

# THE DENIAL OF HUMANITARIAN ASSISTANCE IN ARMED CONFLICT



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## 1 Introduction

Recent conflicts such as those in Sudan, Sri Lanka and Gaza highlight the importance of providing assistance to civilians in need during time of armed conflict. With the passing celebration of the 60<sup>th</sup> anniversary of the Geneva Conventions<sup>1</sup> on 12 August 2009, it is important to look into the legal obligations incumbent on States under international humanitarian law today, particularly in the light of allegations of instances of the denial of humanitarian assistance in such conflicts. It seems that the debates in legal literature have placed a greater focus on the provision of humanitarian assistance by the use of force,<sup>2</sup> rather than emphasizing and highlighting the legal duty of the State concerned to provide it. This paper will explore what constitutes humanitarian assistance, who is entitled to it, and ultimately it will assess the legal duty of States<sup>3</sup> to provide humanitarian assistance to the civilian population under their control. The paper examines four main areas: (i) where a State may legally deny humanitarian assistance; (ii) where a State may lawfully or unlawfully impede humanitarian assistance; (iii) the reckless denial of humanitarian assistance by States; and (iv) the denial of humanitarian assistance as an international crime. In each of these areas the paper will offer a review of the obligations on States under international humanitarian law and provide an analysis of these. It will also highlight those provisions in international humanitarian law which may need more clarification and those areas in which gaps may exist in the law.

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<sup>1</sup> The First, Second, Third and Fourth Geneva Conventions are hereafter referred to in the footnotes as GC I, GC II, GC III and GC IV respectively. GC I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; GC II: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; GC III: Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949; GC IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

<sup>2</sup> This debate (often termed as 'humanitarian intervention') focuses on when humanitarian assistance is provided by force, without the consent of the concerned State, by another State, a group of States or by the United Nations Security Council acting under Chapter VII of the 1945 UN Charter.

<sup>3</sup> For the purposes of this paper, "States" (also referred to in the Geneva Conventions as "High Contracting Parties") means States which are Party to the four Geneva Conventions, and also includes States Party to the two Additional Protocols, hereafter referred to in the footnotes as API and APII. AP I: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; APII: Protocol Additional to the Geneva Conventions of 12 August, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), 8 June 1977.

In times of armed conflict it can be difficult to get assistance to certain areas, for example, areas that are under siege or blockade or where the fighting is most violent. Issues of safety for those providing the humanitarian assistance come into play, as does obtaining the cooperation (and even in some cases, consent) of the party to a conflict<sup>4</sup> holding effective control of the territory in which humanitarian assistance is needed. For example, if an armed group, which is fighting the government authorities of the State, controls a large part of State territory, then the provision of humanitarian assistance may in practice require the cooperation and consent of both warring parties (i.e., both the State authorities and the armed group).

The legal requirements under international humanitarian law can often be quite different to the reality on the ground. In cases where consent is not required under law, it is often needed to ensure the safe arrival of aid. Situations become increasingly complex when one or neither party to the conflict agrees to provide, or allow for the provision of humanitarian assistance. Even more difficulties arise in situations where humanitarian assistance is permitted but is impeded, for example, where it is diverted from its intended destination or unable to get there due to mine laying. In these types of situations, the cooperation of both parties to the conflict can be imperative in securing a safe and secure route for aid convoys carrying humanitarian assistance to those in need.

Under international law States have an obligation to respect, protect and fulfil the right to life of all individuals within its territory and subject to its jurisdiction.<sup>5</sup> This requires that States must refrain from directly or indirectly violating this right, but also ensure this right is not violated.<sup>6</sup> Whilst it is not the intention of this paper to analyze the relationship between international human rights law and international humanitarian law, it is important to note that the right to life and other basic fundamental rights of the individual are subject to different conditions under international humanitarian law. The

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<sup>4</sup> A “party to a conflict” is one which is directly participating in an armed conflict. It can be a State Party to the Geneva Conventions and/or their two Additional Protocols, a State non-Party or a non-State actor (for an explanation of a non-State actor, see footnote 14 of this paper).

<sup>5</sup> Article 3, Universal Declaration of Human Rights 1948; Article 6, International Covenant on Civil and Political Rights 1966.

<sup>6</sup> Stoffels, Ruth Abril. *Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps*. International Review of the Red Cross. No.855 (2004), p.517.

normally non-derogable right to life can be limited in times of armed conflict.<sup>7</sup> When a State denies a civilian population humanitarian assistance which results in the loss of life, does it violate its duties under international humanitarian law and to what extent?

International humanitarian law is also known as the law of armed conflict. Treaty law and customary international humanitarian law<sup>8</sup> are the main sources of international humanitarian law. The main treaties of this area of law include the Hague Conventions,<sup>9</sup> the Geneva Conventions and their Additional Protocols. Many of the provisions in the Hague Conventions and the Geneva Conventions are considered to be a part of customary international humanitarian law.<sup>10</sup> The phrase normally referred to as the “Martens Clause” was incorporated into Article 1(2) Additional Protocol I and places both civilians and combatants under the “protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience”.<sup>11</sup> The Martens Clause is important because, through its reference to customary law, it stresses the importance of customary norms in the regulation of armed conflicts.<sup>12</sup> In addition, its reference to "the principles of humanity" and "the dictates of the public conscience" must be borne in mind when considering the provision of humanitarian assistance to those in need.

The principal instruments of international humanitarian law in use today are the Geneva Conventions and their Additional Protocols, international treaties to which only States may become Party to.<sup>13</sup> 194 States are Party to the four Geneva Conventions and they therefore enjoy universal acceptance. Additional Protocols I and II are slightly less widely embraced, with 168 and 164 State Parties respectively. Should a State decide to

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<sup>7</sup> “Non-derogable rights” are rights which cannot be violated under any circumstances. See: *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996, para.25, p.240.

<sup>8</sup> A rule is customary if it reflects state practice and when it is clear the international community requires such practice as a matter of law. See Cassese (2005) Chapter 8, p.153-169.

<sup>9</sup> Hague Convention II: Convention with Respect to the Laws and Customs of War on Land, 29 July 1899; Hague Convention IV: Convention respecting the Laws and Customs of War on Land, 18 October 1907.

<sup>10</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996, para.79, p.257.

<sup>11</sup> It was also incorporated into GC I: Art. 63; GC II: Art. 62; GC III: Art. 142; GC IV: Art. 158 and the Preamble to APII.

<sup>12</sup> Ticehurst, Rupert. *The Martens Clause and the Laws of Armed Conflict*. International Review of the Red Cross. No. 317 (1997), p.125-134.

<sup>13</sup> A State may become Party to a treaty by means of signature plus ratification, accession and succession.

become a Party to a treaty, it therefore consents to be bound by the rules and obligations contained within it. However, all States and non-State actors<sup>14</sup> involved in an armed conflict, including States not bound by treaty law, are bound by those rules which have crystallized into customary international humanitarian law.

Should one of the States participating in an armed conflict not be a Party to the Geneva Conventions, in accordance with Common Article 2 of the Geneva Conventions the States which are Parties remain bound by it in their mutual relations. Furthermore, States not formally Party to the Conventions may be bound by them if they accept and apply the provisions contained within.<sup>15</sup>

As stated above, non-State actors are bound by customary international humanitarian law. Common Article 3 of the Geneva Conventions states, “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...”. A number of international courts have held Common Article 3 to constitute customary international humanitarian law applicable in both international and non-international armed conflicts.<sup>16</sup> The use of the phrase "each Party to the conflict" makes it possible for this provision to bind a non-State actor. However, Common Article 3 does state that its application “shall not affect the legal status of the Parties to the conflict”. Therefore, even if a non-State actor decided to apply the provisions of the Convention, it would in no way affect its legal status (i.e., it would not make it a State or a de jure government in its own right).

Under Additional Protocol I, an authority of a non-State actor which represents peoples fighting against colonial domination, alien occupation or against racist regimes may

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<sup>14</sup> In the context of this paper, “non-State actors” are armed groups such as armed opposition groups, rebel fighters or insurgents. For more detailed discussion, see: Cassese (2005), p.124-131; and Clapham, Andrew. *Human rights obligations of non-State actors in conflict situations*. International Review of the Red Cross. No. 863 (2006), p.491-523.

<sup>15</sup> Articles 1, 2 and 3 are ‘common’ to all four Geneva Conventions, i.e., they are all reproduced exactly in GC I, GC II, GC III and GC IV.

<sup>16</sup> See: *The Prosecutor v Akayesu*, ICTR, TC I, 2 September 1998, Case No. ICTR-96-4-T, para.608; *The Prosecutor v Tadić*, ICTY, AC, 2 October 1995, Case No. IT-94-1-AR72, para.98; *Nicaragua v United States of America (Merits)*, ICJ, 27 June 1986, para.218.

undertake to apply the Conventions and the Protocol in relation to the conflict by means of a unilateral declaration. Such a declaration will have the effect of bringing the Conventions and Additional Protocol I into force for the said authority with immediate effect. It will also obligate the authority to assume the same rights and duties as a State which means that the Conventions and the Protocol will be equally binding upon all parties to the conflict.<sup>17</sup>

In non-international armed conflicts, Article 1 of Additional Protocol II extends the application of Common Article 3 to dissident armed forces or other organized armed groups, which fulfil the requisite conditions. These conditions require that they be under responsible command and exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol. When comparing this Article with that of Common Article 3, which simply refers to the “case of armed conflict not of an international character”, it is evident that there is a much higher threshold of application in Additional Protocol II. The definition in Common Article 3 does not require that armed groups are fighting against the government of the territory, rather the conflict may be fought between armed groups within State territory or between an armed group outside State territory and the State.<sup>18</sup> In establishing a much higher threshold, the range of applicability of Additional Protocol II to non-State actors is very much reduced in modern armed conflicts.<sup>19</sup>

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<sup>17</sup> Article 96 API

<sup>18</sup> Fleck (ed.), (2008) p.609.

<sup>19</sup> Ibid., p.610.



## 2 Humanitarian assistance

### 2.1 What is humanitarian assistance?

The term ‘humanitarian assistance’ is one that is used broadly and there is no universally accepted exhaustive legal definition of it, nor is it the intention of this paper to provide one. Generally, humanitarian assistance is provided in emergency situations, such as in armed conflict or as a result of a natural disaster. It normally comprises of objects and services which are indispensable to the survival of the civilian population, such as food and medical supplies. In addition, humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality.<sup>20</sup>

The right to humane treatment is at the very core of international humanitarian law, protecting persons in war both in international and non-international armed conflict. Article 27 of Geneva Convention IV obligates State parties in an international armed conflict to treat protected persons humanely at all times. Common Article 3 of the Geneva Conventions obligates State parties in non-international armed conflicts to treat persons taking no active part in the hostilities humanely in all circumstances. Article 75 of Additional Protocol I and Article 4 of Additional Protocol II also offer fundamental guarantees of humane treatment. The obligation to treat civilians in a humane way not only means the prohibition of certain behaviour, but also expresses a positive obligation on the State to act – including the provision of assistance in time of armed conflict to those in need.<sup>21</sup>

Elements of what might constitute humanitarian assistance can be found in various provisions of international humanitarian law.<sup>22</sup> For the purposes of this paper, “humanitarian assistance” shall include the right to receive in time of armed conflict

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<sup>20</sup> UN General Assembly Resolution 46/182 (1991).

<sup>21</sup> Fleck (ed.), (2008) p.269.

<sup>22</sup> Articles 23 and 55 GC IV; Articles 54, 69 and 70 API; Article 18(2) APII.

food, water, medical supplies, medical services, shelter, clothing, bedding and objects necessary for religious worship.

## 2.2 Who is entitled to humanitarian assistance?

Civilians are entitled to receive humanitarian assistance to alleviate the sufferings caused by war in both international and non-international armed conflicts. This is true of the civilian population of any territory under the control of a party to the conflict, including those in occupied territories.<sup>23</sup> In establishing who is entitled to humanitarian assistance, a distinction must first be made between international and non-international armed conflicts as the laws regulating the duty to provide humanitarian assistance are dependent on the nature of the conflict.

An international armed conflict occurs when one State uses armed force against another State, even if the state of war is not recognized by one of them. A situation is also classed as an international armed conflict in all cases of partial or total military occupation of a State territory, even if the occupation is met with no armed resistance.<sup>24</sup> The effect of Article 1(4) of Additional Protocol I is to extend the applicability of the provisions relating to international armed conflict to also include armed conflicts in which peoples are fighting against colonial domination, alien occupation and against racist regimes in the exercise of self-determination.<sup>25</sup>

A non-international armed conflict (sometimes referred to as an 'internal conflict') is a confrontation within a single national territory between the armed forces of the existing governmental authority and dissident armed forces, or other organized armed groups, which exercise such control over a part of national territory as to enable them to carry out sustained and concerted military operations.<sup>26</sup> From considering the text of the relevant applicable provisions in the Geneva Conventions and their Additional Protocols, non-international armed conflicts do not include situations of internal

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<sup>23</sup> Articles 23, 55, 59 GC IV; Articles 69 and 70 API; Article 18(2) APII.

<sup>24</sup> Common Article 2 to the Geneva Conventions.

<sup>25</sup> Article 1(4) API.

<sup>26</sup> Article 1(1) APII.

disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.<sup>27</sup>

In international armed conflicts, ‘protected persons’ are entitled to receive humanitarian assistance. Geneva Convention IV deals with humanitarian assistance with respect to protected persons in time of war. Article 4 of Geneva Convention IV defines protected persons as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. Article 4 also provides that nationals of a State which is not bound by the Convention are not protected by it, nor are the nationals of a neutral State or of another State taking part in the armed conflict, as long as their State has normal diplomatic relations in the State whose hands they are. Article 4 makes it very difficult to ascertain the legal obligation of a State towards civilians who are not nationals of an internationally recognized State. For example, those civilians living in Gaza today, who consider themselves to be Palestinian, yet in the absence of an internationally recognized State of Palestine.<sup>28</sup>

However, the application of the provisions of Part II of the Convention, “General Protection of Populations Against Certain Consequences of War”, is widened by Article 13 of the Convention to include the whole populations of the countries in conflict, “without any adverse distinction based, in particular, on race, nationality, religion or political opinion”. Article 5 of Geneva Convention IV stipulates that if an individual protected person is definitely suspected of, or engaged in, activities hostile to the security of the State, that person shall not be entitled to the rights and privileges under the Convention, if these would be prejudicial to the security of the State, however, in each case such persons shall nevertheless be treated with humanity. The withholding of humanitarian assistance would arguably constitute inhumane treatment. “Activities hostile to the security of the State” is not defined by the Convention. The ICRC Commentary on Article 5 suggests that what is meant is “probably above all espionage,

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<sup>27</sup> Article 1(2) APII.

<sup>28</sup> This is a very complex issue which the length of this paper does not allow me to discuss. The ICRC Commentary on Article 4 GC IV, p.47, does seem to suggest it would be for the State in whose hands they are to decide whether the persons concerned should or should not be regarded as citizens of the country.

sabotage and intelligence with the enemy Government or enemy nationals”.<sup>29</sup> The ambiguity of this Article is an unfortunate lacuna in Geneva Convention IV. It is also unclear which authority may determine what action would be prejudicial to the security of the State and begs the question whether the sustenance of an adversary could be considered this. The ICRC Commentary concludes, “It must be emphasized most strongly, therefore, that Article 5 can only be applied in individual cases of an exceptional nature, when the existence of specific charges makes it almost certain that penal proceedings will follow. This Article should never be applied as a result of mere suspicion”.<sup>30</sup>

Section II of Additional Protocol I, “Relief in Favour of the Civilian Population” states that its provisions are supplementary to the relevant provisions of Geneva Convention IV. Its provisions apply to “the civilian population” in international armed conflict as defined by the Protocol.<sup>31</sup> Article 50 defines the civilian population. A civilian is any person who is not a combatant (i.e., not a member of the armed forces, militias or other volunteer corps, organized resistance movement, nor a person who has spontaneously taken up arms to resist the approach of an invading enemy). In case of doubt whether a person is a civilian, the person shall be considered to be a civilian.<sup>32</sup> The civilian population comprises all persons who are civilians.<sup>33</sup> The presence of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character.<sup>34</sup>

A civilian is generally accepted to be a person who is not taking a direct part in the fighting. The term “combatant” is commonly used to describe persons who are taking a direct part in the fighting. Additional Protocol I defines combatants as persons who are members of the armed forces of a party to a conflict, however the term does not include medical personnel and chaplains in the armed forces.<sup>35</sup> The armed forces of a conflict consist of all organized armed forces, groups and units which are under a command

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<sup>29</sup> ICRC Commentary Article 5 GC IV, p.56.

<sup>30</sup> Ibid., p.58.

<sup>31</sup> Article 68 API.

<sup>32</sup> Article 50(1) API.

<sup>33</sup> Article 50(2) API.

<sup>34</sup> Article 50(3) API.

<sup>35</sup> Article 43(2) API.

responsible to a party to the conflict for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by an adverse party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.<sup>36</sup> In order to promote the protection of the civilian population from the effect of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.<sup>37</sup>

Rule 5 of the ICRC Study on customary international humanitarian law simplifies the above into the following customary rule: “Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians”.<sup>38</sup> The study asserts that state practice establishes this rule as a norm of customary international humanitarian law applicable in international armed conflicts. It also notes that although this rule also applies to non-international armed conflicts, state practice in this regard is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians.<sup>39</sup>

It is important to determine whether the entitlement to civilian protection also affects the entitlement of a civilian to humanitarian assistance. In international armed conflicts, Section I, Part IV of Additional Protocol I contains provisions regarding the protection of the civilian population, with Article 51(3) providing, “Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.” In non-international armed conflicts, civilians are afforded humanitarian assistance under Common Article 3 of the Geneva Conventions (applicable in situations of non-international armed conflict and considered customary law)<sup>40</sup> and Additional Protocol II. Common Article 3 stipulates that “persons taking no

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<sup>36</sup> Article 43(1) API.

<sup>37</sup> Article 44(3) API.

<sup>38</sup> *Customary International Humanitarian Law, Volume I: Rules*. Edited by Jean-Marie Henckaerts and Louise Doswald-Beck. (International Committee of the Red Cross) / Cambridge (Cambridge University Press) 2007, p.17. (This publication will hereafter be referred to in this paper as the ‘ICRC Study on customary international humanitarian law’).

<sup>39</sup> Ibid.

<sup>40</sup> See footnote 16 of this paper.

active part in the hostilities” shall in all circumstances be treated humanely. Article 13(3) of Additional Protocol II provides that civilians shall enjoy the protection afforded by Part IV of the Protocol “unless and for such time as they take a direct part in hostilities.” It is necessary therefore, to explore briefly the concept of participation in hostilities. The recent publication of the ICRC’s, *Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law* determines that in order to qualify as a direct participation in hostilities, “a specific act must meet the following cumulative criteria: (1) The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and; (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and; (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)”.<sup>41</sup>

The ICRC publication also provides some insight into the temporal scope for the loss of protection from direct attack arising from the phrase “unless and for such time” and makes a clear distinction between civilians and members of organized armed groups. It clarifies that “such suspension lasts exactly as long as the corresponding civilian engagement in direct hostilities” and that the ‘revolving door’<sup>42</sup> of civilian protection “is an integral part, not a malfunction, of [international humanitarian law]. It prevents attacks on civilians who do not, at the time, represent a military threat”.<sup>43</sup> It discusses that although this mechanism of protection may make it more difficult for the enemy, “it remains necessary to protect the civilian population from erroneous or arbitrary attack and must be acceptable for the operating forces or groups as long as such participation occurs on a merely spontaneous, unorganized or sporadic basis”.<sup>44</sup> Members of organized armed groups, in contrast to civilians, “cease to be civilians for

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<sup>41</sup> Melzer, Nils. *Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law*. Geneva (International Committee of the Red Cross) 2009, p.46.

<sup>42</sup> The ‘revolving door’ debate is used to describe the notion of an individual as a ‘civilian by day’ and ‘combatant by night’. This is a highly contentious issue difficult to resolve when armed forces are trying to establish legitimate military targets.

<sup>43</sup> Melzer, supra footnote 41, p.70.

<sup>44</sup> *Ibid.*, p.71.

as long as they remain members by virtue of their continuous combat function [...] In other words, the ‘revolving door’ of protection starts to operate based on membership”.<sup>45</sup>

Based on the conclusions above, it would seem that for the time a civilian is taking a direct part in hostilities, he/she will lose the protection afforded to civilians against direct attack. However, once he/she has stopped taking part the protection will return. In determining whether the loss of civilian protection also affects the entitlement of a civilian to humanitarian assistance, it is important to return to the provisions of international humanitarian law. As stated above, in international armed conflicts, Article 51(3) in Section I, Part IV of Additional Protocol I provides that civilians only enjoy the protection afforded by Section I “unless and for such time as they take a direct part in hostilities”. However, Section II, Part IV, deals with “Relief in Favour of the Civilian Population” which suggests that civilians losing protection under Section I (i.e., losing protection from attack) do not necessarily forfeit their entitlement to humanitarian assistance.

The situation is slightly different in non-international armed conflicts. Additional Protocol II, Part IV deals with both the protection of the civilian population (Article 13) and the provision of humanitarian assistance (Article 18). Article 13(3) states, “Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities”. Therefore, it could be concluded that civilians lose their entitlement to receive humanitarian assistance for the duration of their engagement in hostilities. However, it could be argued (following the ICRC’s findings, that a civilian does not cease to be a member of the civilian population when taking part in hostilities), that humanitarian assistance must be provided to the entire civilian population, regardless of the temporal scope of protection from attack of individual civilians. Although it is difficult to reconcile these two opposing positions of a civilian as a legitimate military target on one side, and on the other side, as an individual in need of supplies essential to survival, the findings of the ICRC publication suggests that this situation is necessary to protect the larger civilian population as a whole.

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<sup>45</sup> Ibid., p.71 and p.72.

It would be too difficult to ascertain whether to allow an individual access to humanitarian assistance, which he/she would not be legally entitled to whilst taking part in hostilities, but then entitled to again once he/she has stopped. This would prove near impossible when faced with the ‘farmer by day, guerilla by night’ scenario. What is clear is that combatants in international armed conflicts and fighters in non-international armed conflicts are not eligible to receive humanitarian assistance. However, with the humane treatment requirement in Common Article 3 of the Geneva Conventions for “persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause”,<sup>46</sup> the entitlement of humanitarian assistance could also be argued to stretch not just to those who have taken part in hostilities, but to those who no longer do so.

### 2.3 Who are the providers of humanitarian assistance?

There are many possible providers of humanitarian assistance, for example, the State itself, one State acting on behalf of another State, an Occupying Power, international organizations, non-international organizations, charitable and humanitarian organizations, States acting upon a UN Security Council resolution. As mentioned in the introduction, this paper will only deal with the duty of the State under international humanitarian law to provide humanitarian assistance to the civilian population under its control.

### 2.4 The duty of the State

The duty of providing a civilian population with the supplies essential for its survival arguably rests first and foremost with the State exercising control over that civilian population. Article 29 of Geneva Convention IV states “The Party to the conflict in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents”. If the civilians of a party to an international armed conflict are not

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<sup>46</sup> ‘Hors de combat’: a French term, literally meaning ‘out of the fight’ refers to combatants unable to carry on taking part in hostilities.



adequately supplied with indispensable goods then relief actions shall be undertaken, subject to the agreement of the parties concerned in such relief actions.<sup>47</sup> All States, even those which are not party to the conflict, are obligated to grant free passage of relief consignments.<sup>48</sup> It is also the duty of the State to provide civilians in occupied territory with the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.<sup>49</sup> If it is unable to do so, then the Occupying Power is duty-bound to agree to relief schemes to provide the necessary humanitarian assistance on behalf of the population. Such assistance may be provided by States or by impartial humanitarian organizations, such as the ICRC.<sup>50</sup> Civilians who find themselves in the territory of a party to the conflict are also entitled to receive individual or collective relief that may be sent to them by their own States.<sup>51</sup> In cases of non-international armed conflict, if the civilian population is suffering undue hardship owing to a lack of supplies essential for its survival, relief actions shall be undertaken subject to the consent of the State concerned.<sup>52</sup>

It is important to look closely at the legal language of the relevant provisions of international humanitarian law when deducing the duty of the State in this regard. Article 23 of Geneva Convention IV, although stipulating that States “shall allow” for free passage, does grant States the right to make passage conditional upon certain conditions being fulfilled. It may therefore be deduced from the Article that “consent” is not actually a requirement of Article 23, as it infers that free passage should be granted (i.e., not consented to) unless certain conditions are present which would enable a State to disallow such passage. In contrast, Article 70(1) of Additional Protocol I provides that relief actions shall be undertaken “subject to the agreement of the Parties concerned in such relief actions”. In this case, it is clear that in order for humanitarian assistance to be granted, consent is actually required not just by the State concerned, but also by other parties concerned in the relief actions. In situations where relief must

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<sup>47</sup> Article 70(1) API.

<sup>48</sup> Article 23 GC IV, Article 38 GCIV; Article 70 API also includes relief equipment and personnel. See ‘Lawful and unlawful impediment of humanitarian assistance’, p.21 of this paper.

<sup>49</sup> Article 55 GC IV.

<sup>50</sup> Article 59 GC IV.

<sup>51</sup> Article 38 GC IV.

<sup>52</sup> Article 18(2) APII.

cross between States, particularly those at war with each other, this requirement can be problematic.

The ICRC Commentary on Article 70 confirms that the types of party concerned within the meaning of the Article “are primarily the Parties from which the relief is to come (assuming of course that it is not the government itself which has initiated the relief action or will be sending the relief consignments) and the Parties for which the relief is intended. However, it should be stressed once again that this provision should be read in conjunction with Article 54 (Protection of objects indispensable to the survival of the civilian population) which prohibits the starvation of civilians as a method of warfare, and the possibility of refusing a relief action or relief consignments is not a matter of discretion: such refusals should thus remain exceptional”.<sup>53</sup>

Article 70(1) also raises the question of whether a State must be obliged to accept relief actions on behalf of its own population, upon which the sovereignty of States must be discussed. The ICRC Commentary clarifies this question somewhat in its explanation of the drafting process of this provision. During negotiations, it was stressed that the expression “subject to the agreement of the Parties concerned”, did not involve any infringement of the sovereignty of the Parties concerned and suggested that the necessary agreement should not be withheld, and thus the expression should be interpreted in this sense. Furthermore, the Commentary purports, this interpretation is actually supported by the provision of Article 54(1) which prohibits the starvation of civilians as a method of warfare.<sup>54</sup>

The issue of consent is slightly different in non-international armed conflicts. Article 18(2) of Additional Protocol II, states that relief actions shall be undertaken “subject to the consent of the High Contracting Party concerned”. The ICRC Commentary on this provision states that, “In principle the ‘High Contracting Party concerned’ means the government in power. In exceptional cases, when it is not possible to determine which are the authorities concerned, consent is to be presumed in view of the fact that assistance for the victims is of paramount importance and should not suffer any

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<sup>53</sup> ICRC Commentary Article 70 API, p.820.

<sup>54</sup> *Ibid.*, p.819.

delay”.<sup>55</sup> The Commentary goes on to state, “The fact that consent is required does not mean that the decision is left to the discretion of the parties. If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place. In fact, they are the only way of combating starvation when local resources have been exhausted”.<sup>56</sup>

The above establishes that in accordance with the two Additional Protocols, in both international and non-international armed conflicts the obligation to consent or agree to humanitarian assistance rests clearly with the State, either as a High Contracting Party or as a party concerned in the relief actions. Both Article 70 of Additional Protocol I and Article 18(2) of Additional Protocol II state that relief actions “shall be undertaken”. In addition, in relation to occupied territories, Article 59 Geneva Convention IV states that the Occupying Power “shall agree to relief schemes” on behalf of the occupied population. The use of the word “shall” in the Articles by the drafters clearly denotes a duty on the State. Refusal of humanitarian assistance by the State without good grounds would be a violation of its duties under international humanitarian law.

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<sup>55</sup> ICRC Commentary Article 18 APII, p.1479.

<sup>56</sup> Ibid.

### **3 Legally permissible denial of humanitarian assistance**

There are certain circumstances in which the denial of humanitarian assistance is legally permissible under humanitarian law. In situations of siege or naval blockade, the question of humanitarian assistance is a complex one as these methods of warfare are generally employed in an attempt to bring the hostilities to a close more quickly. A siege generally takes place in a limited area, which is encircled by an army (the besieging force). A siege of an enemy position may result in the supply of goods for the civilian population being cut off.<sup>57</sup> A blockade is a means of obstructing an enemy coast or port so that vessels and aircraft are prevented from entering and departing, with the purpose of blocking supplies to an enemy coast.<sup>58</sup> Whereas in a siege situation, the area is a military objective, it may or may not contain civilians; naval blockades, on the other hand, are likely to affect the civilian population as a whole.

According to Article 17 of Geneva Convention IV, in international armed conflicts States shall “endeavour” to conclude local agreements for the removal of wounded, sick, infirm and aged persons, children and maternity cases from besieged or encircled areas, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas. The use of the word “endeavour” does not denote a clear and firm obligation on States to fulfil this duty. In addition, only some of the civilian population benefit from this provision. Nor does the provision clarify what should happen to the rest of the civilian population, they must presumably stay within the besieged area. However, under Additional Protocol I, the civilian population and individual civilians enjoy general protection against dangers arising from military operations.<sup>59</sup> Civilians must never be the object of attack and must be protected from indiscriminate attacks.<sup>60</sup> States which are parties to the conflict must at all times distinguish between the civilian population and combatants, and between civilian

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<sup>57</sup> Fleck (ed.), (2008) p.243.

<sup>58</sup> *Ibid.*, p.551.

<sup>59</sup> Article 51(1) API.

<sup>60</sup> Article 51(2) API, Art 51(4) API.

objects and military objectives.<sup>61</sup> Article 54 of Additional Protocol I expressly prohibits the starvation of civilians as a method of warfare.<sup>62</sup> In addition, it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, for the specific purpose of denying them for their sustenance value to the civilian population or to the enemy, “whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive”.<sup>63</sup> However, this prohibition does not apply to objects used as sustenance solely for the members of the armed forces of the enemy, nor to those used by the enemy in direct support of military action, provided of course, that the civilian population will not be left with such inadequate food or water as to cause its starvation or force its movement.<sup>64</sup>

It seems, therefore, that as long as the purpose is to achieve a military objective and the expected result will not cause the starvation of the civilian population, it may be legal to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population in a siege situation. It is only lawful to starve members of enemy forces.<sup>65</sup> A food supply which is used by the civilian population and enemy forces must therefore not be attacked or taken away. It has to be used exclusively by the enemy armed forces to lose its immunity.

Article 23 of Geneva Convention IV was drafted to deal with blockade situations.<sup>66</sup> However, looking closely at the Article it is apparent that the obligation created is limited in scope. In addition to the conditions that a State may require to be met before allowing free passage, relief consignments intended for all civilians are in fact limited only to “medical and hospital stores and objects necessary for religious worship”. The Article is subject to some interpretation as it states that each High Contracting Party to the Convention “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.” The word “likewise” in this sentence could denote it shall also

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<sup>61</sup> Article 48 API.

<sup>62</sup> See starvation as a war crime, p.32 of this paper.

<sup>63</sup> Article 54(2) API.

<sup>64</sup> Article 54(3) API.

<sup>65</sup> However, should members of enemy forces fall into the power of the enemy, they must be humanely treated at all times (Article 13 GC III).

<sup>66</sup> ICRC Commentary on Article 23 *General background* p.178-179.

allow free passage of these goods intended only for civilians of another High Contracting Party, but it could also be interpreted to mean that free passage of consignments should be granted to all children under fifteen, expectant mothers and maternity cases, including those among its own nationals. However, it may be more likely that the first interpretation was meant by the drafters.

Regardless, it seems there is no requirement under Article 23 to allow for the passage of foodstuffs and clothing to the civilian population as a whole. Nor is there an obligation to allow free passage of consignments intended for the State's own civilians. Therefore, under Geneva Convention IV, it could be argued that a blockade could be lawful as long as the purpose was to achieve a military objective, even if it resulted in the starvation of the civilian population. However, this position would still be at odds with the obligation under Article 27 of Geneva Convention IV to treat protected persons humanely at all times; in addition, of course, to the customary international humanitarian law rule that parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need.<sup>67</sup> Similarly, Article 70 of Additional Protocol I includes the obligation to allow and facilitate the "rapid and unimpeded passage of all relief consignments, equipment and personnel" even if destined for the civilian population of the adverse party.<sup>68</sup>

The ICRC Commentary on Article 23 highlights that the words "intended only for civilians" cannot be interpreted "a contrario as meaning that that right does not apply to medical consignments intended to be used for the treatment of wounded and sick of the armed forces"<sup>69</sup> and that when such consignments are sent by sea, they are in fact entitled to free passage under Article 38 of Geneva Convention II. "Such an interpretation is in full accordance with the general idea underlying the Geneva Conference, which, as we have mentioned on several occasions, tends to put the wounded and sick, whether civilians or members of the armed forces, on a footing of equality in the matter of relief. It would, therefore, be perfectly possible, if the present Article and the Article of the Second Convention mentioned were applied in

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<sup>67</sup> Henckaerts and Doswald-Beck (eds.), *supra* footnote 38, p.193.

<sup>68</sup> Article 70(2) API.

<sup>69</sup> ICRC Commentary on Article 23 GC IV, p.180.

conjunction, for a medical consignment to be intended both for civilians and for wounded and sick members of a belligerent's armed forces".<sup>70</sup>

The ICRC Commentary on Article 54(1) of Additional Protocol I emphasizes that the object of a blockade is to deprive the adversary of supplies needed to conduct hostilities, and not to starve civilians. However, if the effects of the blockade lead to such results, reference should be made to the relief action which should be undertaken in accordance with Article 70 of the Protocol. Moreover, the principle of the prohibition of starvation should command the evacuation of such persons if it turned out to be impossible to send sufficient aid for that part of the population of a besieged or encircled area in need.<sup>71</sup>

With regard to non-international armed conflicts there are no such Articles in Additional Protocol II relating to sieges or naval blockades, however, Articles 13 and 14 prohibit the attack of civilians, the use of starvation as a method of warfare, and the attack, destruction, removal or rendering useless of objects indispensable to the civilian population. In addition, Article 18 provides for relief actions to be undertaken if the civilian population is suffering undue hardship owing to a lack of essential supplies for its survival.

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<sup>70</sup> ICRC Commentary on Article 23 GC IV, p.180.

<sup>71</sup> ICRC Commentary on Article 54(1) API, p.654.

#### **4 Lawful and unlawful impediment of humanitarian assistance**

Humanitarian assistance can be impeded from reaching its intended destination for many reasons, both lawful and unlawful. International humanitarian law does provide States with a few permissible exceptions to allowing free passage of relief supplies. However, it is an unfortunate fact that in some cases humanitarian assistance is in fact wilfully impeded and that those in need are intentionally denied access to the supplies and personnel they need for their survival.

Article 23 of Geneva Convention IV provides that States must allow free passage subject to being satisfied of a number of conditions. These are that the State must have “serious reasons for fearing”: a) that the consignments may be diverted from their destination; b) that the control may not be effective; or c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods. The conditions listed above could be interpreted to reduce the obligation on States to allow free passage, as it is not clear what exactly constitutes a “serious reason”, or for that matter, what is the threshold of “fear”. It is also not stipulated upon which sort of information or intelligence this fear must be based on. It seems, therefore, on the basis of Article 23, that States may refuse passage on their own assessment of the situation and at their own discretion.

The ICRC Commentary on this Article states that a doubt as to the destination of consignments would not be sufficient reason for refusing them free passage; the fears of the State imposing the blockade must be based on serious grounds (i.e., they must have been inspired by the knowledge of certain definite facts). The ICRC Commentary further states that the conditions laid down in Article 23 have been criticized as leaving too much to the discretion of the blockading Powers and that such objections appear to be only too well justified. The Commentary stresses that the wording of Article 23 is vague and there is a danger that it may seriously jeopardize the principle set out in the



Article to allow free passage. The ICRC Commentary also raises concern over Article 23, where it allows States to refuse passage on the basis of a definite advantage which may accrue to the economy of the enemy (point (c) above). It is stressed that the provision of humanitarian assistance does to some extent relieve the burden on the economy of the receiving party, however, when looking at the situation with some degree of proportionality, “there is no way in which one could weigh the humanitarian considerations of an action destined to ensure the survival of a civilian population lacking essential supplies against the advantage that such an action could have for the receiving Party, which would in any case always be minimal and indirect, even though it would be wrong to deny its existence altogether”.<sup>72</sup>

Article 23 further reduces the strength of the obligation to allow free passage of consignments, by granting States the power to make permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.<sup>73</sup> It also gives States the right to prescribe the technical arrangements under which passage is allowed. This is true also of States obligations under Article 70 of Additional Protocol I. However, Article 70 does provide that States 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”.<sup>74</sup> It also obligates States which are parties to the conflict to protect relief consignments and facilitate their rapid distribution; in addition to requiring that all States encourage and facilitate effective international coordination of the relief actions.<sup>75</sup>

In summary, the free passage and distribution of humanitarian assistance in international armed conflicts is subject to the consent and technical conditions of States where they believe that consignments: a) may be diverted; b) may not be under effective supervision and control; or c) may provide an advantage to their adversary. If

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<sup>72</sup> ICRC Commentary on Article 70 of AP I, in discussion of Article 23 GC IV, p.827.

<sup>73</sup> A Protecting Power is a State or impartial organization, such as the ICRC, which safeguards the interests of a party to the conflict (including the interests of its nationals) in relation to an adverse party (Articles 9 and 11 of GC IV).

<sup>74</sup> Article 70(3)(c) API.

<sup>75</sup> Article 70(4), Article 70(5) API.

a State has serious reasons for fearing the above, it can refuse the passage. Where a State consents to the passage of humanitarian assistance, it must be forwarded as rapidly as possible.<sup>76</sup> However, in those situations where it does not consent, or even in those where the State has invoked their rights under Article 23 of Geneva Convention IV and/or Article 70 of Additional Protocol I to prescribe the technical arrangements under which such passage is permitted, States may lawfully impede humanitarian assistance. It is generally accepted that under these circumstances States are entitled to check or search consignments and arrange for their forwarding at prescribed times and on prescribed routes to ensure the safety of convoys and to safeguard against abuses by the enemy.<sup>77</sup> States are not entitled to refuse passage; they must do so only on the grounds indicated above.

In situations of occupation, in accordance with Article 59 of Geneva Convention IV, Occupying Powers must permit the free passage of consignments of foodstuffs, medical supplies and clothing, where it has agreed to a relief scheme. Furthermore, they must guarantee the protection of these consignments. Under Article 60 of Geneva Convention IV, consignments must in no way be diverted from the purpose for which they are intended, except in the case of urgent necessity, in the interests of the population of the occupied territory and with the consent of the Protecting Power.

Both Article 70 of Additional Protocol I and Article 60 of Geneva Convention IV prohibit the diversion of consignments except in the case of urgent necessity. The ICRC Commentary on Article 60 purports that the word "divert" must be understood in its broadest sense, as covering a change of destination of any kind, including requisition. It explains the purpose behind this particular provision was to enable relief consignments to be diverted in certain situations, such as when epidemics stop in one town and start in another, when it is too difficult to transport relief consignments to the area chosen, or when there is a delay in the transport of perishable foodstuffs. Under such circumstances, humanitarian assistance may be diverted and used on behalf of other persons. However, this diversion must only take place in "cases of urgent necessity" which means they must only happen in very exceptional circumstances. In

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<sup>76</sup> Article 23 GC IV.

<sup>77</sup> ICRC Commentary Article 23 GC IV, p.183.

addition, the diversion must be in the interests of the civilian population receiving the relief. In order to avoid abuses by Occupying Powers, the consent of Protecting Powers is also required. The ICRC Commentary also notes that the conditions which may be imposed by the Party allowing the passage of relief consignments under Article 70(3) of Additional Protocol I are less restrictive than those in Article 23 of Geneva Convention IV.<sup>78</sup>

In some cases, a party to the conflict may be unable to guarantee the security of the personnel, installations, material, units or vehicles involved in the provision of humanitarian assistance. For example, in those cases where the civilian population in need is in the area where the fighting is taking place, a party to the conflict may not be able to guarantee the safety of the staff and convoys. This may be because the other warring party does not care for the plight of the civilian population, or indeed because they are trying to kill them. Mine laying of routes and attacks on convoys can also be a very real danger in war zones. In addition, in some situations, a party may not even have the military resources in order to provide such security. In these types of situations, in accordance with meeting their duty to respect and protect humanitarian assistance consignments and personnel,<sup>79</sup> it may be lawful for States to impede humanitarian assistance for security reasons.

Additional Protocol II does not contain any specific provision regarding impeding humanitarian assistance in non-international armed conflicts. However, Rule 55 of the ICRC Study on customary international humanitarian law states that the rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, must be allowed and facilitated by parties to the conflict, subject to their right of control; and that this is customary international humanitarian law in both international and non-international armed conflicts.<sup>80</sup>

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<sup>78</sup> ICRC Commentary Article 70(3) API, p.827.

<sup>79</sup> Article 59 GC IV, Article 71 API.

<sup>80</sup> Henckaerts and Doswald-Beck (eds.), *supra* footnote 38, p.193.

Whilst the provisions of international humanitarian law listed above do allow for a State to take a number of measures to control the content and delivery of humanitarian assistance (which in some respects may impede the delivery), they do not allow for the deliberate or wilful impediment of assistance.<sup>81</sup> For the purposes of this paper, wilful impediment of humanitarian assistance is different to intentional denial. Intentional denial is discussed in this paper as the outright denial of humanitarian assistance (i.e., the assistance is not allowed to enter State territory, or relief consignments within the State are not permitted to be organized). Wilful impediment, on the other hand, is discussed here in the context of a State allowing for the arrangement of humanitarian assistance to those in need, and then consequently impeding it from reaching its intended destination. In both situations, the result can cause the prolonged suffering of the civilian population and starvation. There are many means whereby humanitarian assistance can be wilfully impeded, including diverting relief convoys and consignments from their intended beneficiaries, refusing to guarantee the security of the convoys and personnel (where a State is in a position to do so), mining of the routes to be taken to the intended destination making transport and passage impossible; or for example, subjecting them to various delays including, inter alia, prolonged searches, unnecessary road blocks, or the imposition of extortionate taxes or bribes which must be paid before passage is granted.

“Wilfully impeding relief supplies” as a method of starvation of civilians is listed as a war crime in international armed conflicts under Article 8(2)(b)(xxv) of the 1998 Statute of the International Criminal Court (ICC Statute).<sup>82</sup> The UN Security Council has condemned the impediment of relief supplies on many occasions, particularly in the conflict of Bosnia and Herzegovina<sup>83</sup> and more recently, in the conflict in Sudan.<sup>84</sup> It would seem that a customary international humanitarian rule is gradually forming prohibiting the wilful impediment of relief supplies both in international and non-international armed conflicts.

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<sup>81</sup> Ibid., p.198.

<sup>82</sup> See starvation as a war crime, p.32 of this paper.

<sup>83</sup> UNSC Resolution 787 (1992).

<sup>84</sup> UNSC Resolution 1574 (2004); UNSC Resolution 1769 (2007).

## 5 Reckless denial of humanitarian assistance

“Recklessness” is defined by Cassese as “a state of mind where a person foresees that his or her action is likely to produce its prohibited consequences, and nevertheless willingly takes the risk of so acting”.<sup>85</sup> In the case of recklessness a person only envisages that a result will be possible or likely, but even so “deliberately takes the risk; however, he does not necessarily will or desire the result”.<sup>86</sup> Whilst Cassese refers to recklessness in the context of individual criminal liability, a State could similarly be accused of acting recklessly if it failed to provide humanitarian assistance to the civilian population under its control. Whilst it is clear that States act through their State officials (which are of course individuals), in certain circumstances an act of an individual State official may be attributable to a State, therefore imputing responsibility of the act to the State.

Article 1 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles)<sup>87</sup> provides that “Every internationally wrongful act of a State entails the international responsibility of that State”. Article 2 establishes that an international wrongful act of a State occurs when conduct consisting of an action or omission is attributable to the State under international law and constitutes a breach of an international obligation of the State. Chapter II of the ILC Draft Articles details under which circumstances certain conduct may be attributed to the State. Whilst it is not the intention of this paper to provide a detailed discussion on the subject of state responsibility, it is important to note that the conduct of any person or entity (which has official status in accordance with the internal law of the State) shall be considered an act of the State under international law provided the person or entity is acting within their official capacity in the particular instance.<sup>88</sup> The International Court of Justice has held this rule to be a part of customary law.<sup>89</sup>

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<sup>85</sup> Cassese (2008) p.66.

<sup>86</sup> Ibid., p.66 and 67.

<sup>87</sup> The UN General Assembly “commended” the ILC Draft Articles to the attention of governments in its Resolution 56/83 (2001).

<sup>88</sup> Article 5 ILC Draft Articles.

<sup>89</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ, Advisory Opinion of 29 April 1999, para.62.

Common Article 1 of the Geneva Conventions obligates States to “respect and to ensure respect” for the Conventions “in all circumstances”. This demonstrates that the Conventions are not based on the notion of reciprocity, but are rather, “a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations, 'vis-à-vis' itself and at the same time 'vis-à-vis' the others”.<sup>90</sup> The use of the phrase “to ensure respect” expresses the intention of the drafters to emphasize the responsibility of State parties. Cassese notes that the provision “empowers and even obligates any State party (and under customary international law, any State or other international entity) to demand of another State party (or any other State entity) that it comply with its obligations under the Conventions [...] It follows that the provision also entitles each State party to demand the cessation of a serious violation of the Conventions or of the general principles of humanitarian law (as well as the case may be, the punishment of the culprits)”.<sup>91</sup>

The ICRC Commentary on Common Article 1 makes reference to Article 29 of Geneva Convention IV which establishes that the party to the conflict in whose hands protected persons may be is responsible for the treatment accorded to them. The Commentary notes, “It would not, for example, be enough for a State to give orders or directions to a few civilian or military authorities, leaving it to them to arrange as they pleased for their detailed execution. It is for the State to supervise the execution of the orders it gives”.<sup>92</sup>

If a State foresees or is aware that its action or omission is likely to produce prohibited consequences, such as the starvation of its citizens, and nevertheless willingly takes the risk of committing such an act or omission, then it could be held that the State is reckless in its actions by which it fails to meet its obligations. This type of situation can occur for example, where a State, which due to a prolonged armed conflict, is lacking the necessary essential resources for its people and fails to raise the alarm within the international community to arrange for the provision of humanitarian assistance. Or in

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<sup>90</sup> ICRC Commentary Common Article 1 of the Geneva Conventions, p.15.

<sup>91</sup> Cassese (2008) p.266.

<sup>92</sup> ICRC Commentary Common Article 1 of the Geneva Conventions, p.16.

the case of a State which, having employed the ‘scorched earth’ tactic as a method of warfare has destroyed objects indispensable to the civilian population, such as agricultural areas for the production of food stuffs, crops, livestock or drinking water installations.

The ICRC Commentary on Common Article 1 proposes that if a State “is to fulfil the solemn undertaking it has given, the State must of necessity prepare in advance, that is to say in peacetime, the legal, material or other means of ensuring the faithful enforcement of the Convention when the occasion arises”.<sup>93</sup> In applying the ICRC interpretation in this scenario, a State must prepare means in advance of any armed conflict to ensure its civilian population is provided for in the event of emergency. This could include for example, the stockpiling of emergency provisions in times of warfare. A State also has the duty to prepare in advance the legal means of ensuring the enforcement of the Conventions. In this way all States are duty bound to have in place the necessary legislation to enforce their obligations under the Conventions. Unfortunately, not all States are consistent in their legislative approaches. However, if States were to begin to take a universal approach to this obligation it could well result in a universal approach to the fundamental humanitarian principles underlying international humanitarian law, including the provision of humanitarian assistance to those in need.

The ICRC Commentary purports that Common Article 1 does not, however, apply to non-international armed conflicts. These types of armed conflict are covered by Common Article 3.<sup>94</sup> There is support in this argument in the fact that the requirement for States to “respect and to ensure respect” is present in Additional Protocol I,<sup>95</sup> but not in Additional Protocol II. However, it could be argued that as Common Article 3 is a part of the Geneva Conventions, the requirement to “respect and to ensure respect” for the Conventions laid down in Common Article 1 applies to non-international armed conflicts too.

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<sup>93</sup> Ibid.

<sup>94</sup> Ibid., p.16.

<sup>95</sup> Article 1(1) API.

The issue of a State's responsibility to carry out its obligations under international humanitarian law can become quite problematic when a State is unable to act. This often happens in non-international conflicts. In some situations the government of a State can lose the ability to effectively control its own territory, or a part of its territory (e.g., the recent conflict in Sri Lanka between the government and the Tamil Tigers). In other situations, the government of the State can actually break down, resulting in different armed groups holding effective control over different parts of the State territory, in effect causing the State to become 'ungovernable' (e.g., the conflict in Somalia in the 1990s). Where a State has lost control over its territory or part thereof to an armed group, the question must be raised, to what extent are armed groups bound by international humanitarian law? Whilst this question is too broad to be dealt with in this paper, it is important to note that non-State actors are bound by those provisions which have attained the status of customary international humanitarian law and in addition, may choose to bind themselves voluntarily to the obligations contained in the Conventions and Additional Protocols.<sup>96</sup> Non-State actors may also be bound by the legislation in force in the State and of course, individuals may be held criminally liable under international criminal law for any crimes they commit.

A State may also act recklessly in refusing to accept offers of humanitarian assistance when it is in fact needed. As mentioned in an earlier section of this paper offers of relief can come from a number of different sources.<sup>97</sup> Article 70(1) of Additional Protocol I maintains that offers of relief "shall not be regarded as interference in the armed conflict or as unfriendly acts". In international armed conflicts, although a State may limit the number of societies and organizations allowed to carry out their activities in its territory, this limitation shall not hinder the supply of effective and adequate relief.<sup>98</sup> In non-international armed conflicts relief societies located in the territory of the State may explicitly offer their services to the victims of the armed conflict.<sup>99</sup> A State may be deemed reckless in its action to refuse an offer of humanitarian assistance, if it has failed to undertake a comprehensive assessment of the needs of the civilian

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<sup>96</sup> Article 96 AP I. See also p.4-5 of this paper.

<sup>97</sup> See p.13 of this paper.

<sup>98</sup> Article 142 GC IV.

<sup>99</sup> Article 18(1) APII.



population under its control. Under Article 30 of Geneva Convention IV, 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”. Protected persons within the meaning of Geneva Convention IV are those who find themselves in the hands of a party to the conflict or occupying power of which they are not nationals.<sup>100</sup> However, there does not seem to be the same right for the civilian population comprising of the nationals of the State in question to make such application for assistance.<sup>101</sup>

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<sup>100</sup> Article 4 GC IV. The ICRC Commentary on this Article states that the definition of protected persons “has been put in a negative form; as it is intended to cover anyone who is 'not' a national of the Party to the conflict or Occupying Power in whose hands he is”. ICRC Commentary Article 4 GC IV, p.46.

<sup>101</sup> See p.47-48 of this paper for more discussion on this particular issue.

## 6 Denial of humanitarian assistance as an international crime

The denial of humanitarian assistance, as an intentional (or wilful) act or omission to deny civilians in need of supplies essential for its survival, can in some circumstances constitute an international crime. Intentional denial may have various aims, for example, ethnic cleansing, the siege or blockade of an enemy, the denial of supplies for civilians in favour of the fortification of troops, looting or stealing supplies for personal gain, denial for reasons of reprisal, or denial due to the uncertain nature of civilian population (in cases where there is suspicion that rebel forces are hiding within the population). The type of denial discussed in this section is the intentional act or omission of the State itself, the enemy State, the Occupying Power or non-State actors. This section will examine under which circumstances the denial of humanitarian assistance can be classified as a war crime, as a crime against humanity and as genocide.

### 6.1 War crimes

War crimes are serious violations of customary international humanitarian law or treaty law which make up international humanitarian law. Grave breaches of the Geneva Conventions are considered war crimes. In addition, Article 8 of the ICC Statute also sets out the prohibited conduct and elements required for an act or omission to constitute a war crime. It is important to note that grave breaches of the Geneva Conventions and the two Additional Protocols entail state responsibility, whereas the International Criminal Court (ICC) deals with individual criminal responsibility. The Appeal Chamber of the ICTY in the *Tadić* case contended that even if the Geneva Conventions and their Protocols do not explicitly state that a given conduct constitutes a crime, violations of both customary and treaty law could still entail individual criminal responsibility.<sup>102</sup> A war crime may be perpetrated in either an international or non-

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<sup>102</sup> *The Prosecutor v Tadić*, ICTY, AC, 2 October 1995, Case No. IT-94-1-AR72, para.128-134. This is consistent with the ICRC Commentary on Article 147, p.597.

international armed conflict.<sup>103</sup> However, a link between the crime and the armed conflict must be established for the crime to constitute a war crime.<sup>104</sup>

### 6.1.1 Starvation

Article 54 of Additional Protocol prohibits starvation as a method of warfare in international armed conflict. Starvation as a method of warfare, whilst not specifically mentioned as a grave breach of Additional Protocol I, is included as a war crime in Article 8(2)(b)(xxv) of the ICC Statute, including “wilfully impeding relief supplies as provided for under the Geneva Conventions”. These words are of particular significance as they specifically categorize a war crime as a deliberate denial of humanitarian assistance in breach of the Geneva Conventions.

With respect to starvation in non-international armed conflicts, Article 14 of Additional Protocol II states “Starvation of civilians as a method of combat is prohibited”. It is not, however, classified as a war crime by the ICC Statute. However, the ICRC Study on customary international humanitarian law confirms that state practice establishes this rule as a norm of customary international humanitarian law applicable in both international and non-international armed conflicts.<sup>105</sup>

### 6.1.2 Wilful killing or murder

The war crime of wilful killing or murder can be committed either by act or by omission as was confirmed by the ICTY in the *Delalić* case.<sup>106</sup> Murder of civilians is prohibited in international conflicts and constitutes a grave breach of international humanitarian law.<sup>107</sup> The ICRC Commentary on Article 147 of Geneva Convention IV which lists the grave breaches of the Convention, states that wilful killing can cover cases where death occurs through a fault of omission. However, the omission must have been wilful and there must have been an intention to cause death by it. The ICRC

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<sup>103</sup> *The Prosecutor v Tadić*, ICTY, AC, 2 October 1995, Case No. IT-94-1-AR72, para.135-136; Articles 8(2)(c),(d),(e),(f) ICC Statute.

<sup>104</sup> *The Prosecutor v Tadić*, ICTY, TC II, 14 July 1997, Case No. IT-94-1-T, para.573; *The Prosecutor v Delalić et al*, ICTY, TC II, 16 November 1998, Case No. IT-96-21.T, para.193.

<sup>105</sup> Henckaerts and Doswald-Beck (eds.), supra footnote 38, p.186.

<sup>106</sup> *The Prosecutor v Delalić et al*, ICTY, TC II, 16 November 1998, Case No. IT-96-21.T, para.422-424.

<sup>107</sup> Articles 32 and Article 147 GC IV, Article 85(3)(a) API.

Commentary states, “It seems, therefore, that persons who gave instructions for the food rations of civilian internees to be reduced to such a point that deficiency diseases causing death occurred among the detainees would be held responsible”.<sup>108</sup>

In her article *The denial of humanitarian assistance as a crime under international law*<sup>109</sup> Christa Rottensteiner explains that the term “wilful” is understood to include “intent” and “recklessness”, but to exclude ordinary negligence, which she finds evidence for in the ICRC Commentary on the Geneva Conventions,<sup>110</sup> and in various decisions of the ICTY and the International Criminal Tribunal for Rwanda (ICTR). In the *Delalić* case, for example, the ICTY held that “the necessary intent [...] required to establish the crimes of wilful killing and murder [...] is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life”.<sup>111</sup> Rottensteiner propounds that if “civilians die as a clear result of the unlawful denial of humanitarian assistance, for instance if a region is completely blocked from the outside world for a long period, then it is arguable that the denial constitutes murder if the other conditions are fulfilled. This could also be the case when detainees are unlawfully deprived of the most essential goods”.<sup>112</sup> Therefore, the intentional denial of humanitarian assistance can, under certain circumstances, constitute wilful killing.

### 6.1.3 Torture or inhumane treatment

Common Article 3 of the Geneva Conventions prohibits violence to life and persons including all kinds of cruel treatment and torture. Torture and inhumane treatment of the civilian population are prohibited by Geneva Convention IV and by both Additional Protocols.<sup>113</sup> It is also listed as a grave breach of the Geneva Conventions and a war

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<sup>108</sup> ICRC Commentary Article 147 GC IV, p.597.

<sup>109</sup> Rottensteiner, Christa. *The denial of humanitarian assistance as a crime under international law*. International Review of the Red Cross, No. 835 (1999), p.555-582.

<sup>110</sup> ICRC Commentary Article 85 API, p.994.

<sup>111</sup> *The Prosecutor v Delalić et al*, ICTY, TC II, 16 November 1998, Case No. IT-96-21.T, para.422.

<sup>112</sup> Rottensteiner, supra footnote 109, p.563.

<sup>113</sup> Article 32 GC IV, Article 75 API, Article 4 APII.

crime under the ICC Statute in both international and non-international armed conflicts.<sup>114</sup> Both can be committed by either an act or omission.

In the *Delalić* case the ICTY confirmed the definition of torture contained in Article 1 of the 1984 UN Convention on Torture to be part of customary international law.<sup>115</sup> Article 1 of the Convention requires that the infliction of severe pain or suffering must be intentional for such purpose as obtaining information or a confession, punishment, intimidation or coercion. It also requires that the pain and suffering is inflicted by or at the instigation of, or with the consent or acquiescence of, a public official or other such person acting in an official capacity. Therefore, to constitute the war crime of torture, the denial of humanitarian assistance must be proven to cause severe pain and suffering which must be intentionally inflicted. It therefore, might be easier to prove that the denial amounts to inhumane treatment.<sup>116</sup>

Rottensteiner highlights that the ICTY in the *Delalić* case stated that the condition that “the suffering be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity” must be interpreted to include officials of non-State parties to a conflict.<sup>117</sup> The Tribunal further found that torture also extends to officials who “take a passive attitude or turn a blind eye to torture”.<sup>118</sup> Rottensteiner also notes that the Special Rapporteur on Torture mentioned the prolonged denial of food as constituting torture in one of his reports.<sup>119</sup>

Inhumane treatment is defined in the *Elements of Crime* for the ICC as the infliction of “severe physical or mental pain or suffering upon one or more persons”.<sup>120</sup> The ICTY defined it as acts which “violate the principles of humane treatment, particularly the respect for human dignity”.<sup>121</sup> Rottensteiner notes that depriving civilians or prisoners

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<sup>114</sup> Article 147 GC IV, Article 8(2)(a)(ii), Article 8(2)(c)(i) ICC Statute.

<sup>115</sup> *The Prosecutor v Delalić et al*, ICTY, TC II, 16 November 1998, Case No. IT-96-21.T, para.1328.

<sup>116</sup> Rottensteiner, supra footnote 109, p.566.

<sup>117</sup> *The Prosecutor v Delalić et al*, ICTY, TC II, 16 November 1998, Case No. IT-96-21.T, para.473.

<sup>118</sup> Ibid.

<sup>119</sup> Report of the Special Rapporteur, Mr P Kooijmans, UN document E/CN.4/1986/15, 19 February 1986, para.119.

<sup>120</sup> *Elements of Crimes*, ICC document ICC-ASP/1/3, p.15.

<sup>121</sup> *The Prosecutor v Furundžija*, ICTY, TC II, 10 December 1998, Case No. IT-95-17/1-T, para.542-544.

of war of relief will in many cases be contrary to the principle of humanity and therefore constitute inhuman treatment.<sup>122</sup> Inhumane treatment is distinguished from torture because it does not require that the treatment be inflicted for a specific purpose, nor does it require a State official's involvement.

#### 6.1.4 Wilfully causing great suffering, or serious injury to body or health

As with wilful killing and torture and inhumane treatment, this class of war crime can also be committed by either an intentional act or omission. Article 32 of Geneva Convention IV, prohibits States from taking any measures to cause the physical suffering or mutilation of civilians or any other measures of brutality. Wilfully causing great suffering or serious injury to body or health to civilians is listed as a grave breach of the Geneva Conventions in international armed conflicts and as war crime under the ICC Statute in both international and non-international armed conflicts.<sup>123</sup> Violence to life and persons is also prohibited in non-international armed conflicts under Common Article 3 of the Geneva Conventions and Article 8(2)(c)(i) of the ICC Statute.

The ICTY in the *Furundžija* case defined 'wilfully causing great suffering, or serious injury to body or health' as an act or omission which causes serious mental or physical suffering or injury. It also confirmed that it covers those acts that do not "meet the purposive requirements for the offence of torture".<sup>124</sup> Rottensteiner notes that the threshold is also lower for this crime than it is for torture as the definition can also be held to cover mental suffering.<sup>125</sup>

In the *Delalić* case the ICTY held that the "creation and maintenance of an atmosphere of terror in the Celebici prison camp, by itself and a fortiori, together with the deprivation of adequate food, water, sleeping and toilet facilities and medical care, constitutes the offence of cruel treatment under Article 3 of the Statute, and wilfully

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<sup>122</sup> Rottensteiner, supra footnote 109, p.567.

<sup>123</sup> Article 147 GC IV; Article 8(2)(a)(ii), Article 8(2)(c)(i) ICC Statute.

<sup>124</sup> *The Prosecutor v Furundžija*, ICTY, TC II, 10 December 1998, Case No. IT-95-17/1-T, para.511.

<sup>125</sup> Rottensteiner, supra footnote 109, p.567.

causing great suffering or serious injury to body or health under Article 2 of the Statute”.<sup>126</sup>

#### 6.1.5 Outrages upon personal dignity

Committing outrages upon personal dignity, in particular, humiliating and degrading treatment is prohibited under Common Article 3 of the Geneva Conventions and both Additional Protocols.<sup>127</sup> It is not listed as a grave breach under the Geneva Conventions, however, it is listed as a war crime under the ICC Statute in both international and non-international armed conflicts.<sup>128</sup>

‘Outrages upon personal dignity’ is defined in the *Elements of Crimes* for the ICC as acts which humiliate, degrade or otherwise violate the dignity of the person to such a degree as to be generally recognized as an outrage upon personal dignity.<sup>129</sup> Denial of essential supplies to civilians such as food, water and medical supplies could arguably amount to such a crime.

#### 6.1.6 Attacks against the delivery of humanitarian assistance

Article 71(2) of Additional Protocol I obligates States to respect and protect humanitarian relief personnel in international armed conflicts. Whereas Article 18(2) of Additional Protocol II does not specifically state that humanitarian personnel be protected, it does require that relief be provided. The safety and security of humanitarian relief personnel is crucial to the delivery of humanitarian assistance to civilian populations in need. In addition, the ICRC purports that state practice establishes this rule as a norm of customary international humanitarian law applicable in both international and non-international armed conflicts.<sup>130</sup> The ICC Statute establishes as a war crime, in both international and non-international armed conflicts, “Intentionally directing attacks against personnel, installations, material, units or

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<sup>126</sup> *The Prosecutor v Delalić et al*, ICTY, TC II, 16 November 1998, Case No. IT-96-21.T, para.1119.

<sup>127</sup> Common Article 3(1)(c) of the Geneva Conventions, Article 75(2)(b) API, Article 4(2)(e) APII.

<sup>128</sup> Article 8(2)(b)(xxi), Article 8(2)(c)(ii) ICC Statute.

<sup>129</sup> *Elements of Crimes* ICC document ICC-ASP/1/3, p.29.

<sup>130</sup> Henckaerts and Doswald-Beck (eds.), *supra* footnote 38, p.105.

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 law of armed conflict.<sup>131</sup> Members of the armed forces delivering humanitarian aid are, therefore, not covered by this rule.

### 6.1.7 Collective punishments

Collective punishment of protected persons is prohibited in international armed conflicts under Article 33 of Geneva Convention IV. They are also prohibited in non-international armed conflicts under Article 4(2)(b) of Additional Protocol II. The ICRC Commentary on Article 33 of Geneva Convention IV defines collective punishments as “penalties of any kind inflicted on persons or entire groups of persons in defiance of the most elementary principles of humanity, for acts that these persons have not committed”.<sup>132</sup> The ICRC Commentary on Article 4(2)(b) of Additional Protocol II stresses that the term ‘collective punishments’ “should be understood in its widest sense”.<sup>133</sup> Rottensteiner purports that since these acts are punishable when committed in non-international armed conflicts, an argument can be made that they should a fortiori be punishable in international armed conflicts. Furthermore, if humanitarian assistance is impeded in order to punish certain persons, this could constitute collective punishment.<sup>134</sup>

## 6.2 Crimes against humanity

Crimes against humanity are crimes which constitute a serious attack on human dignity or a grave humiliation or degradation. They must be large scale and of extreme gravity and must be part of a widespread or systematic attack. The ICTY in the *Blaškić* case held that ‘systematic’ refers to four elements: i) the existence of a political objective or ideology; ii) the commission of a crime on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; iii) the crime involves the preparation and use of significant public or private resources; iv)

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<sup>131</sup> Article 8(2)(b)(iii), Article 8(2)(e)(iii) ICC Statute.

<sup>132</sup> ICRC Commentary Art 33 GC IV, p.225.

<sup>133</sup> ICRC Commentary Article 4(2)(b) APII, p.1374.

<sup>134</sup> Rottensteiner, supra footnote 109, p.569-570.



the implication of high-level authorities in the plan.<sup>135</sup> In order to constitute crimes against humanity, acts or omissions which are intended to deny civilians in need humanitarian assistance must be proven to be widespread or systematic and based on a policy or plan. Seemingly random crimes, such as sporadic attacks on relief convoys or the attacking of relief personnel can often be the result of careful planning. Therefore, it can be difficult to prove the widespread or systematic nature of the crimes.

Crimes against humanity are listed under Article 7 of the ICC Statute. The following crimes could result from the denial of humanitarian assistance: murder, extermination, torture, persecution and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. As both murder and torture were dealt with above in the section on war crimes they will not be dealt with here.

### 6.2.1 Extermination

Extermination of civilians is prohibited by Geneva Convention IV.<sup>136</sup> The ICTY in the *Krstić* case held that “for the crime of extermination to be established, in addition to the general requirements for a crime against humanity, there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population”.<sup>137</sup> This means that extermination can qualify as a crime in situations where some parts of the population are killed and others are not. ‘Extermination’ is defined by the ICC Statute to include the “intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”.<sup>138</sup> Here, a direct link to the denial of humanitarian assistance can be interpreted. If the denial is proven to calculate the bringing about of the destruction of part of a population, then it can be deemed to be a crime against humanity.

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<sup>135</sup> *The Prosecutor v Blaškić*, ICTY, TC I, 3 March 2000, Case No. IT-95-14.T, para.203-204.

<sup>136</sup> Article 32 GC IV.

<sup>137</sup> *The Prosecutor v Krstić*, ICTY, TC, 2 August 2001, Case No. IT-98-33-T, para.503.

<sup>138</sup> Article 7(2)(b) ICC Statute.

### 6.2.2 Persecution

Under the ICC Statute, “persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.<sup>139</sup> Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other ground that are universally recognized as impermissible under international law, in connection with any act under Article 7(1) of the ICC Statute or any crime within the jurisdiction of the ICC, constitutes a crime against humanity. The ICTY in the *Tadić* case held the crime of persecution to encompass “a variety of acts, including, *inter alia*, those of a physical, economic or judicial nature, that violate an individual’s right to the equal enjoyment of his basic rights”.<sup>140</sup> “Under customary international law, the bases for persecution are alternatives and it is sufficient if one discriminatory basis is present”.<sup>141</sup> In light of these comments, it could be argued that if humanitarian assistance is denied on a discriminatory basis, it could constitute persecution as a crime against humanity.

### 6.2.3 Other inhumane acts

Article 7(1)(k) of the ICC Statute classifies as crimes against humanity “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. The reference to “acts of a similar character” is to those acts listed in Article 7(1)(a) to (j) such as murder, extermination and torture. The acts must cause injury to human beings in terms of physical or mental integrity, health or human dignity. Cassese notes of this crime, “the rule is important for it may function as a ‘residual clause’ covering and criminalizing instances of human behavior that do not neatly fall under any of the other existing categories of crimes against humanity”.<sup>142</sup> The denial of humanitarian assistance could arguably constitute an inhumane act if it intentionally causes great suffering, or serious injury to body or to mental or physical health.

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<sup>139</sup> Article 7(2)(g) ICC Statute.

<sup>140</sup> *The Prosecutor v Tadić*, ICTY, TC II, 7 May 1997, Case No. IT-94-1-T, para.710.

<sup>141</sup> *Ibid.*, para.712.

<sup>142</sup> Cassese (2008), p114.

### 6.3 Genocide

Genocide is often referred to as the “Crime of crimes”,<sup>143</sup> and is prohibited regardless of whether it is perpetrated in time of war or peace. The definition of genocide laid down in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was reproduced in Article 6 of the ICC Statute, Article 4 of the ICTY Statute and Article 2 of the ICTR Statute.<sup>144</sup> The definition reads, “For the purposes 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”.

The crime of genocide requires a special intent (*dolus specialis*) which requires an individual to possess the intent to commit the underlying offence (i.e., those offences listed in (a) to (e) in the above paragraph), in addition to the intent to destroy in whole or in part a national, ethnic, racial or religious group as such. In the *Akayesu* case an ICTR Trial Chamber discussed that intent “is a mental factor which is difficult, even impossible, to determine” and held that intention could be inferred from a certain number of presumptions of fact. It also added that intent can be inferred from “all acts or utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such acts were committed by the same perpetrator or even by other perpetrators”.<sup>145</sup>

There have been a number of interpretations as to what “intent to destroy” constitutes within the meaning of the definition of genocide. Legal scholars argue on the one side that this intent must be aimed at the physical-biological destruction of the protected group and on the other side that the intent also encompasses the destruction of a group

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<sup>143</sup> *The Prosecutor v Kambanda*, ICTR, 4 September 1998, Case No. ICTR 97-23-S, para.16.

<sup>144</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia; Statute of the International Criminal Tribunal for Rwanda.

<sup>145</sup> *The Prosecutor v Akayesu*, ICTR TC I, 2 September 1998, Case No. ICTR-96-4-T, para.523 and 728.

as a social unit. Intent is the most difficult element of genocide to prove, especially as in order to convict the accused of any crime under the ICC Statute, the Court must be convinced of the guilt of the accused beyond reasonable doubt.<sup>146</sup> Rottensteiner recounts in her article, “In the absence of a confession, intent can be inferred only from certain factual circumstances. In the case of denial of humanitarian assistance this might be particularly difficult: it is already complicated to establish a link between the act of impeding and the result, but even more so to prove that the intended result of the denial is destruction of a particular group”.<sup>147</sup>

The phrase "in whole or in part" has also been subject to a number of different interpretations. In the *Krstić* case the ICTY AC found that "the part must be a substantial part of that group. The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole".<sup>148</sup> Cassese points out, in what he refers to as a “blatant” flaw or omission of the definition of genocide, that the four classes of protected groups (national, ethnical, racial and religious) are not defined, nor are criteria for their definition provided.<sup>149</sup> The Trial Chamber in *Akayesu* attempted to give some definition to these groups.<sup>150</sup>

The denial of humanitarian assistance may amount to genocide, if the act or omission of denial which results in genocide is committed with intent to destroy in whole or in part a national, ethnic, racial or religious group as such. In addition, this intent must be accompanied by one of the underlying offences. The offences which are relevant to this discussion are those detailed in (a) to (c) below.

*(a) Killing members of the group.*

It is clear that the denial of food and medical supplies may result in the killing of civilians. The ICTR in the *Akayesu* case held that in the context of genocide, “killing”

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<sup>146</sup> Article 66(3) ICC Statute.

<sup>147</sup> Rottensteiner, supra footnote 109, p.578.

<sup>148</sup> *The Prosecutor v Krstić*, ICTY, TC, 2 August 2001, Case No. IT-98-33-T, para.8.

<sup>149</sup> Cassese (2008), p.130-131.

<sup>150</sup> *The Prosecutor v Akayesu*, ICTR TC I, 2 September 1998, Case No. ICTR-96-4-T, para.512-515.

must be interpreted as murder (i.e., intentional or voluntary killing).<sup>151</sup> The discussions on murder above, in the section on war crimes are also applicable in this category of genocide.

*(b) Causing serious bodily harm or mental harm to members of the group.*

The denial of foodstuffs and clothing in the cold winter months may cause serious bodily harm to members of a group. The ICTR in the *Akayesu* case established that causing such harm “does not necessarily mean that the harm is permanent and irremediable”.<sup>152</sup> This stance was reiterated in *Krstić*, but the ICTY Trial Chamber did find in addition that it “must involve a harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be a harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”.<sup>153</sup> This position is altered somewhat in the recent judgement from the ICTR Trial Chamber in the *Rukundo* case.<sup>154</sup> In considering mental harm equating to the crime of genocide, the Court did not hear evidence of the mental state of the victim, and instead drew inferences that the victim suffered mental harm from the evidence presented taking into account in particular, the circumstances surrounding the commission of the prohibited act.<sup>155</sup>

*(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.*

Deliberately starving or allowing members of a group to perish in harsh weather or without any medical supplies can bring about conditions of life which will cause its physical destruction. In *Akayesu*, the Trial Chamber held that this term includes, inter alia, “subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirements”.<sup>156</sup> In *Kayishema and Ruzindana* an ICTR Trial Chamber held that this offence included the “deliberate deprivation of resources indispensable for survival,

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<sup>151</sup> *Ibid.*, para.500-501.

<sup>152</sup> *Ibid.*, para.502.

<sup>153</sup> *The Prosecutor v Krstić*, ICTY, TC, 2 August 2001, Case No. IT-98-33-T, para.513.

<sup>154</sup> *The Prosecutor v. Rukundo*, ICTR TC II, Case No. 27 February 2009, Case No. ICTR-2001-70-T

<sup>155</sup> *Ibid.*, para.388-389.

<sup>156</sup> *The Prosecutor v Akayesu*, ICTR TC I, 2 September 1998, Case No. ICTR-96-4-T, para.505-506.

such as food or medical services”.<sup>157</sup> In *Braanin*, an ICTY Trial Chamber confirmed it also included “the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion”.<sup>158</sup>

Cassese highlights an interesting question of whether the killing of only one single member of the group, with the required intent, may amount to genocide.<sup>159</sup> This could be the case where aid is diverted and denied to a group in need, but only one or a few civilians die as a result of starvation or lack of medical supplies, services or attention. In *Akayesu* the Trial Chamber held the view that genocide may be committed even if the acts prohibited by Article 2 of ICTR Statute (which deals with genocide) are committed against one member of the group.<sup>160</sup> Cassese argues that “this broad interpretation is not consistent with the text of the norms on genocide, which speak instead of ‘members of a group’”.<sup>161</sup> In his discussion of the customary international rule which, he says, does not require that the victims of genocide be numerous, he states “the only thing that can be clearly inferred from the rule is that genocide cannot be held to occur when there is only one victim. However, as long as the other requisite elements are present, the killing or commission of the other enumerated offences against more than one person may amount to genocide”.<sup>162</sup>

A person who directly and publicly incites others to prevent humanitarian assistance from reaching those in need by, for example, diverting convoys, disrupting their routes or attacking them, with the requisite intent, may be held responsible for incitement to commit genocide.<sup>163</sup> In accordance with Article 27 of the ICC Statute, the Statute applies equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government shall in no case exempt a person from criminal responsibility. Therefore, should a Government official or even the Head of State order (directly and publicly) the denial of humanitarian assistance to a

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<sup>157</sup> *The Prosecutor v Kayishema and Ruzindana*, ICTR, TC II, 21 May 1999, Case No. ICTR-95-1-T, para.115.

<sup>158</sup> *The Prosecutor v Braanin*, ICTY, TC II, 1 September 2004, Case No. ICTY-96-33-T, para.691.

<sup>159</sup> Cassese (2008) p.134.

<sup>160</sup> *The Prosecutor v Akayesu*, ICTR TC I, 2 September 1998, Case No. ICTR-96-4-T, para.521.

<sup>161</sup> Cassese (2008) p.134.

<sup>162</sup> *Ibid.*, p.146.

<sup>163</sup> Article 25(3)(e) ICC Statute.

protected group, with the intent to destroy it in whole or in part, he/she will be liable for prosecution for the crime of genocide.

Article 28(1) of the ICC Statute provides for the possibility of a military commander, or person effectively acting as a military commander to be held criminally responsible for crimes committed by forces under his or her effective command and control (or effective authority and control as the case may be). Article 28(2) of the ICC Statute contains similar provisions for superior and subordinate relationships not of a military character (i.e., a civilian superior). Distinction is made in Article 28 between civilian and military superiors, requiring a more stringent mens rea<sup>164</sup> standard for the former than the latter. Cassese notes that it has been purported that the ICC Statute appears to allow genocide to be committed on a lower mens rea element in the case of superior command, as commanders can seemingly incur liability for genocide committed by their subordinates even if they have no real knowledge of the crime. However, he states this contention may be objected to only be true in cases where the superior knows that a genocide is about to be perpetrated (or is being committed) and deliberately fails to prevent or repress it.<sup>165</sup>

Whilst the above discussion on genocide has largely focused on individual criminal responsibility for the crime of genocide, it is important to note that under both the Genocide Convention and the ICC Statute, State parties are obligated to criminalize and punish authors of genocide. The International Court of Justice in the *Bosnia v Serbia* case held that the Genocide Convention upholds a duality of responsibility for genocide, which entails national and international responsibility on the part of individuals and States.<sup>166</sup> The Court concluded that Article I of the Genocide Convention, in addition to imposing a duty on States to prevent and punish genocide, also prohibited them from committing it themselves.<sup>167</sup> The Court further concluded that the obligation to prevent

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<sup>164</sup> "Mens rea" is the mental element required for the crime (e.g., if a perpetrator intended to commit an act of killing, the "intent" part of crime would be called mens rea. The act of killing would be called the "actus reus").

<sup>165</sup> Cassese (2008) p.146-147.

<sup>166</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ, 26 February 2007, para.163, 173 and 174.

<sup>167</sup> *Ibid.*, para.167.

genocide is not limited to the State's own territory.<sup>168</sup> The obligation on States requires them to exercise due diligence in employing “all means reasonably available to them, so as to prevent genocide so far as possible”.<sup>169</sup> However, critics<sup>170</sup> of this judgment argue that the Convention’s provisions only cover individual criminal responsibility and that state responsibility is in fact covered by customary international law. Cassese purports that genocidal acts are normally “in fact part of a pattern of conduct tolerated, approved, or condoned by governmental authorities”.<sup>171</sup>

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<sup>168</sup> Ibid., para.183.

<sup>169</sup> Ibid., para.430.

<sup>170</sup> Cassese (2008) p.129, footnote no.7.

<sup>171</sup> Ibid, p.141.



## 7 Conclusion

The intention of this paper has been to offer a substantive assessment of the duties incumbent on States under international humanitarian law to provide humanitarian assistance to the civilian population under its control. In doing so, it has sought to provide a comprehensive overview and analysis of the relevant provisions and customary law rules in international humanitarian law. It has explored what constitutes humanitarian assistance and who is entitled to receive it. It has also proffered an insight into the definition of a “civilian” and the protection afforded to civilians in time of armed conflict. The paper has covered four main areas where humanitarian assistance may be denied by the State to the civilian population under its control and has analyzed the legality of such denial. It has also examined in depth where such denial may constitute a grave breach of the Geneva Conventions and an international crime. Also discussed in the paper are those provisions in international humanitarian law which may need more clarification and the areas in which gaps may exist in the law.

### 7.1 Filling the gaps

There seems to be a gap in the protection afforded to civilians that are nationals of a State party to a conflict. Whilst the provisions of Part II of Geneva Convention IV (which includes Article 23) cover the whole of the populations of the countries in conflict, the requirements under Article 23 only obligate States to allow free passage of relief consignments (which is of course subject to permissible exceptions) if intended for those civilians of another State Party to the Conventions, even if an adversary; and “likewise” free passage of consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases. It is unfortunate that Geneva Convention IV does not obligate States to allow for the passage of relief consignments for the civilian population as a whole. It also does not obligate a State to allow free passage of relief consignments to its own civilians (i.e., the nationals of the State party in question).

There also seems to be a gap in protection with respect to the right of the civilian population to request assistance. Under Article 30 of Geneva Convention IV, the right is granted to make application for assistance, however, this right is only afforded to “protected persons”, which by virtue of Article 4 of Geneva Convention IV, do not include a State's own nationals, only those who find themselves in the hands of a party to the conflict or Occupying Power of which they are not nationals. Nor does Article 4 include nationals of a neutral State who find themselves in the territory of a party to the conflict. Even the requirement of humane treatment in Article 27 of Geneva Convention IV is directed at protected persons. It seems, therefore, that under Geneva Convention IV (which has more State Parties to it than the Additional Protocols), a civilian population which is denied humanitarian assistance by its own State has little right under international humanitarian law to request or receive assistance. The ICRC Commentary on Article 4 is evidence of this conclusion, stating, “The Convention thus remains faithful to a recognized principle of international law: it does not interfere in a State's relations with its own nationals.”<sup>172</sup>

The situation is altered somewhat when considering Additional Protocol I, which does provide protection for the nationals of a State party to the conflict. Article 50 of Additional Protocol I provides a broad scope for defining a “civilian”; even in the case of doubt a person shall be considered a civilian. Whilst Article 23 of Geneva Convention IV stipulates that consignments should be allowed free passage when “intended only for civilians of another High Contracting Party”, Article 70 of Additional Protocol I on the other hand makes no such distinction, stipulating that free passage be granted “even if such assistance is destined for the civilian population of the adverse party”. The drafting of Article 70(2), therefore, allows for a much broader interpretation of this requirement of free passage, and it could be argued that under Article 70(2) States must allow free passage of consignments to any intended civilian population, even to their own nationals.

The fundamental guarantee of humane treatment afforded by Common Article 3 to “persons taking no active part in the hostilities” goes some way to address the gap in

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<sup>172</sup> ICRC Commentary Article 4 GC IV, p.46.

protection left by Geneva Convention IV. Although referring to non-international armed conflicts in the Convention itself, the customary status of common Article 3 means it is applicable in both international and non-international armed conflicts. The denial of humanitarian assistance to those in need would undoubtedly constitute inhumane treatment. In addition, Article 75 of Additional Protocol I guarantees humane treatment to those in the power of a party to the conflict who do not benefit from a more favourable treatment under the Conventions or under Additional Protocol I.

Another gap in protection exists when the civilian population are reliant on the will of the State in order to receive relief. In international armed conflicts relief actions shall be undertaken subject to the agreement of the parties concerned in such relief actions.<sup>173</sup> In non-international armed conflicts, relief actions shall be undertaken subject to the consent of the State concerned.<sup>174</sup> The civilian population is therefore dependent on the State consenting to such relief actions, which may be problematic particularly where a State is for example, conducting a genocidal campaign against its population, or in situations where the civilians in need are those in the territory under the effective control of a non-State actor. The above problem is negated only by the guarantee of humane treatment provided to the civilian population by Article 4 of Additional Protocol II, and of course in Common Article 3 of the Geneva Conventions.

Therefore, the guarantee of humane treatment seems to afford the most protection to those civilians not in the power of an enemy or of an Occupying Power. Civilians in non-international armed conflicts have fewer privileges and protections than those in international armed conflicts. A State's own nationals have no right to request assistance from outside their own State under international humanitarian law; this is also true of the civilian population in non-international armed conflicts. Where a civilian population is in need of essential supplies for its survival, it is important that the facility exist for them to raise the alarm within the international community. This is especially important in countries where the media is highly restricted or not allowed free movement, or where the State has collapsed or intends to deny humanitarian

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<sup>173</sup> Article 70(1) API.

<sup>174</sup> Article 18(2) APII.

assistance in circumstances which amount to a criminal offence under international law. This is an area that needs to be addressed in the future development of the law, so that individuals do not need to rely on the will of their own State in order to receive humanitarian assistance.

## 7.2 The way forward

Although the jurisprudence arising from the ICC and other ad hoc tribunals such as the ICTY and ICTR go some way to provide enforcement mechanisms for international humanitarian law by punishing violators of the law, what is needed is effective mechanisms to enforce implementation of the law before such violations occur. Whilst one might purport that these courts act as a deterrent for future violators it has not yet been assessed to what extent this holds true. The ICC has not been in existence for long enough to assess the deterrent effect it has on States or individual perpetrators and has yet to convict anyone. Before a perpetrator can be brought to justice there must exist, not only the political will to act either amongst the international community or by the State itself, but also the resources to take action in the first place. State practice has shown a reluctance from States to get involved in matters of no direct concern to them, but it may be considered unlawful for a State to maintain a passive attitude when it is in a position to take action. Failure to respond allows the rights of those protected under international humanitarian law to be abused.<sup>175</sup>

Not only is there is a need for effective implementation measures but also timely ones. The UNSC has periodically confirmed its commitment to the protection of civilians in armed conflict, however, it often does not respond to violations in a timely nor effective way. Resolutions are passed which “urge” or “demand” compliance with obligations to provide humanitarian assistance,<sup>176</sup> but where violations are not considered a threat to international peace and security, it can be a lengthy process to ensure essential supplies reach those in need. Violations by non-state actors are also extremely difficult to assess or remedy. In times of armed conflict it is also difficult to obtain the necessary

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<sup>175</sup> Stoffels, *supra* footnote 6, p.529.

<sup>176</sup> E.g., UNSC Resolution 1674 (2006), reaffirmed by the UNSC in Resolution 1870 (2009).

information to assess the needs of civilian population, particularly those in territory under the effective control of a non-State actor.

A stronger adherence by the international community to Common Article 1 to “respect and to ensure respect” for the Conventions in all circumstances is greatly needed to ensure that where serious breaches of international humanitarian law take place, such as the unlawful denial of humanitarian assistance to those in need, these violations are addressed and remedied as quickly as possible. Where such denial is criminal, it is important that the perpetrators are brought to justice.

If something is done to enforce and promote compliance amongst States under Common Article 1 perhaps this could reduce the number of cases in which humanitarian assistance is denied. This is in keeping with the values of "the principles of humanity" and "the dictates of the public conscience" contained within the Marten's Clause which must be borne in mind when considering the provision of humanitarian assistance to those in need. Interpretations of the law should afford the greatest level of protection possible. As the four Geneva Conventions celebrate their 60<sup>th</sup> year since adoption, it may be appropriate to reflect on the statements made by Jakob Kellenberger, President of the ICRC, at the ceremony to celebrate the 60th anniversary of the Geneva Conventions. “Humanitarian issues arise [...] in part because of a lack of rules, or because the rules are too broad or vague, leaving much to subjective interpretation. These areas include access to populations in need of humanitarian assistance [...] The essential spirit of the Geneva Conventions – to uphold human life and dignity even in the midst of armed conflict – is as important now as it was 60 years ago”.<sup>177</sup>

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<sup>177</sup> Address by Jakob Kellenberger, President of the ICRC, at the ceremony to celebrate the 60th anniversary of the Geneva Conventions, Geneva, 12 August 2009.  
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