

# The legal framework of humanitarian access in armed conflict

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## **Abstract**

*Obtaining and maintaining humanitarian access to populations in need by humanitarian actors is a challenge. A wide range of constraints on humanitarian access exist, including ongoing hostilities or an otherwise insecure environment, destruction of infrastructure, often onerous bureaucratic requirements, and attempts by parties to armed conflict to block access intentionally. The difficulties that these constraints present to humanitarians are frequently compounded by a lack of familiarity – on the part of states, non-state armed groups, and humanitarian relief organizations – with the legal framework. The main purpose of this article is to lay out the existing international legal framework regulating humanitarian access in situations of armed conflict.*

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## **The challenge: to obtain and maintain humanitarian access**

Humanitarian access<sup>1</sup> to populations in need in conflict zones has become more difficult and complex in many cases in recent years and is viewed by many

\* This article reflects the views of the author alone and not necessarily those of the Swiss Federal Department of Foreign Affairs. The author thanks Damaris Carnal for her valuable comments.

humanitarian agencies as the most significant current challenge for humanitarian action to overcome in the future. Why is that so?

On the one hand, many of today's armed conflicts have become fragmented and complex, with many different groups fighting each other.<sup>2</sup> Complexity also arises when protracted crises overlap with conflicts and/or when a natural disaster strikes a country that already suffers from conflict. Most of today's armed conflicts are non-international, and humanitarian activities are sometimes denied because they are perceived as a threat to state sovereignty.

On the other hand, the number of humanitarian organizations has increased greatly. This means that more co-ordination and negotiation of humanitarian access is needed. In addition, the lines between military, political, and humanitarian operations have gradually been blurred. If one or more parties to a conflict, or parts of the population, start to perceive humanitarian actors as instruments of a political agenda, access to those in need can become difficult or impossible. Humanitarian workers are even at an increased risk of becoming an object of attack themselves because of these blurred lines.<sup>3</sup>

The difficulties that these constraints present to humanitarians are frequently compounded by a lack of familiarity – on the part of states, non-state armed groups, and humanitarian relief organizations – with the legal framework. The main purpose of this article is therefore to lay out the existing international legal framework regulating humanitarian access in situations of armed conflict, even though access constraints are rarely the result of purely legal obstacles.<sup>4</sup>

## **Reference sources: the *Handbook* and the *Field Manual on Humanitarian Access in Situations of Armed Conflict***

What reference sources on humanitarian access exist? The Swiss Federal Department of Foreign Affairs (FDFA), together with partners, has created two reference documents on humanitarian access in situations of armed conflict: the *Handbook on the Normative Framework of Humanitarian Access in Situations of*

1 The notion of 'humanitarian access' is not defined in international law. Here, humanitarian access is understood as a precondition for effective humanitarian assistance, which requires, to the extent discussed hereafter, the consent of the state or the entity controlling a territory (a non-state armed group). Where the need for such assistance is sustained over a period of time, the term should encompass not only access for goods and services to reach the beneficiaries rapidly but also the maintenance of such access as long as necessary.

2 Keynote address by Dr. Jakob Kellenberger, the President of the ICRC, during the 31st International Conference of the Red Cross and Red Crescent, Geneva, 28 November 2011, p. 2f., available at: [http://www.rcrcconference.org/docs\\_upl/en/Speech\\_ICRC\\_President\\_EN.pdf](http://www.rcrcconference.org/docs_upl/en/Speech_ICRC_President_EN.pdf) (last visited December 2011).

3 See, for example, Fiona Terry, 'The International Committee of the Red Cross in Afghanistan: reasserting the neutrality of humanitarian action', in *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, pp. 173–188; Antonio Donini, 'Between a rock and a hard place: integration or independence of humanitarian action?', in *International Review of the Red Cross*, Vol. 93, No. 881, March 2011, pp. 141–157.

4 This article does not purport to offer an exhaustive analysis of the issues raised in its various parts.

*Armed Conflict and the Field Manual of Humanitarian Access in Situations of Armed Conflict.*<sup>5</sup>

The protection of civilians in armed conflict is a central component of Switzerland's foreign policy. The FDFA has therefore recently developed a strategy in this field.<sup>6</sup> One objective of this strategy is that humanitarian access to populations in need is guaranteed.<sup>7</sup> As early as August 2006, during the Stockholm Conference for Lebanon's Early Recovery, Switzerland announced its commitment to develop further the subject of humanitarian access. Later, the FDFA convened an expert meeting in Montreux from 30 June to 1 July 2008, to which governmental and military experts, academics, and humanitarian actors were invited, with the objective to identify the main constraints on access, and to think about means to overcome these difficulties at legal, political, and operational levels.<sup>8</sup> Among the constraints on humanitarian access identified by participants were the lack of clarity regarding the existing legal obligations on access for humanitarian actors and the need to create a practical tool on humanitarian access.

Based on the conclusions of the meeting in Montreux, a consultation group with representatives of the FDFA, the International Committee of the Red Cross (ICRC), the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), and Conflict Dynamics International was established in order to give advice on the elaboration of a *Handbook* on the normative framework of humanitarian access in situations of armed conflict and a *Field Manual* with a structured approach and practical guidance for humanitarian practitioners. The legal analysis of humanitarian access in this article is based on material in this *Handbook*.

## The international legal framework: why it matters

It is important to be familiar with the international legal framework (i.e. general international law, international humanitarian law, international human rights law, and international criminal law) because access is blocked in many crisis situations. The international legal framework is a tool to ensure humanitarian access,<sup>9</sup> and for

5 These two documents were presented during a side event of the 31st International Conference of the Red Cross and Red Crescent on 29 November 2011. They are available at: <http://www.eda.admin.ch/eda/en/home/doc/publi/phumig.html> (last visited December 2011).

6 Strategy of the Federal Department of Foreign Affairs (FDFA) 2009–2012 on the Protection of Civilians in Armed Conflict, available at: <http://www.eda.admin.ch/etc/medialib/downloads/edazen/doc/publi/aussen.Par.0009.File.tmp/EDA%20Schutz%20der%20Zivilbevölkerung%20e.pdf> (last visited December 2011).

7 *Ibid.*, objective 2.2., p. 19.

8 State experts from Argentina, Canada, the Democratic Republic of Congo, Egypt, India, Iraq, Jordan, South Africa, Sri Lanka, Sudan, and Switzerland took part in the meeting, as well as representatives of international and non-governmental organizations. Participants expressed their views in a personal capacity. The discussion was limited to situations of armed conflict and was not focused on any specific context.

9 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report prepared for the 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011, p. 24.

humanitarian negotiators it is an important basis for seeking agreement on access.<sup>10</sup> The legal framework specifies the obligations and rights of parties to armed conflict, for states not participating in the conflict, and for humanitarian actors. It also identifies conditions under which humanitarian actors may or may not gain access to people in need of assistance. It provides an objective set of rules, to which different actors can each or jointly refer in securing and sustaining access.

The international legal framework is described below, a section at a time, in order to give answers to the following questions:

- 1 Who is primarily responsible for ensuring the basic needs of affected populations?
- 2 If populations remain in need, what can humanitarian actors do?
- 3 To what extent must relief actions be consented to, and what are the conditions under which relief actions must be conducted under international humanitarian law?
- 4 What human rights obligations exist with regard to humanitarian access?
- 5 What are the consequences of violations?

The article finishes by reflecting on whether the current legal framework is an adequate tool to ensure humanitarian access. Finally, the legal framework on humanitarian access is summarized in a separate box.

## **Who is primarily responsible for ensuring the basic needs of affected populations?**

Under international law, states bear the primary responsibility for ensuring the basic needs of affected populations. This is a consequence of the principle of sovereignty<sup>11</sup> and has been confirmed in international practice.<sup>12</sup> For example, the UN General Assembly Resolution 46/182 (1991) (Guiding Principles on Humanitarian Assistance) confirms that:

Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory.<sup>13</sup>

10 See generally Gerard McHugh and Manuel Bessler, *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners*, OCHA, New York, 2006.

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

12 See UNGA Res. 43/131 (1988), 8 December 1988; UNGA Res. 45/100 (1990), 14 December 1990; UNGA Res. 46/182 (1991), 19 December 1991; UNSC Res. 1706 (2006), 31 August 2006, para. 12; UNSC Res. 1814 (2008), 15 May 2008, para. 17; UNSC Res. 1894 (2009), 11 November 2009, preambular paras. 5 and 6; UNSC Res. 1906 (2009), 23 December 2009, para. 3; UNSC Res. 1910 (2010), 28 January 2010, preambular para. 16; UNSC Res. 1923 (2010), 25 May 2010, para. 2; and UNSC Res. 1970 (2011), 26 February 2011, preambular para. 9.

13 UNGA Res. 46/182 (1991), 19 December 1991, Annex, para. 4.

## If populations remain in need, what can humanitarian actors do?

The issue of access for humanitarian actors becomes acute when the state is unwilling or unable to live up fully to its legal responsibility to ensure the basic needs of affected populations in times of armed conflict. The question then is of what humanitarian actors can do to satisfy those needs. The answer is that they can offer their services according to international humanitarian law, which contains rules on humanitarian assistance and access to civilian populations affected by armed conflicts.<sup>14</sup>

Offers of relief action cannot be considered as foreign intervention in the receiving state's internal affairs insofar as the principles of humanity,<sup>15</sup> impartiality,<sup>16</sup> and non-discrimination<sup>17</sup> are respected.<sup>18</sup> The International Court of Justice (ICJ) noted that:

There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.<sup>19</sup>

Humanitarian actors can therefore offer their services but do not have an obligation to do so.<sup>20</sup> To avoid being considered an unlawful interference in a state's internal affairs, humanitarian assistance must be provided in accordance with humanitarian principles.

14 Art. 3(2) common to the four Geneva Conventions; GC IV, Arts. 10 and 59(2); AP I, Art. 70(1); AP II, Art. 18(1) and (2).

15 The starting point must be the human suffering and the offer must be exclusively dedicated to addressing humanitarian needs.

16 The principle of impartiality requires that persons participating in the operation do not take side for reasons of interest, prejudice, or personal sympathy. Jean S. Pictet, *The Fundamental Principles of the Red Cross Proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1975: Commentary*, Henry Dunant Institute, Geneva, 1979, pp. 48ff.

17 The principle of non-discrimination prohibits distinctions made to the detriment of certain persons 'for the sole reason that they belong to some specific category' based on criteria such as race, religion, or political opinion. J. S. Pictet, above note 16, p. 38. However, the principle of non-discrimination does not exclude positive actions in favour of particularly vulnerable groups of the population. See Yves Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 2821.

18 UNGA Res. 46/182 (1991), 19 December 1991, Annex, para. 2. The clearest manifestation of the principle of non-intervention is Art. 2(4) of the UN Charter, which prohibits Member States from using force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

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

20 Yoram Dinstein, 'The right to humanitarian assistance', in *Naval War College Review*, Vol. 53, No. 4, 2000, pp. 77–92.

## To what extent must relief actions be consented to, and what are the conditions under which relief actions must be conducted under international humanitarian law?

The extent to which relief actions must be consented to and the conditions under which relief actions must be conducted will be outlined according to the three situations that international humanitarian law regulates: international armed conflict (other than occupation), non-international armed conflict, and occupation. Although military occupation is a form of international armed conflict, this part will be analysed at the end because humanitarian access is regulated quite differently in this situation.

### Consent and conditions in international armed conflict (other than occupation)

In territories other than occupied territories, humanitarian operations are subject to the consent of the parties concerned according to Article 70(1) of Additional Protocol I of 1977. This precondition balances the interests of the civilian population and the interests of the receiving state.<sup>21</sup> The draft versions of the Additional Protocols of 1973 contained an obligation to accept relief, if the relief met certain requirements, such as impartiality and humanity.<sup>22</sup> However, in order to protect the sovereignty of the state accepting relief, the requirement of consent was added during the diplomatic conference of 1974–1977.<sup>23</sup> State representatives nonetheless clearly stated that this condition did not imply that the affected parties had absolute and unlimited freedom to refuse their agreement to relief actions.<sup>24</sup>

21 Heike Spieker, 'The right to give and receive humanitarian assistance', in Hans-Joachim Heintze and Andrej Zwitter (eds), *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism*, Springer Verlag, Berlin/Heidelberg, 2011, p. 13.

22 Art. 62(1) of Draft Additional Protocol I to the Geneva Conventions (1973): 'If the civilian population is inadequately supplied, in particular, with foodstuffs, clothing, medical and hospital stores and means of shelter, the Parties to the conflict *shall agree* to and facilitate those relief actions which are exclusively humanitarian and impartial in character and conducted without any adverse distinction' (emphasis added). ICRC, 'Draft Additional Protocols to the Geneva Conventions of 12 August 1949', Geneva, 1973, p. 78, available at: [http://www.loc.gov/rr/frd/Military\\_Law/pdf/RC-Draft-additional-protocols.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/RC-Draft-additional-protocols.pdf) (last visited December 2011). See also Art. 33(1) of Draft Additional Protocol II to the Geneva Conventions (1973): 'If the civilian population is inadequately supplied, in particular, with foodstuffs, clothing, medical and hospital stores and means of shelter, the parties to the conflict *shall agree* to and facilitate, *to the fullest possible extent*, those relief actions which are exclusively humanitarian and impartial in character and conducted without any adverse distinction' (emphasis added). *Ibid.*, p. 165.

23 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH), Geneva, 1974–1977, available at: [http://www.loc.gov/rr/frd/Military\\_Law/RC-dipl-conference-records.html](http://www.loc.gov/rr/frd/Military_Law/RC-dipl-conference-records.html) (last visited December 2011).

24 The Swiss representative said that his delegation would have preferred to delete the words 'subject to the agreement of the Parties concerned', which it felt conflicted with the philosophy of the fourth Geneva Convention. The German representative stressed that a party refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones. See CDDH, above note 23, Vol. 12, CDDH/II/SR.87, p. 336, paras. 26–27, available at: [http://www.loc.gov/rr/frd/Military\\_Law/pdf/RC-records\\_Vol-12.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/RC-records_Vol-12.pdf) (last visited December 2011).

To what extent is a state obliged to accept relief? As a minimum, consent cannot be refused on arbitrary grounds.<sup>25</sup> A refusal must be based on valid reasons.<sup>26</sup> Whether a decision not to accept assistance is arbitrary depends on the circumstances and should be determined on a case-by-case basis.<sup>27</sup> In extreme situations, where the lack of relief would amount to starvation, no valid reasons can be invoked to justify the refusal.<sup>28</sup> Article 54(1) of Additional Protocol I provides that 'starvation of civilians as a method of warfare is prohibited'.<sup>29</sup>

What are the conditions under which relief actions must be conducted? According to Article 70(2) of Additional Protocol I, all states must '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'. This provision applies to the whole civilian population (not only to vulnerable groups), and relief consignments include all supplies essential to the survival of the population (not only to specific categories of goods).<sup>30</sup> Additional Protocol I further

- 25 This view is confirmed in soft law instruments. The Guiding Principles on Internal Displacement confirm that consent to assistance provided by humanitarian organizations and other appropriate actors 'shall not be arbitrarily withheld [by national authorities], particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance . . .' (Principle 25). In 1998, the UN Secretary-General stated that '[h]umanitarian access is, inter alia, a right of refugees, displaced persons and other civilians in conflict situations and *should not be seen as a concession to be granted to humanitarian organizations on an arbitrary basis*': UN Secretary-General, Report on Protection for Humanitarian Assistance to Refugees and Others in Conflict Situations, UN Doc. S/1998/883 (1998), para. 15 (emphasis added). 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*, Session of Bruges, Paris, Vol. 70, Part I, 2003, p. 563; Robert Kolb, 'De l'assistance humanitaire: la résolution sur l'assistance humanitaire adoptée par l'Institut de droit international à sa session de Bruges en 2003', in *International Review of the Red Cross*, Vol. 86, No. 856, 2004, p. 869.
- 26 Reasons of imperative military necessity may be considered valid reasons according to Katja Luopajarvi, 'Is there an obligation on states to accept international humanitarian assistance to internally displaced persons under international law?', in *International Journal of Refugee Law*, Vol. 15, No. 4, 2003, p. 689.
- 27 Institute of International Law, *Resolution of the Institute of International Law on Humanitarian Assistance*, Bruges Session 2003, Art. VIII.1, concludes that 'Affected States are under the obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare'.
- 28 Rebecca Barber argues that there is an obligation in customary international law to consent to humanitarian assistance whether or not the denial of that assistance may lead to starvation. See Rebecca Barber, 'Facilitating humanitarian assistance in international humanitarian and human rights law', in *International Review of the Red Cross*, Vol. 91, No. 874, 2009, p. 391.
- 29 This rule is also of a customary nature: see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC and Cambridge University Press, Cambridge, 2005, Rule 53 (hereafter ICRC Study on Customary International Humanitarian Law). For online access to the study, see <http://www.icrc.org/customary-ihl/eng/docs/home> (last visited December 2011). Starvation is understood as 'causing the population to suffer hunger, particularly by depriving it of its sources of food or of supplies'. Y. Sandoz *et al.*, above note 17, para. 2089.
- 30 Art. 17 of GC IV only concerns evacuation of certain vulnerable groups (wounded, sick, infirm, aged persons, children, and maternity cases) and the passage of ministers of all religions, medical personnel, and equipment. Art. 23(1) of GC IV limits relief to particular types of goods and the obligation to allow free passage of other supplies, such as food or clothing, is only for the benefit of particularly vulnerable civilians.

prohibits states from delaying the forwarding of relief consignments and from diverting them from the purpose for which they are intended. Exceptions are permitted only in cases of urgent necessity and if this is in the interest of the population concerned.<sup>31</sup> This means that the delay can only be justified if it is impossible for reasons of security to enter the territory where the receiving population is situated, or to cross some part of the territory of the party allowing the transit, particularly if this is a party to the conflict. According to the Commentary on the Additional Protocols, diverting relief consignments 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 also be justifiable in the case that a natural disaster . . . affected the Party through whose territory the relief consignment was passing, so that the provisions were even more necessary for the victims of this disaster than for those for whom they had initially been intended. However, in this case the consignment should only be diverted with the agreement of the donor.<sup>32</sup>

Parties to the conflict have an obligation to take positive action to protect relief consignments and to facilitate their rapid distribution, as well as a duty to encourage and facilitate effective international co-ordination of the relief actions.<sup>33</sup> However, the parties to the conflict and other States Parties to Additional Protocol I have the right to prescribe technical arrangements, such as pre-determined times and routes.<sup>34</sup> They are also allowed to control the consignments or to ask for the local supervision of the relief action by a Protecting Power or an impartial humanitarian organization.<sup>35</sup>

Relief personnel must be respected, protected, and assisted, to the fullest extent practicable, in carrying out their mission.<sup>36</sup> But relief personnel may not exceed the terms of their mission under any circumstances, and must respect security requirements imposed by the states in whose territory they are working. The mission of those who do not respect these conditions may be terminated.<sup>37</sup>

## Consent and conditions in non-international armed conflict

The issue of humanitarian assistance and access is not expressly addressed in Article 3 common to the four Geneva Conventions. However, article 18(2) of Additional Protocol II provides that relief actions shall be undertaken subject to the

31 AP I, Art. 70(3)(c).

32 Y. Sandoz *et al.*, above note 17, paras. 2845–2847.

33 AP I, Art. 70(4) and (5).

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

35 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 and its nationals in the third state.

36 AP I, Art. 71. It is also a rule of customary international humanitarian law that humanitarian relief personnel and objects must be respected and protected. See ICRC Study on Customary International Humanitarian Law, above note 29, Rules 31, 32, and 56.

37 AP I, Art. 71(4).

consent of the affected state.<sup>38</sup> As in international armed conflicts, where the lack of relief would lead to starvation, no valid reason can be invoked to justify a refusal. Article 14 of Additional Protocol II prohibits starvation of civilians as a method of warfare.

From a practical point of view, the consent of relevant non-state armed groups controlling or operating in the territory in question is necessary for relief actions to be carried out.<sup>39</sup> Nevertheless, to ask a non-state armed group for its consent to humanitarian operations does not constitute recognition, nor does it confer any legal status upon that actor.<sup>40</sup> The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) is innovative in that it refers specifically to armed groups.<sup>41</sup> The treaty states that members of armed groups are prohibited from impeding humanitarian assistance and passage of all relief consignments, equipment, and personnel to internally displaced persons.<sup>42</sup>

According to a customary rule, parties to non-international armed conflicts must facilitate rapid and unimpeded passage of humanitarian relief for civilians in need.<sup>43</sup> In addition, humanitarian relief personnel and objects must be respected and protected, and the freedom of movement of authorized humanitarian relief personnel must be ensured. Their movements may only be temporarily restricted in case of imperative military necessity.<sup>44</sup>

## Consent and conditions during occupation

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 fulfilled. This mainly results from Article 55(1) of the Fourth Geneva Convention, which provides that the Occupying Power has the duty to ensure the provision of food and medical supplies for the civilian population. Article 69(1) of Additional Protocol I further stipulates that the Occupying Power must ensure without adverse distinction the

38 This obligation is also found in customary law. See ICRC Study on Customary International Humanitarian Law, above note 29, 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’.

39 Even though AP II, Art. 18(2) gives the legal government an advantage over the rebel party by requiring the agreement of the ‘High Contracting Party’. See Denise Plattner, ‘Assistance to the civilian population: the development and present state of international humanitarian law’, in *International Review of the Red Cross*, Vol. 32, No. 288, pp. 249–263. See also Joakim Dungel, ‘A right to humanitarian assistance in internal armed conflicts respecting sovereignty, neutrality and legitimacy: practical proposals to practical problems’, in *Journal of Humanitarian Assistance*, 2004, available at: <http://sites.tufts.edu/jha/archives/838> (last visited December 2011).

40 See, for example, Common Art. 3(4).

41 According to Art. 1(e) of the Kampala Convention, ‘“Armed Groups” means dissident armed forces or other organized armed groups that are distinct from the armed forces of the state’. This treaty has not yet entered into force as binding international law.

42 Kampala Convention, Art. 7(5)(g). It is important to note that this treaty includes a disclaimer to avoid the treaty being used as proof of legitimacy for the groups addressed: see Art. 7(1).

43 ICRC Study on Customary International Humanitarian Law, above note 29, Rule 55.

44 *Ibid.*, Rules 31, 32, and 56.

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.<sup>45</sup> While imposing clear obligations in this regard, the Fourth Geneva Convention and Additional Protocol I do not ignore the material difficulties that the Occupying Power may face in practice. These instruments provide that the Occupying Power is bound to meet these needs '[t]o the fullest extent of the means available to it'.<sup>46</sup> Financial constraints or transport problems, for instance, may seriously affect the concerned authorities' capabilities to meet their obligations.<sup>47</sup>

However, if the Occupying Power is not in a position to fulfil its duty to provide the civilian population under its control with essential supplies, it must agree to relief schemes on behalf of this population.<sup>48</sup> This obligation is unconditional.<sup>49</sup> The Occupying Power must either ensure that the civilian population receives essential supplies or agree to relief actions.

The Occupying Power has the obligation to facilitate relief actions by all the means at its disposal.<sup>50</sup> Occupying Powers must also facilitate the rapid distribution of relief consignments, which must be exempt from all charges, taxes, or customs duties except if they are necessary for the economy of the occupied territory.<sup>51</sup> Relief consignments must not be diverted from the purpose for which they are intended. Exceptions to this rule are allowed in cases of urgent necessity only and if this is in the interest of the occupied population and with the consent of the Protecting Power.<sup>52</sup> The rights and duties of relief personnel also apply in times of occupation.<sup>53</sup>

In addition, the Fourth Geneva Convention sets out obligations for third states, including, most notably, those through whose territory relief consignments must pass. Parties to the Convention must permit the free passage of such consignments and guarantee their protection.<sup>54</sup> However, authorities granting the authorization are allowed to check the consignments to satisfy themselves that the operation is strictly humanitarian, and may regulate their passage according to prescribed times and routes.<sup>55</sup>

45 These obligations may be conceived as 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. Hague Regulations concerning the Laws and Customs of War on Land, 18 October 1907, Art. 43.

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

47 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 310.

48 GC IV, Art. 59(1).

49 J. S. Pictet, above note 47, p. 320; Y. Sandoz *et al.*, above note 17, p. 813.

50 GC IV, Art. 59(1).

51 GC IV, Art. 61(2).

52 GC IV, Art. 60. On urgent necessity, see comments above under 'Control in international armed conflict (other than occupation)'.

53 AP I, Art. 69(2) in connection with AP I, Art. 71. See comments above under 'Control in international armed conflict (other than occupation)'.

54 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 International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995, para. 103, which is widely recognized to reflect international customary law.

55 GC IV, Art. 59(4).

## What human rights obligations exist with regard to humanitarian access?

International human rights law continues to apply, alongside international humanitarian law, in times of armed conflict, whether of an international or of a non-international character. The two are complementary and not mutually exclusive.<sup>56</sup> The major human rights law instruments do not refer explicitly to humanitarian assistance and access. However, some references are found in the Convention on the Rights of the Child,<sup>57</sup> the African Charter on the Rights and Welfare of the Child,<sup>58</sup> and the Kampala Convention.<sup>59</sup>

Generally, states have an obligation to ensure the minimum essential levels of all economic, social, and cultural rights at all times.<sup>60</sup> In determining the contents of those obligations, the UN Committee on Economic, Social and Cultural Rights (CESCR) has referred to essential food, primary health care, and basic shelter and housing.<sup>61</sup> States must respect, protect, and fulfil these rights.<sup>62</sup> The right to food and the right to health are described as examples.

Regarding the right to food,<sup>63</sup> CESCR has 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

56 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 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.

57 UN Convention on the Rights of the Child, Art. 22(1).

58 African Charter on the Rights and Welfare of the Child, Art. 23(1).

59 Kampala Conventions, Art. 5(6) and (7), Art. 7(5)(b) and (5)(g).

60 The International Covenant on Economic Social and Cultural Rights (ICESCR) does not allow for derogation in times of public emergency, and the general nature of state obligations in the realization of these rights is found in Art. 2(1) of the 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'.

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

62 CESCR, General Comment No. 12 on the right to adequate food, para. 15; CESCR, General Comment No. 15 on the right to water, para. 20; CESCR, General Comment No. 14 on the right to the highest attainable standard of health, para. 33; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22–26 January 1997, para. 6.

63 ICESCR, Art. 11. See also Jelena Pejić, 'The right to food in situations of armed conflict: the legal framework', in *International Review of the Red Cross*, Vol. 83, No. 844, 2001, pp. 1097–1109.

group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly.<sup>64</sup>

The minimum core obligations inherent to the right to health<sup>65</sup> require states at least to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups; to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone; to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water.<sup>66</sup>

It can be argued that international human rights law, and particularly the protections enshrined in the International Covenant on Economic Social and Cultural Rights (ICESCR), provides a more substantive protection of humanitarian assistance than does international humanitarian law in situations where the restrictions to humanitarian assistance are attributable to State Parties to the ICESCR.<sup>67</sup>

States must seek international assistance indispensable for the survival and the fulfilment of a population's essential needs.<sup>68</sup> A state that claims that it is unable to fulfil its legal obligations for reasons beyond its control must show that it has made 'every effort to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.<sup>69</sup> In determining whether a state is truly unable to fulfil its obligations under human rights law, it is necessary to consider both the resources existing within a state and those available from the international community.<sup>70</sup>

## What are the consequences of violations?

A state is responsible for violations of international law regarding humanitarian access in situations of armed conflict where the violations are attributable to the state.<sup>71</sup> The UN Security Council has addressed violations of international law by

64 CESCR, General Comment No. 12, para. 15.

65 ICESCR, Art. 12.

66 CESCR, General Comment No. 14, para. 43.

67 R. Barber, above note 28, p. 395.

68 Institute of International Law, Resolution of the Institute of International Law on Humanitarian Assistance, Bruges Session 2003, Art. III.3; R. Kolb, above note 25, p. 864. See also Kampala Convention, Art. 5(6).

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

70 CESCR, General Comment No. 3, para. 13.

71 The draft articles on state responsibility of the International Law Commission recall the general principle of international law that a breach of a state's international obligation constitutes an international wrongful act, which entails the international responsibility of that state. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Arts 1 and 2.

non-state armed groups on numerous occasions.<sup>72</sup> Moreover, international criminal law prohibits certain conduct and holds individual perpetrators accountable for violations of these rules.

## War crimes

The denial of humanitarian assistance and access to civilians may under certain conditions constitute the war crime of starvation. International humanitarian law prohibits the starvation of civilians as a method of warfare in both international and non-international armed conflict.<sup>73</sup> The Rome Statute of the International Criminal Court draws a distinction between international and non-international armed conflict as regards the starvation of civilians. In international armed conflict, the intentional starvation of civilians as a method of warfare through deprivation of objects indispensable to their survival is prohibited, 'including wilfully impeding relief supplies as provided for under the Geneva Conventions'.<sup>74</sup> In non-international armed conflict, starvation as a method of warfare does not constitute a war crime under the Statute. However, starvation of civilians as a method of warfare constitutes a war crime under several national legislations, and states have denounced alleged instances of the use of starvation in non-international armed conflicts.<sup>75</sup>

Attacking persons or objects involved in the provision of humanitarian assistance – provided that they are not directly participating in hostilities – is a war crime according to the Rome Statute, if such attacks take place during, and in connection with, an international or non-international armed conflict.<sup>76</sup> States have committed themselves to ensure that perpetrators of attacks against humanitarian personnel are held accountable, by encouraging disciplinary measures and criminal prosecutions.<sup>77</sup>

72 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), 21 December 1998, para 5. See also UNSC Res. 1478 (2003), 6 May 2003, para. 8; UNSC Res. 1649 (2005), 21 December 2005, preambular paras. 4 and 5; UNSC Res. 1674 (2006), 28 April 2006 para. 22; UNSC Res. 1794 (2007), 21 December 2007, para. 17; UNSC Res. 1936 (2010), 5 August 2010, preambular para 14.

73 AP I, Art. 54; AP II, Art. 14; ICRC Study on Customary International Humanitarian Law, above note 29, Rule 53.

74 Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.138/9, Art. 8(2)(b)(xxv).

75 ICRC Study on Customary International Humanitarian Law, above note 29, Vol. I, Rule 53, pp. 187–188. This could indicate the emergence of a customary criminalization of starvation of the civilian population in non-international armed conflicts. See also J. Dungal, above note 39.

76 The Rome Statute defines it as follows in Art. 8(2)(b)(iii) and (e)(iii): 'Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'.

77 31st International Conference of the Red Cross and Red Crescent, Resolution 2: '4-Year Action Plan for the Implementation of International Humanitarian Law', 31IC/11/R2, available at: [http://www.rccconference.org/docs\\_upl/en/R2\\_4-Year\\_Action\\_Plan\\_EN.pdf](http://www.rccconference.org/docs_upl/en/R2_4-Year_Action_Plan_EN.pdf) (last visited December 2011).

## Crimes against humanity

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.<sup>78</sup> They include murder, extermination, torture, persecution, and other inhumane acts.<sup>79</sup> The Rome Statute defines the crime against humanity of ‘extermination’ as including ‘the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population’.<sup>80</sup> The individuals responsible can be prosecuted in national and international courts.

## Conclusion: is the current legal framework an adequate tool to ensure humanitarian access?

The tension between the needs of victims to receive humanitarian assistance, the interests of the international community in providing relief, and the right of the state to decide who and what can enter its territory is obvious.<sup>81</sup> Generally, international humanitarian law demands that a balance be struck between military necessities and the requirements of humanity.<sup>82</sup> The difficult questions with regard to humanitarian access are: how exactly is that balance to be struck and what are possible areas of further clarifications?

The extent to which parties to both international and non-international armed conflicts are bound to accept relief actions could be clarified. It could be defined on which grounds – besides starvation – consent cannot be refused.<sup>83</sup> Or, positively, an obligation to accept relief could be determined.<sup>84</sup> Clarifications on the scope and limitations of the right of control that the parties are allowed to exercise on relief operations would also be helpful. For instance, the extent to which humanitarian organizations are entitled to enjoy freedom of movement in their activities and the correlative right of the parties to armed conflicts to restrict their

78 See Christa Rottensteiner, ‘The denial of humanitarian assistance as a crime under international law’, in *International Review of the Red Cross*, Vol. 81, No. 835, 1999, pp. 555–582.

79 Rome Statute, Art. 7(1).

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

81 States may, for example, declare that there is no need for humanitarian assistance in order to limit humanitarian access. Ruth Abril Stoffels, ‘Legal regulation of humanitarian assistance in armed conflict: achievements and gaps’, in *International Review of the Red Cross*, Vol. 86, No. 855, 2004, pp. 537–538.

82 See, for example, AP I, Art. 51, on the protection of the civilian population; Daniel Thürer, *International Humanitarian Law: Theory, Practice, Context*, Hague Academy of International Law, The Hague, 2011, p. 69.

83 States have committed themselves to adopt adequate measures at a domestic level, including national legislation, to comply with their international obligations concerning arbitrary obstruction of humanitarian assistance. See 31st International Conference of the Red Cross and Red Crescent, Resolution 2, above note 77.

84 There is also a debate on a potential right to impose assistance without the consent of the parties concerned. Spieker concludes that, to date, a ‘right to access’ has not crystallized in customary international law. See H. Spieker, above note 21, pp. 17–18.

freedom for reasons of imperative military necessity could be defined more precisely.

Overall, the current legal framework is an adequate tool to ensure humanitarian access but the abovementioned areas could be clarified. This said, it needs to be pointed out that nothing prevents humanitarian actors from seeking to obtain greater access than that specified in international law. International law only represents the limits or minimum standards of humanitarian access. The key is to use the most persuasive arguments that allow the provisions of international law on humanitarian access to be implemented and the well-being of civilian populations secured.<sup>85</sup> Even though access constraints are rarely the result of purely legal obstacles (humanitarian access is often complicated by administrative restrictions, such as difficulties in obtaining visas, import authorizations for relief supplies, or repeated controls), the legal framework is a useful tool to obtain and secure access to affected populations. This implies that this legal framework must be widely known and disseminated,<sup>86</sup> and both humanitarian actors and those who can prevent access need to be trained in this legal framework.<sup>87</sup>

## Summary

The following points summarize the international legal framework on humanitarian access in armed conflict as discussed in this article:

- States bear the primary responsibility for ensuring the basic needs of affected populations.
- Humanitarian actors can offer their services but do not have an obligation to do so. To avoid being considered unlawful interference in a state's internal affairs, humanitarian assistance must be provided in accordance with humanitarian principles.
- In territories other than occupied territories, humanitarian operations are subject to the consent of the parties concerned. The legal challenge is to determine in each specific case whether concerned states may invoke valid reasons to refuse relief actions on their territories. It must be established under which criteria the refusal may be considered as arbitrary, and therefore

85 The UN Office for the Coordination of Humanitarian Affairs (OCHA) published a study in 2011 that highlights seven categories of good practices for securing and sustaining humanitarian access in high-risk environments. See Jan Egeland, Adele Harmer, and Abby Stoddard, *To Stay and Deliver: Good Practice for Humanitarians in Complex Security Environments*, OCHA, New York, 2011, pp. 18ff. 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. Furthermore, UNITAR'S Operational Satellite Applications Programme (UNOSAT) – a technology-intensive programme delivering imagery analysis and satellite solutions – can help humanitarian actors within and outside the UN to help make a difference in critical areas such as humanitarian relief. See <http://www.unitar.org/unosat/> (last visited December 2011).

86 See GC I, Art. 47; GC II, Art. 48; GC III, Art. 127; GC IV, 144; AP I, Art. 83; AP II, Art. 19.

87 Objective one of the 4-Year Action Plan for the Implementation of International Humanitarian Law adopted by the 31st International Conference of the Red Cross and Red Crescent is to enhance access by civilian populations to humanitarian assistance in armed conflict. See Resolution 2, above note 77.

contrary to relevant provisions of international humanitarian law. In extreme situations, where the lack of relief would amount to starvation, there is no valid reason justifying a refusal.

- To ask a non-state armed group for its consent to the provision of humanitarian assistance does not constitute recognition of, nor does it confer any legal status upon, that actor.
- In occupied territories, there is a clear obligation for the Occupying Power either to ensure adequate supplies to the population or to agree to and facilitate relief actions, if all or part of the population is inadequately supplied.
- Humanitarian relief personnel and objects must be respected and protected, and the freedom of movement of authorized humanitarian relief personnel must be ensured. Parties to the conflict have the right to prescribe technical arrangements, such as pre-determined times and routes. Relief personnel must respect security requirements imposed by the states in whose territory they are working.
- 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. A state that claims that it is unable to fulfil its legal obligations for reasons beyond its control must show that it has made every effort to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.
- A state is responsible for violations of international law regarding humanitarian access where the violations are attributable to the state.
- The denial of humanitarian assistance and access may constitute a crime under international criminal law. Relevant examples include the war crimes of starvation and of launching attacks against persons involved in humanitarian assistance. The individuals responsible can be prosecuted in national and international courts.
- The current legal framework – which should be widely known and disseminated – is an adequate tool to ensure humanitarian access but could be clarified further.