum, consent cannot be refused on arbitrary grounds.⁴⁸ A refusal must be based on valid reasons.

If an offer meets a clear need for humanitarian assistance and the humanitarian principles are respected (see below paragraphs regarding these principles), the affected State must possess valid reasons for choosing not to give 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 on the international obligations incumbent upon the party

44 See Section 2 on General International Law.

45 AP I, Art. 70(1).

46 Art. 62(1) of Draft AP I and Art. 33(1) of Draft AP II to the GC of August 12, 1949 (1973).

47 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1974-1977, CDDH/II/SR.87, paras. 27-30.

48 This was mentioned during the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1974-1977, O.R. XII, p. 336, CDDH/II/SR.87, para 27. See also 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. 2805. This view has been supported by subsequent 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.

whose consent is required. It should therefore be determined on a case-by-case basis.⁴⁹

In any case, it should be emphasized that under IHL, the rule is that when the civilian population suffers undue hardship owing to the lack of essential supplies, humanitarian relief operations shall be undertaken. Under customary IHL, once relief action has been agreed to, parties to the conflict, whether international or non-international, 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. Access can only be refused based on valid and lawful reasons. Furthermore, the denial of access should not amount to a violation of other rules of IHL. For instance, the use of starvation of the civilian population as a method of warfare is specifically prohibited in IHL.⁵⁰ Therefore, where the lack of relief would amount to starvation (in particular when starvation is used as a method of warfare), no valid reason would justify a refusal.⁵¹ In such cases, the withholding of consent could be considered as arbitrary. Starvation is understood as "causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies" essential to the survival of the civilian population.⁵²

Relief actions must be exclusively humanitarian. According to the principle of impartiality, the starting point must be human suffering and humanitarian action must be exclusively dedicated to addressing humanitarian needs. It must not be used as a means to reach other goals.⁵³ The principle of non-discrimination prohibits distinctions made to the detriment of certain persons "for the sole reason that they belong

49 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. The Secretary-General, in his 2013 report on the Protection of Civilians in Armed Conflict (UN Doc. S/2013/689) requested OCHA to examine relevant rules pertaining to the issue of arbitrary withholding of consent and consider options for providing guidance (para. 80).

50 Art. 54 (1) API.

51 The Institute of International Law, in its Resolution 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."

52 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 API 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 (chap. 5).

53 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).

to some specific category”⁵⁴ based on criteria such as race, religion, or political opinion.⁵⁵ 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, such as children, expectant mothers, maternity cases, and nursing mothers, receive privileged treatment or special protection. 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.⁵⁶

3.2.2 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, 23, and 30 of the Fourth GC**, as well as **Articles 54, 70, and 71 of AP I**. Customary IHL rules are also applicable.⁵⁷

Article 17 of the Fourth GC 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 GC 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.”⁵⁸ 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

54 Ibid., p. 38.

55 Fourth Geneva Convention, Art. 27.

56 Sandoz Y. et al. (eds.), *Commentary on the Additional Protocols*, para. 2821.

57 ICRC *Study on Customary International Humanitarian Law*, Rules 31, 32, 55, and 56.

58 This provision originally addresses the humanitarian consequences of a blockade.

of other supplies, such as food or clothing, is only for the benefit of particularly vulnerable civilians.

Article 30 of the Fourth GC states that protected persons shall have every facility for making application to any organization that might assist them. These organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.

These provisions of the Fourth GC have been complemented and reinforced through the development of IHL, both treaty and customary law.

Articles 54(1) and (2) of AP I protect objects indispensable to the survival of the civilian population and provide 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 parties to armed conflicts.⁵⁹

Article 70(2) of AP I provides that all States (i.e., not only the parties to the conflict) 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.”⁶⁰ This provision expands existing rules of the Fourth GC in two main ways. First, it applies to the whole civilian population, not only to vulnerable groups; second, relief consignments include all supplies essential to the survival of the population, not uniquely to some specific categories of goods.

Under **Article 70(3) of AP 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.⁶¹ Accordingly, delay can 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. With regard to diverting relief consignments, this could 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

⁵⁹ ICRC *Study on Customary International Humanitarian Law*, Rule 53.

⁶⁰ International practice gives examples supporting this rule. The Guiding Principles on Humanitarian Assistance adopted by the UNGA 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.

Also, 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, U.N. Doc. A/49/49 (1994), 09.12.1994, Art. 5.

⁶¹ 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).

also be justifiable in the case that a disaster – such as an earthquake or epidemic – 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.⁶²

Parties to the conflict have an obligation to take positive action to protect relief consignments and facilitate their rapid distribution.⁶³ 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.”⁶⁴ UN bodies have insisted on this obligation on several occasions.⁶⁵ However, the passage of such assistance may be subject to certain conditions. Parties to the conflict and other States Parties to AP I have the right to prescribe technical arrangements, such as determined times and routes.⁶⁶ They are also allowed to control the consignments or ask for local supervision of the relief action by a Protecting Power⁶⁷ or an impartial humanitarian organization.⁶⁸

Article 71(2) of AP I requires that relief personnel be respected, protected, and assisted, to the fullest extent practicable, in carrying out their mission. Paragraph 4 of Article 71 provides that relief personnel may not exceed the terms of their mission under any circumstances. They must take into account 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. However, only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

Customary IHL also requires humanitarian relief personnel and objects to be respected and protected⁶⁹ 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.⁷⁰

62 See Sandoz Y. et al. (eds.), *Commentary on the Additional Protocols*, paras. 2845-2847.

63 AP I, Art. 70(4).

64 AP I, Art. 70(5).

65 The UNGA 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.

66 AP I, Art. 70(3)(a). See also GC IV, Art. 23.

67 The Protecting Power is a State instructed by another State (known as the Power of Origin) to safeguard its interests and those of its nationals in relation to a third State (known as the State of Residence).

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

69 ICRC *Study on Customary International Humanitarian Law*, Rules 31 and 32.

70 *Ibid.*, Rule 56.

3.3

Occupation

Definition

Under IHL, a territory is occupied “when it is actually placed under the authority of the hostile army.”⁷¹ This means that two conditions must be fulfilled: 1) the former government has been rendered incapable of publicly exercising its authority in that area; 2) the Occupying Power is in a position to substitute its own authority for that of the former government.⁷² Occupation is a form of IAC.

Applicable law

Relevant rules regulating occupation are set forth primarily in three international treaties: the Hague Regulations concerning the laws and customs of war on land (1907); the Fourth GC relative to the protection of civilian persons in time of war (1949); and the Protocol additional to the GC 1949 relating to the protection of victims of IACs (AP I) (1977). Most of these rules are also customary in nature.

3.3.1 Responsibility for meeting the basic needs of affected populations 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 GC** 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 AP I** further stipulates that the Occupying Power must ensure without adverse distinction the provision of clothing, bedding, means of shelter, and 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.⁷³ This must be read in conjunction with **Article 56 of the Fourth GC**, which requires the Occupying Power to ensure and maintain “the medical and hospital establishments and services, public health and hygiene in the occupied territory.”

71 Hague Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Art. 42.

72 United Kingdom, Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), point 11.3, p. 275.

73 Hague Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Art. 43.

While imposing clear obligations, the Fourth GC and AP I do not 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.”⁷⁴ Financial constraints or transport problems, for instance, may seriously affect the concerned authorities’ capabilities to meet their obligations.⁷⁵ 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 and facilitate them by all the means at its disposal.⁷⁶ The occupation authorities must therefore cooperate in the execution of these schemes. For that purpose they have many and varied means at their disposal (transport, stores, facilities for distributing, and supervising agencies). Such schemes, which may be undertaken either by States or by impartial humanitarian organizations, such as the ICRC, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies, and clothing.⁷⁷

In occupied territories, this obligation is unconditional.⁷⁸ The Occupying Power must either ensure that the civilian population receives essential supplies or agree to relief actions.

3.3.2 Practical rules on humanitarian assistance and access

The Fourth GC contains a series of rules aimed at ensuring the free passage of relief consignments to civilian populations in need of humanitarian assistance.⁷⁹ In particular, the Occupying Power has the obligation to facilitate relief actions by all the means at its disposal.⁸⁰

The Occupying Power must abstain from taking any action which might impede or affect the achievement of such operations. 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 popu-

74 GC IV, Art. 55(1); AP I, Art. 69(1).

75 Pictet J. et al. (eds.), *Commentary on the Geneva Convention IV*, p. 310.

76 GC IV, Art. 59(1).

77 GC IV, Art. 59 (2). Consignments need not be restricted to these items and would include at the minimum all supplies indispensable to the survival of the population of the occupied territory. Three categories of relief have been mentioned specifically because they are of vital importance and the Occupying Power would be justified in refusing to accept any consignments not urgently needed to feed the population. See Pictet J. et al. (eds.), *Commentary on the Geneva Convention IV*, p.321.

78 Pictet J. et al. (eds.), *Commentary on the Geneva Convention IV*, p. 320.

79 GC IV, Arts. 59, 60, 61.

80 GC IV, Art. 59(1).

lation and with the consent of the Protecting Power.⁸¹ Relief consignments must be exempt from all charges, taxes, or customs duties except if they are necessary for the economy of the occupied territory.⁸² The Occupying Powers must also “facilitate the rapid distribution” of relief consignments.⁸³

In addition, the Fourth GC lays down obligations for third States, including, most notably, those through whose territory relief consignments must transit. All States must permit the free passage of such consignments and guarantee their protection.⁸⁴ 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.⁸⁵ These safeguards, which were prescribed in the interests of the Powers granting free passage, must in no case be misused in order to make the rule itself inoperative or unduly delay the forwarding of relief.⁸⁶

Article 71 of AP I on the rights and duties of relief personnel also applies in times of occupation.⁸⁷ 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.⁸⁸

81 GC IV, Art. 60. On urgent necessity see comments under part 3.3.2 above.

82 GC IV, Art. 61(2).

83 GC IV, Art. 61(2).

84 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.

85 GC IV, Art. 59(4). These obligations have been reaffirmed on several occasions. For instance, the UNGA 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.

86 Pictet J. et al. (eds.), *Commentary on the Geneva Convention IV*, p. 322.

87 See also AP I, Art. 69(2).

88 AP I, Art. 71(3).

3.4

Non-international armed conflict

Definition

NIACs are protracted armed confrontations occurring between governmental armed forces and the forces of one or more NSAG, or between such groups. In order to be considered a NIAC, such confrontations must meet two conditions: a) they must reach a minimum level of intensity; and b) the parties involved must show a minimum degree of organization.⁸⁹

Applicable law

Rules of IHL applicable in NIACs are mainly found in **Article 3 common to the four GC of 1949, Additional Protocol II to the GC of 1949 (AP II)** and **customary IHL**.

However, the scope of application of AP II does not cover all forms of NIAC. AP II applies only to NIACs "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."⁹⁰

Two limitations result from the scope of application of AP II: a) this instrument only applies to NIACs in which one or more NSAG actually exercise control over part of the territory; and b) AP II only governs armed conflicts between such groups and governmental armed forces, thus excluding confrontations between opposing NSAGs only. In practice, however, it does not appear that States make a distinction between NIACs falling within the scope of AP II and other NIACs in respect to

89 See ICTY, *Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. 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 caliber 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, *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 headquarter; 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, *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgment, 3 April 2008, para. 60.

90 AP II, Art. 1(1).

humanitarian relief. Indeed, as confirmed by State practice and *opinio juris* the obligation to allow humanitarian relief applies to all types of NIAC.⁹¹

3.4.1 Responsibility for meeting the basic needs of affected populations and access

Article 3 common to the four GC regulates all forms of NIACs. 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 and which might result in serious mental or physical suffering.⁹² The denial of access to essential supplies could in certain circumstances amount to inhumane treatment and cause serious mental or physical suffering in the sense of Article 3. This article 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 organizations to offer their services to the parties to NIAC. Such an offer should not be considered as interference in domestic affairs or an unfriendly act.⁹³ It is an offer that the parties to the conflict must take into consideration, but they are not bound to accept.⁹⁴ 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.⁹⁵

Article 18(2) of AP 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.”

A similarity between AP II and AP 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 NIACs, as in IACs, where the lack of relief would lead to starvation used as a method of warfare,

91 See commentary to rule 55 with various references to State practice in ICRC *Study on Customary International Humanitarian Law, Volume I*, p. 194. For States practices, see: http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule55.

92 ICTY, *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.”

93 Pictet J. et al. (eds.), *Commentary on the Geneva Convention I*, p. 58.

94 *Ibid.*, p. 57.

95 See, for example, common Art. 3(4) to the GC. From a practical point of view, the consent of relevant NSAG controlling or operating in the territory in question is necessary for relief actions to be carried out, especially for security reasons.

no valid reason can be invoked to justify a refusal. This results from **Article 14 of AP II**, which prohibits starvation of civilians as a method of warfare. As in IACs, relief actions in NIACs must be humanitarian, impartial, and conducted without any adverse distinction. This obligation is found in both treaty and customary law and has to be understood in the same manner both in IAC other than occupations and in NIAC.⁹⁶

3.4.2 Practical rules on humanitarian assistance and access

There is no express rule in treaty IHL regulating the practical provision of humanitarian relief in NIACs.⁹⁷ However, customary law provides that parties to NIAC 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.⁹⁸ In addition, they must respect and protect humanitarian relief personnel and objects⁹⁹ 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.”¹⁰⁰

International practice in this regard is extensive.¹⁰¹ The UNSC 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.”¹⁰² In a resolution on the situation in Liberia, the UNSC 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 of United Nations humanitarian agencies and non-governmental organizations.”¹⁰³ The UNGA has also on various occasions called on parties to NIACs “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.”¹⁰⁴

96 AP II, Art. 18(2); ICRC *Study on Customary International Humanitarian Law*, Rule 55.

97 AP II, Arts. 9 and 11 contain rules on the protection of medical and religious personnel as well as the protection of medical units and transports.

98 ICRC *Study on Customary International Humanitarian Law*, Rule 55.

99 *Ibid.*, Rules 31 and 32.

100 *Ibid.*, Rule 56.

101 *Ibid.*, Volume II: Practice, Part 1, pp. 1174-1235.

102 UNSC Res. 1794 (2007), para. 17.

103 UNSC Res. 2104 (2013), para. 17; UNSC Res. 2046 (2012), para. 4; UNSC Res. 1936 (2010), preambular para 14; UNSC Res. 1674 (2006), para. 22; UNSC Res. 1478 (2003), para. 8.

104 UNGA Res. 52/167 (1998), 53/87 (1999), 54/192 (2000), 55/175 (2001), 56/127 (2002), 57/155 (2003), 58/122 (2004), 59/211 (2005), 60/123 (2006), 61/133 (2007), 62/095 (2008), 63/138 (2009), 64/077 (2010), 65/132 (2011), 66/117 (2012).



International human rights law

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Summary

IHRL applies in peacetime and 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 with 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. It is primarily States that must respect, protect, and fulfil these rights.

Shortage or lack of essentials such as food, water, or health care is often closely linked to a lack of protection and fulfilment 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 contribute to the protection and fulfilment of socio-economic human rights.

A State that claims it is unable to fulfil its legal obligations for reasons beyond its control must show that it has made every effort to use all the resources at its disposal in an endeavour 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.

4.1

Introduction

Human rights are rights inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. IHRL lays down obligations of governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups. It applies at all times. Thus, it continues to apply, alongside IHL, in times of armed conflict, whether of an international or a non-international character. IHL and human rights law share the common goal of preserving the dignity and humanity of all. They are complementary and not mutually exclusive.¹⁰⁵

In contrast to the provisions of IHL, 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.¹⁰⁶ Some human rights, such as the prohibition of torture and cruel, inhuman, or degrading treatment, cannot be derogated under any circumstances. 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 or over a person.¹⁰⁷

105 The ICJ 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.

106 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).

107 UN Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13 (2004), para. 10: "... a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State. ..." This has been confirmed by various human rights bodies and courts (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004 paras 102-113), even though some States reject this extraterritorial applicability.

The primary responsibility for meeting the basic needs of affected populations lies with States.¹⁰⁸ The UNSC has addressed human rights violations by NSAGs on numerous occasions.¹⁰⁹ 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.¹¹⁰

4.2

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 (CRC), the African Charter on the Rights and Welfare of the Child (AfCRC), and the Kampala Convention.¹¹¹

Article 22(1) of the CRC pertaining to refugee children 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.”

108 When NSAGs exercise government-like functions over a given territory and population, it is generally accepted that they shall respect fundamental human rights standards. See for example: UNSC Res. 1894 (2009), in which the Security Council demands that parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law; A/HRC/2/7, para. 19. The joint report by a group of four special procedure mandate holders indicates that “It is especially appropriate and feasible to call for an armed group to respect human rights norms when it ‘exercises significant control over territory and population and has an identifiable political structure.’” UN Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, New York and Geneva, 2011, pp. 23ff. In 2005, the Communist Party of Nepal-Maoist issued, for example, a statement welcoming the establishment of a United Nations human rights field operation in Nepal, promising United Nations personnel full access to the areas it controlled and committing itself to respect human rights standards. See UN Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, New York and Geneva, 2011, p. 26. See also Andrew Clapham, “Human rights obligations of non-state actors in conflict situations,” *International Review of the Red Cross*, No. 863 (2006), pp. 491-523.

109 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.

110 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.”

111 African Union, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (“Kampala Convention”), 22 October 2009. 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.”

Article 23(1) of the AfCRC 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 states the primary duty and responsibility of States to provide protection and humanitarian assistance to internally displaced persons within their territory or jurisdiction.¹¹² It stipulates 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.”¹¹³ 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.”¹¹⁴ 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.”¹¹⁵

112 Ibid., Art. 5(1).

113 Ibid., Art. 5(6).

114 Ibid., Art. 5(7).

115 Ibid., 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,¹¹⁶ the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment,¹¹⁷ the right to food,¹¹⁸ the right to water,¹¹⁹ the right to health,¹²⁰ the right to shelter,¹²¹ the right to clothing,¹²² the right to an adequate standard of living,¹²³ the right to livelihood,¹²⁴ and the principle of non-discrimination.¹²⁵ The most pertinent human rights, and how they relate to humanitarian access, are discussed in detail below.

4.3

Right to life

The right to life is the most fundamental human right. It is a non-derogable right, including in situations of armed conflict, where its application should be interpreted in accordance with the rules of IHL, including those relating to the conduct of hostilities.¹²⁶ 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

116 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.

117 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.

118 UDHR, Art. 25; International Covenant on Economic Social and Cultural Rights (ICESCR), Art. 11(1) and (2); CRC, Art. 24(2)(c) and 27(3); 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.

119 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; AfCPR, Art. 14(2)(c).

120 UDHR, Art. 25; ICESCR, Art. 12; CRC, Art. 24(1); AfCHPR, Art. 16(1); Protocol of San Salvador, Art. 10.

121 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).

122 UDHR, Art. 25; ICESCR, Art. 11(1); CRC, Art. 27(3).

123 CRC, Art. 27

124 UDHR, Art. 25; ICESCR, Art. 6.

125 ICCPR, Art. 2(1); ICESCR, Art. 2(2); International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

126 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."

and safeguard life.¹²⁷ 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 allow humanitarian access and accept humanitarian assistance could constitute a violation of the right to life.¹²⁸

4.4

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 (UDHR), “[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 (ICCPR)** and the **1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (Convention against Torture – CAT). 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.¹²⁹

The most comprehensive definition of torture is found in the CAT.¹³⁰ 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,” such as extracting information or a confession from individuals. What would be more relevant to humanitarian assistance and access are therefore other forms of ill-treatment, including cruel, inhuman, or

127 See e.g. UN Human Rights Committee, General Comment No. 6, para. 5.

128 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3, para. 10.

129 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 (ECtHR), *Selmouni v. France*, Judgment, ECtHR, 28 July 1999, para. 101.

130 Article. 1, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

degrading treatment. 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 (ECtHR) has defined inhuman treatment as measures that cause “if not actual bodily injury, at least intense physical and mental suffering.”¹³¹ 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.¹³²

4.5

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.¹³³ 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.”¹³⁴ In determining the contents, the UN Committee on Economic, Social and Cultural Rights has

131 ECtHR, *Ireland v. The United Kingdom*, 1978, Series A, No. 25, para. 167.

132 ECtHR, *Soering v. The United Kingdom*, 1989, Series A, No. 161, para. 100. The ECtHR decided that deprivation of food and drink, as part of interrogation techniques, amounted to inhuman treatment. See ECtHR, *Ireland v. The United Kingdom*, 1978, Series A No. 25, para. 167. Similarly, the UN 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 UN Doc. CCPR/C/37/D/242/1987 (1989), *Tshisekedi v. Zaire*, No. 242/1987, para. 13 b; UN Doc. CCPR/C/51/D/414/1990 (1994), *Mika Miha v. Equatorial Guinea*, No. 414/1990, para. 6.4; UN Doc. CCPR/C/51/D/458/1991 (1994), *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.

133 These rights need to be fulfilled at 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.

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

often referred to essential food, essential primary health care, basic shelter, and housing.¹³⁵ According to the generally accepted scope of obligations, States must respect, protect, and fulfil these rights.¹³⁶

The duty to respect requires that States¹³⁷ 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.¹³⁸

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 realization of these rights, for instance, through the provision of basic medical services 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.”¹³⁹

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

135 ICESCR, 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.

136 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; General Comment No. 13 on the right to education; No. 15 on the right to water.

137 Arguably, NSAGs can be bound to respect international human rights law when they exercise government-like functions. Nevertheless, the existence of human rights obligations of NSAG remains controversial and will not be addressed in this Handbook.

138 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.

139 ICESCR, General Comment No. 14, para. 40.

human rights treaties.¹⁴⁰ A State that claims 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, as a matter of priority, those minimum obligations.”¹⁴¹ 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.¹⁴²

The rights to food and water and the right to health are described as examples.

4.5.1 Rights to food and water

Article 11 (1) of the ICESCR states that the States Parties recognize the right of everyone to an adequate standard of living for himself/herself and his/her family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. It obliges States to 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. The minimum core obligations inherent to the right to food includes 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.¹⁴³

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.”¹⁴⁴

140 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 chapter 2 on general international law of this Handbook.

141 ICESCR, 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.

142 ICESCR, General Comment No. 3, para. 13.

143 ICESCR, General Comment No. 12, para. 8.

144 *Ibid.*, para. 15.

Water is not explicitly mentioned in Article 11 of the ICESCR. 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.¹⁴⁵ The Committee has also 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.”¹⁴⁶ In 2010, the UNGA and the Human Rights Council adopted resolutions recognizing the right to safe and clean drinking water and sanitation as a human right essential for the full enjoyment of life and all human rights.¹⁴⁷

The right to water requires that access is ensured 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 water; and to ensure equitable distribution of all available water facilities and services.¹⁴⁸ 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.¹⁴⁹

4.5.2 Right to health

The right to health is set out in **Article 12 of the ICESCR**.¹⁵⁰ 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

145 ICESCR, General Comment No. 15, para. 3. The right to water is explicitly recognized in CEDAW, Art. 14(2)(h) and in CRC, Art. 24(2)(c).

146 ICESCR, General Comment No. 15, para. 3.

147 UN GA Res. A/RES/64/292 (2010) and UN HRC Res. A/HRC/15/L.14 (2010).

148 ICESCR, General Comment No. 15, para. 37.

149 *Ibid.*, 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.

150 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.”

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 World Health Organization Action Programme on Essential Drugs; to ensure equitable distribution of all health facilities, goods and services.”¹⁵¹ States should refrain from limiting access to health services as a punitive measure, for example, during armed conflicts.¹⁵²

4.5.3 Right to housing

The right to housing is set out in **Article 11 of the ICESCR**.¹⁵³ According to the UN Committee on Economic, Social and Cultural Rights, adequate housing must be accessible.¹⁵⁴ The right to housing requires States to guarantee at least minimum essential levels of this right. For instance, States should ensure that significant numbers are not deprived of basic shelter and housing.

151 ICESCR, General Comment No. 14, para. 43.

152 *Ibid.*, para. 34.

153 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.” Numerous other human rights treaties recognize the right to adequate housing, see: Art. 21, Convention Relating to the Status of Refugees (1951), Art. 5 (2), International Labor Organization (ILO) Convention no 117 concerning Basic aims and standards of social policy, Art. 5 (e) (iii), Convention on the elimination of all forms of racial discrimination, Art. 17, International Covenant on civil and political rights, Art. 14 (2) and 15 (2), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Art. 16 (1) and 27 (3), Convention on the Rights of the Child, Art. 14, 16 and 17, ILO Convention no. 169 concerning indigenous and tribal peoples in independent countries, Art. 43 (1) d), International Convention on the Protection of the rights of all Migrant Workers and Members of their Families, Art. 9, Convention on the Rights of Persons with Disabilities. The Guiding Principles on Internal Displacement also recalls that IDPs have the right to an adequate standard of living and that, at a minimum, regardless of the circumstances and without discrimination, the competent authorities shall provide IDPs with and ensure safe access to basic shelter and housing (principle 18).

154 ICESCR, General Comment No. 4, para. 8 e.

5

International criminal law

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Summary

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

5.1

Introduction

ICL encompasses rules that prohibit certain conduct and make perpetrators accountable for violating these rules. The Nuremberg and Tokyo trials at the end of the Second World War established the standard that the violation of certain rules of international law entails individual criminal responsibility. 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. International tribunals have recognized individual criminal responsibility for State officials (including members of the armed forces and of the civilian administration), members of NSAGs, and individuals.¹⁵⁵

The main purpose of ICL is to criminalize certain acts or omissions, to deter their commission, and to hold perpetrators accountable. It makes an important contribution to the fulfilment and respect for IHL and IHRL. International crimes include war crimes, crimes against humanity, genocide, and the crime of aggression. ICL applies at all times, with the exception that war crimes can only be committed in times of armed conflict. Denial of humanitarian assistance and access could constitute the basis of several crimes under ICL.¹⁵⁶

It should be noted that it is the primary responsibility of States to investigate and prosecute international crimes. When they are unable or unwilling to do so, an international tribunal, such as the International Criminal Court – if and when competent – could be seized of the matter.¹⁵⁷

155 Personnel of private military and security companies are also 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.

156 See Christa Rottensteiner, "The denial of humanitarian assistance as a crime under international law," *International Review of the Red Cross*, No. 835 (1999), pp. 555-582.

157 In accordance with the principle of complementarity between domestic and international jurisdiction, priority is given to national systems and States retain primary responsibility for trying perpetrators of the most serious crimes.

5.2

War crimes

A war crime is a serious and criminally punishable violation of IHL that is committed in an IAC or NIAC. War crimes can be committed by any person. A nexus between the act and the armed conflict must be established. The **GC** and the **AP I** establish an obligation for States to search for persons alleged to have committed, or to have ordered to be committed, grave breaches,¹⁵⁸ and to bring such persons, regardless of their nationality, before their own courts or to hand such persons over for trial to another State.¹⁵⁹

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. These acts also constitute grave breaches according to the GC and AP I.

5.2.1 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.¹⁶⁰ Intentionally attacking persons or objects involved in the provision of humanitarian assistance is a war crime according to the **Rome Statute of the ICC**, if such attacks take place during, and in connection with, an IAC or NIAC.¹⁶¹ The Special Court for Sierra Leone convicted three militia leaders of war crimes for having directly targeted humanitarian workers and peacekeepers.¹⁶²

158 A distinction exists between a list of particularly serious war crimes, known as “grave breaches” and other “war crimes.” The term “grave breaches” was first used in the GC for establishing compulsory universal jurisdiction for these serious war crimes. More violations have been classified as “grave breaches” by AP I to the GC. 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.

159 See GC, Art. 49/50/129/146; AP I, Art. 85.

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

161 The Rome Statute, which distinguishes war crimes committed in IAC and NIAC, 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.”

162 *Prosecutor v. Sesay, Kallon and Gbao*, RUF Case, February 2009; Art. 4(b) of the Statute of the Special Court for Sierra Leone.

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).¹⁶³ The Convention and its Protocol also require States to include these crimes in their national criminal legislation.¹⁶⁴

5.2.2 Starvation

The Rome Statute of the ICC draws a distinction between IAC and NIAC in respect to the starvation of civilians. In IAC, **Article 8(2)(b)(xxv) of the Rome 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 NIAC, starvation as a method of warfare is prohibited under IHL but 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 legislations¹⁶⁵ and States have on several occasions denounced alleged instances of the use of starvation in NIAC.¹⁶⁶ This could indicate the emergence of a customary criminalization of starvation of the civilian population also in NIAC.

163 The Convention on the Safety of United Nations and Associated Personnel 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."

164 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.

165 ICRC *Study on Customary International Humanitarian Law*, Volume II: Practice, Part 1, pp. 1174-1235.

166 *Ibid.*, 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 AP 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.

5.3

Crimes against humanity

Crimes against humanity are acts 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 of violence. 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* and mixed tribunals, in particular the International Criminal Tribunal for the former Yugoslavia (ICTY) (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).¹⁶⁷

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, forcible transfer, 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.

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.”¹⁶⁸ The ICTY 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.”¹⁶⁹ This conduct incurred individual criminal responsibility for inhumane acts as crimes against humanity.¹⁷⁰

167 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.”

168 Rome Statute, Art. 7(1)(b) and Art. 7(2)(b).

169 *Prosecutor v. Radislav Krstic*, Case No. IT-98-33, Judgement, 2 August 2001, para. 615.

170 *Ibid.*, paras. 618 and 653.

5.4

Genocide

According to **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 other international crimes 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 of 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.

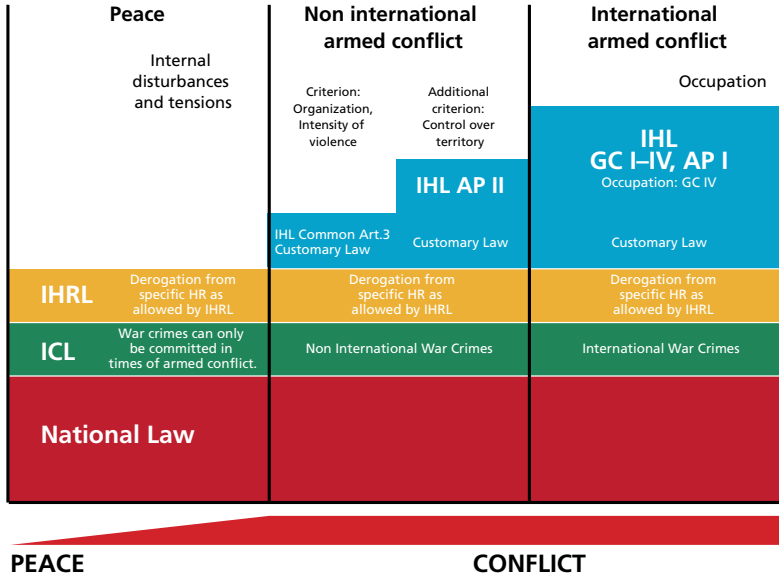


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Annex I

Applicable law according to situation



Annex II

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.

Vienna Convention on the Law of Treaties (VCLOT)

Article 26 VCLOT

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

Geneva Conventions (GC)

Common Article 1 of the four GC [IAC and NIAC]

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Common Article 3 of the four GC [NIAC]

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.

Fourth Geneva Convention relative to the protection of civilian persons in time of war (GC IV)

Article 10 GC IV [IAC]

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 [IAC]

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 [IAC]

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 30 GC IV [IAC]

Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

These several organizations shall be granted all facilities for that purpose by the authorities, within the bounds set by military or security considerations.

Article 55 GC IV [occupation]

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 popula-

tion 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 [occupation]

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 [occupation]

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 [occupation]

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 [occupation]

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 (AP I)

Article 54 AP I [IAC]

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 [occupation]

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 [IAC]

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 [IAC]

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 (AP II)

Article 14 AP II [NIAC]

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 [NIAC]

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.

INTERNATIONAL HUMANITARIAN LAW (CUSTOMARY INTERNATIONAL HUMANITARIAN LAW STUDY (CIHL))

Rule 31 CIHL [IAC and NIAC]

Humanitarian Relief Personnel

Humanitarian relief personnel must be respected and protected.

Rule 32 CIHL [IAC and NIAC]

Humanitarian Relief Objects

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

Rule 53 CIHL [IAC and NIAC]

Starvation as a Method of Warfare

The use of starvation of the civilian population as a method of warfare is prohibited.

Rule 55 CIHL [IAC and NIAC]

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 [IAC and NIAC]

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 INSTRUMENTS

Universal Declaration of Human Rights (UDHR)

Article 25 UDHR

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

International Covenant on Civil and Political Rights (ICCPR)

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 (ICESCR)

Article 11 ICESCR

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 ICESCR

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.

Convention on the Rights of the Child (CRC)

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.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Article 12(2) CEDAW

... States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 14(2) CEDAW

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

...

(b) To have access to adequate health care facilities, including information, counselling and services in family planning;

...

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Convention on the Rights of Persons with Disabilities (CRPD)

Article 10

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

Article 11

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights (Protocol of San Salvador)

Article 12 Protocol of San Salvador

1. Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.
2. In order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.

European Convention on Human Rights (ECHR)

Article 3 (ECHR)

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

African Charter on Human and People's Rights

Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

African Charter on the Rights and Welfare of the Child (ACRWC)

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.

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 Rome Statute

For the purpose of this Rome 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;
 - xv) 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;

Convention on the Safety of United Nations and Associated Personnel

Article 9(1)

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.

2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature.



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