

Promoting Compliance with the Rules Regulating Humanitarian Relief Operations in Armed Conflict: Some Challenges

Abstract

In recent years, the increasingly frequent and, in certain contexts, extremely severe, impediments to the provision of humanitarian assistance to civilians in need have focused attention on how to enhance compliance with the rules of international humanitarian law (IHL) regulating humanitarian relief operations. Efforts to hold accountable parties to armed conflict and persons responsible for unlawfully impeding humanitarian relief operations face the challenge that the underlying rules give parties latitude as to how to implement the central obligation to allow and facilitate rapid and unimpeded passage of humanitarian supplies, equipment and personnel. The present article outlines the rules of IHL regulating humanitarian relief operations and highlights the difficulties in determining, in the majority of situations, whether they have been violated. It then presents current endeavours to promote accountability. It concludes with some reflections on whether the threat of accountability is the most effective way of enhancing compliance with this area of IHL, at least while efforts are underway to negotiate access.

1. INTRODUCTION

In recent years, the increasingly frequent and, in certain contexts, extremely severe, impediments to the provision of humanitarian assistance to civilians in need have drawn unprecedented attention to the rules regulating humanitarian relief operations in situations of armed conflict. This has led both to initiatives to provide guidance on the applicable rules,¹ and to consideration of how to promote compliance with this area of international humanitarian law (IHL).² With regard to compliance, attention has focused principally on ways of holding

¹ See, for example, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, (Dapo Akande and Emanuela-Chiara Gillard, commissioned and published by UN OCHA, 2016) (*Oxford Guidance*); 'ICRC Q&A and lexicon on humanitarian access', *International Review of the Red Cross*, Vol 96, Issue 893, March 2014, 359; *Humanitarian Access in Situations of Armed Conflict: Handbook on the Normative Framework* (Swiss Federal Dept of Foreign Affairs, 2012).

² It should be noted that international human rights law and, in particular, the rights relating to physical integrity and to an adequate standard of life (in terms of right to food and water, shelter and to health) are also of relevance to humanitarian relief operations in situations of armed conflict. The present article focuses exclusively on IHL.

accountable parties to armed conflict that obstruct humanitarian relief operations and persons responsible therefor by the imposition of targeted sanctions and the establishment of individual international criminal responsibility.³

These efforts to promote compliance are laudable but particularly complex from a legal point of view as the underlying rules regulating humanitarian relief operations are not necessarily clear-cut. Even though they may cause significant hardship to civilians, not all impediments to humanitarian relief operations are violations of IHL. Parties to an armed conflict do have certain clear obligations, ranging from the all too frequently overlooked duty to meet the needs of civilians under their effective control, before the question of humanitarian relief operations even comes into play, to the prohibition of starvation of the civilian population as a method of warfare. However, the law leaves them significant discretion as to how to implement the central obligation to allow and facilitate rapid and unimpeded passage of supplies, equipment and personnel involved in humanitarian relief operations. To the extent that the underlying substantive rules give parties latitude, making a case for individual criminal responsibility or other forms of accountability for those who violate them is all the more arduous.

This article aims to highlight some of the difficulties that may arise in promoting compliance with violations of the rules of IHL dealing with humanitarian relief operations. The article does not purport to provide a comprehensive examination of the law regarding relief operations,⁴ but the first section provides a brief

³ See, for example, 'Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: the Challenges to Prosecute and Some Proposals for the Future', *Israel Law Review* 48(3), November 2015, 281.

⁴ For an overview of the law in this area, see, for example *the Oxford Guidance* (n.1); Flavia Lattanzi, 'Humanitarian Assistance', in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, 231; Felix Schwendimann, 'The legal framework of humanitarian access in armed conflict', *International Review of the Red Cross*, Vol. 93, No. 884, December 2011, 993; Heike Spieker, 'Humanitarian Assistance, Access in Armed Conflict and Occupation', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press (2013); and Stoffels, Ruth

summary of the rules of IHL in this area. An understanding of these rules is essential when conducting relief operations, and all the more, so when trying to establish accountability for their violation. The second section discusses when these rules can be considered as having been violated and, consequently, humanitarian relief operations unlawfully impeded. The next section presents some of the approaches currently adopted for establishing accountability for violation of these rules and notes some of the problems they face. The final section of the article steps away from the details of the law to highlight some operational and policy concerns raised by an approach to promoting compliance with this area of IHL that focuses on accountability. It ends with some recent examples of practical mechanisms that attempt to address the reservations of parties to armed conflict to agreeing to and facilitating humanitarian relief operations and achieve the law's objective of providing humanitarian assistance to people in need.

2. THE RULES OF INTERNATIONAL HUMANITARIAN LAW REGULATING HUMANITARIAN RELIEF OPERATIONS

The treaty rules of IHL regulating collective humanitarian relief operations for civilians⁵ in situations of international armed conflict and occupation are found principally in Articles 23 and 59 of the Fourth Geneva Convention of 1949 (GC IV),⁶ and Articles 69-71 of the First Additional Protocol thereto of 1977 (AP I).⁷ The rules applicable in non-international conflicts are found in common Article 3(2) to the Geneva Conventions of 1949 (GCs) and Article 18 of Additional Protocol II thereto of 1977 (AP II).⁸ Customary law rules apply alongside these

Abril, 'Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps', *International Review of the Red Cross*, Vol. 86, No. 855, September 2004, pp. 515-546.

⁵ The present article does not address the rules of IHL regulating humanitarian relief for people deprived of their liberty in relation to an armed conflict nor those regulating individual relief.

⁶ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287.

⁷ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3.

⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (entered into force 7 December 1978) 1125 UNTS 609.

treaty provisions. According to the ICRC Customary Law Study, these treaty rules are mirrored in customary law applicable in both types of conflict.⁹

The rules of IHL regulating humanitarian relief operations are, for the most part, the same in international and non-international conflicts. Primary responsibility for meeting the needs of civilians lies with the party to the conflict in whose effective control they find themselves.¹⁰ If this party is unable or unwilling to meet these needs, offers may be made to carry out relief actions that are humanitarian and impartial in character and conducted without any adverse distinction.¹¹ The consent of affected states is required.¹² However, States have no latitude to withhold consent to offers to conduct humanitarian relief operations in two situations: first, in situations of occupation. If an occupying power is not in a position to ensure the adequate provision of supplies essential to the survival of the civilian population of the occupied territory, it must accept offers to conduct relief operations that are humanitarian and impartial in character.¹³ Second, the United Nations Security Council may adopt binding measures requiring parties to consent to humanitarian relief operations or, more radically, impose relief operations. Such measures will alter the otherwise applicable rules of IHL.¹⁴ In all other situations consent is required but it may not be withheld arbitrarily. Once consent has been obtained, parties to an armed conflict¹⁵ must allow and facilitate rapid and unimpeded passage of supplies,

⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules* (International Committee of the Red Cross and Cambridge University Press 2005) (ICRC Customary Law Study) Rule 55.

¹⁰ See, for example, Oxford Guidance (n 1) and references therein.

¹¹ Common Art 3(2) GCs, Art 70(1) AP I, and Art 18(2) AP II.

¹² For a discussion of whose consent is required in non-international armed conflicts see Oxford Guidance (n 1), Section D.

¹³ Art 59 GC IV.

¹⁴ To date this has only occurred once, in relation to Syria. See UNSC Res 2139(2014), 22 February 2014, UN Doc S/RES/2139 (2014), operative para 6; and UNSC Res 2165(2014), 14 July 2014, UN Doc S/RES/2165 (2014), operative para 2. While, as a matter of law, it is only the consent of states that is required, in these resolutions the Security Council demanded that all parties to the conflict consent.

¹⁵ The present article only addresses the obligations of parties to an armed conflict. For a discussion of the obligations of non-belligerent states, see Oxford Guidance (n 1) Section H.

equipment and personnel involved in the humanitarian relief operations. They may prescribe technical arrangements under which such passage is permitted.¹⁶

IHL thus foresees two successive steps: first, an acceptance of offers to conduct humanitarian relief operations; and, second, once consent has been obtained, an obligation to allow and facilitate rapid and unimpeded passage of supplies, equipment and personnel involved in such operations.

Recently attention has focused on the first step, principally because of a small number of situations where the affected state did not consent to humanitarian relief operations being conducted despite the existence of severe needs. Most frequently, however, problems arise at the second stage: states have accepted offers to conduct humanitarian relief operations but subsequently fail to do what is required or necessary to allow and facilitate their rapid and unimpeded passage.¹⁷

3. UNLAWFUL IMPEDING OF HUMANITARIAN RELIEF OPERATIONS

As will be discussed in Section 4.1 below, the ICC Statute includes the war crime of '[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions'.¹⁸ The expression 'wilfully impeding relief supplies' does not appear in IHL treaties. While the expression 'wilful impeding' might have a certain appeal in relation to international criminal law inasmuch as it highlights the mental element required,

¹⁶ In relation to situations of occupation powers see arts 59 and 61 GC IV, and in relation to other situations of international armed conflict, see art 70(2)-(4) AP I. Neither common art 3(2) GCs nor art 18(2) AP II address this aspect of humanitarian relief operations, but the rules in Additional Protocol I on this issue are considered customary and applicable in both international and non-international armed conflicts. See ICRC Customary Law Study (n 9) Rules 55 and 56.

¹⁷ For examples, see the Annex 'Constraints on humanitarian access' to the Secretary-General's reports on the protection of civilians in armed conflict, UN Doc S/2009/227, 29 May 2009; UN Doc S/2010/579, 11 November 2010; and UN Doc S/2012/376, 22 May 2012.

¹⁸ Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute), art 8(2)(b)(xxv).

it is important to bear in mind that not every impediment, obstruction or delay to humanitarian relief operations will be a violation of IHL. Since war crimes are serious violations of IHL, impeding humanitarian relief operations can only amount to war crimes in cases where they constitute such violations of IHL. Thus, in order to establish the war crime provided for in the ICC Statute, it is essential to determine what amounts to a violation of the rules regulating humanitarian relief operations outlined in the previous section. Quite apart from establishing whether the mental element required by the word 'wilful' is present, it will also need to be established that there has been an 'unlawful impeding'.

Humanitarian relief operations will be unlawfully impeded in two circumstances described below. First, there will be unlawful impeding when consent to offers to carry out humanitarian relief operations is withheld in violation of international law. Second, once consent has been obtained, parties to an armed conflict will unlawfully impede humanitarian relief operations where they fail to comply with the obligation to allow and facilitate rapid and unimpeded passage of supplies, equipment and personnel involved in such operations.

3.1 Consent withheld in violation of international law

The withholding of consent to offers to conduct humanitarian relief operations would be in violation of international law in two situations. First, when parties to an armed conflict are obliged to consent to offers to conduct humanitarian relief operations, but fail to do so. As outlined in Section 2 above, the obligation to consent arises in situations of occupation, or when the Security Council has adopted binding measures requiring parties to consent to humanitarian relief operations or has imposed such operations.

Second, consent is withheld unlawfully when states whose consent is required withhold it arbitrarily. Essentially, consent is withheld arbitrarily in three situations:¹⁹

- if it is withheld in circumstances that result in the violation by a state of its obligations under international law with respect to the civilian population in question. One clear example would be withholding consent in situations where the civilian population is inadequately supplied and the state intends to cause, contribute to, or perpetuate starvation. This would violate the prohibition on starvation of the civilian population as a method of warfare.²⁰ Another example would be withholding consent to medical relief operations. The wounded and sick – including enemy combatants – must receive, to the fullest extent practicable and with the least possible delay, the medical care required by their condition. No distinction may be made on any grounds other than medical ones.²¹
- If the withholding of consent violates the principles of necessity and proportionality. Where consent to relief operations is withheld for a legitimate reason, it will nonetheless be arbitrary if it exceeds what is necessary in the circumstances, and thus is disproportionate. Limitations in terms of time, duration, location, and affected goods and services must not go beyond what is absolutely necessary to achieve the legitimate aim.
- If consent is withheld in a manner that is unreasonable, unjust, lacking in predictability or that is otherwise inappropriate.

¹⁹ For a fuller analysis of what amounts to arbitrary withholding of consent to humanitarian relief operations see Oxford Guidance (n 1) Section E, and Dapo Akande and Emanuela-Chiara Gillard, 'Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict', 92 International Law Studies XX (2016).

²⁰ Art 54(1) AP I and art 14 AP II.

²¹ Art 10 AP I and art 7 AP II.

3.2 Violation of the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment and personnel

Humanitarian relief operations are also unlawfully impeded if, once consent has been obtained, parties to an armed conflict do not comply with the obligation to allow and facilitate the rapid and unimpeded passage of humanitarian relief supplies, equipment and personnel.

Determining when humanitarian relief operations have been ‘impeded’ to a degree to amount to a violation of this obligation is complex as a matter of law and of fact. IHL treaties do not provide guidance on this point. Apart from the small number of instances in which specific conduct is required discussed at 3.2.1 below, the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment and personnel may be discharged in a variety of ways, and parties have considerable discretion in its implementation.

3.2.1 What parties are required to do to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment and personnel

Once consent has been obtained, passage of humanitarian relief supplies, equipment and personnel into the country and movement within it must be as rapid as possible in the circumstances, taking into account, for example, the state of roads and other necessary infrastructure and the location of active hostilities.²² The requirement that passage be unimpeded means that parties must refrain from harassment and should reduce administrative procedures and other formalities as far as possible, dispensing with any that are superfluous.²³

²² Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949*, (International Committee of the Red Cross 1987), (ICRC Commentary to the APs), para 2829.

²³ Ibid.

IHL treaties set out a number of specific measures with regard to the obligation of parties to allow and facilitate passage. Parties may not divert relief consignments from their intended purpose nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.²⁴ In addition, restrictions may be imposed on the activities and the freedom of movement of humanitarian relief personnel only in case of imperative military necessity, for example in the case of a military operation in a particular location. Even in such circumstances restrictions may only be imposed temporarily.²⁵ In situations of occupation, humanitarian relief consignments must be exempt from all charges, taxes or customs unless these are necessary in the interests of the economy of the occupied territory.²⁶

Beyond the measures specifically mentioned in IHL treaties, parties to an armed conflict may discharge the obligation to allow and facilitate rapid and unimpeded passage in a variety of ways. While it is possible to identify practical measures that states could take to facilitate passage,²⁷ the fact that they are not mentioned in IHL treaties means that, for the most part, makes it difficult to assert that just because a party has not taken a particular measure, for example, simplified visa procedures or waived customs inspections, it has not complied with the obligation to allow and facilitate rapid and unimpeded passage. As discussed in section 3.2.2 below, it will be necessary to consider the effect of the failure to adopt the measure.

3.2.2 What parties are entitled to do: technical arrangements

While parties to an armed conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment and personnel, they are

²⁴ Art 70(3)(c) AP I.

²⁵ Art 71(3) AP I.

²⁶ Art 61 GC IV.

²⁷ For examples see Oxford Guidance (n 1) Section E.

entitled to prescribe technical arrangements for such passage.²⁸ These arrangements can serve a number of purposes: they may enable parties to assure themselves that relief consignments are exclusively humanitarian; they may prevent humanitarian relief convoys from being endangered or from hampering military operations; and they may ensure that humanitarian relief supplies and equipment meet minimum health and safety standards.

Technical arrangements may include the search of consignments to check they do not contain weapons, other military equipment or items that may be used for military purposes; or the requirement that relief convoys use prescribed routes at specific times to ensure that they do not hamper and are not endangered by military operations. Parties to an armed conflict may make passage of humanitarian relief consignments conditional on their distribution under the local supervision of an impartial organisation or on other measures to guarantee that the supplies will reach their intended beneficiaries.²⁹

As with measures to allow and facilitate rapid and unimpeded passage of relief consignments, parties also have a degree of discretion with regard to technical arrangements. However, those arrangements must be applied in good faith and their imposition or effect must not be arbitrary within the meaning set out in Section 3.1 above. In addition, the nature, extent and impact of such arrangements must not prevent the rapid delivery of humanitarian assistance in a manner which is impartial in character, and conducted without any adverse distinction.³⁰

²⁸ Art 59 GC IV and Art 70(3) AP I. According to the ICRC Customary Law Study (n 9) the same entitlement also exists in situations of non-international armed conflict, Rule 55 and commentary thereto.

²⁹ Art 70(3)(b) AP I.

³⁰ That the ability to impose technical arrangement is subject to an overriding duty not to prevent rapid delivery of humanitarian assistance in a principled manner is evident from the fact that Art. 70(3)(a) AP I, providing for technical arrangements, is stipulated as applying to passage 'in accordance with' Art. 70(2) AP I containing the obligation for rapid and unimpeded passage. Furthermore, Art. 70(1) AP I and Art. 18(2) AP II make clear that the relief action provided for must be 'humanitarian and impartial' and 'conducted without any adverse distinction'.

3.2.3 When has the obligation to allow and facilitate rapid and unimpeded passage of humanitarian supplies, equipment and personnel been violated?

Against this background, it is not straightforward to determine at what point the effect of constraints, impediments or delays to humanitarian relief operations is of such a nature and extent as to amount to a violation of the obligation to allow and facilitate the rapid and unimpeded passage of relief consignments, personnel and equipment. IHL instruments do not provide guidance on this issue and to date it has not been addressed by any national or international tribunal.

The issue should not be analysed in terms of the bi-lateral relationship between each actor authorised to carry out humanitarian relief operations and the party to the armed conflict required to allow and facilitate their rapid and unimpeded passage. Instead, since as stated in Section 2 above, the rules of IHL on humanitarian relief operations only come into play when civilians are inadequately provided with essential supplies,³¹ the key consideration should be the outstanding needs of the civilian population.

It is insufficient that the activities of a particular actor have been impeded, even if severely. Instead, the impact on the civilian population of the impediments on all those authorised to operate must be considered. If they are such as to leave the civilian population as whole, or segments thereof – either in specific locations or particular groups – without essential relief items or specific services for prolonged periods of time, then the party can be considered as having violated

³¹ Two conditions must be met for the rules of IHL on humanitarian relief operations to come into play. First, civilians must be inadequately provided with essential supplies and the party to the armed conflict responsible for meeting their needs must not be providing the requisite assistance. Second, the actor offering its services must be capable of carrying out relief operations that are exclusively humanitarian and impartial in character and conducted without any adverse distinction. Art 70 AP I. See also ICRC Commentary to the APs (n 22) para 4883; and *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons*, UN Doc A/65/282, 1 Aug 2010, para 81.

the obligation to allow and facilitate rapid and unimpeded passage of relief operations and, therefore, unlawfully impeded humanitarian relief operations.

4. CURRENT APPROACHES TO ESTABLISHING ACCOUNTABILITY FOR UNLAWFULLY IMPEDING HUMANITARIAN RELIEF OPERATIONS

Recognizing civilians' frequent reliance on humanitarian relief operations, the suffering caused when these are impeded, and the fact that in certain contexts parties to armed conflict are depriving civilian populations of assistance as a deliberate policy, efforts have been made to hold accountable those responsible for unlawfully impeding relief operations under a number of different mechanisms. These include international criminal responsibility under the ICC Statute; listing under UN sanctions regimes; and reporting under the monitoring and reporting mechanism on grave violations of children's rights in situations of armed conflict.

These endeavours share the same goal of ensuring civilians have access to life-saving assistance. They also face the same challenge: the underlying rules of IHL regulating humanitarian relief operations give parties to armed conflict leeway. While impeding humanitarian relief operations in certain extreme situations – for example, doing so to cause the starvation of the civilian population or intentionally withholding medical assistance – clearly violates these rules, in the majority of situations it is likely to be unclear whether particular obstructions, delays or impediments are actually a violation of the law. This makes pursuing accountability extremely difficult; something that is reflected in the limited recourse to date to the various mechanisms for establishing responsibility for violations of this area of IHL.

4.1 The war crime in the ICC Statute³²

³² For a recent and comprehensive analysis of relevant international criminal law see Rogier Bartels, 'Denying Humanitarian Access as an International Crime in Times of Non-International

Under the ICC Statute '[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions' is a war crime in international armed conflicts.³³

The formulation of the war crime appears to be a combination of the prohibition of starvation of the civilian population³⁴ and of the rules of IHL regulating humanitarian relief operations. As is the case for other war crimes under the ICC Statute that combine prohibitions, this approach impairs the clarity of the crime.³⁵ In the present case, while the prohibition of starvation of the civilian population as a method of warfare is relatively clear, the same cannot be said with regard to the rules regulating humanitarian relief operations and, in particular, as discussed in Section 3.2 above, whether impediments amount to a violation of IHL, let alone a war crime. This lack of clarity is regrettably carried through to the war crime.

4.1.1 Prohibition of starvation as a method of warfare

While there is clarity as to the key elements of the prohibition of starvation of the civilian population as a method of warfare and the related war crime, one element warrants highlighting. The prohibition requires the intent to starve the civilian population.³⁶ It does not cover situations when the starvation of the civilian population occurs as an unintended result of a military operation that has other objectives. An example would be an attack on a bridge used by military

Armed Conflict: the Challenges to Prosecute and Some Proposals for the Future', *Israel Law Review* 48(3), November 2015, 281.

³³ Art 8(2)(b)(xxv) ICC Statute. Under the ICC Statute the war crime only exists in relation to international armed conflicts, even though the underlying prohibition on starvation of the civilian population as a method of warfare exists in both international and non-international armed conflicts. It is unclear why it was also not included in the list of war crimes in non-international armed conflict, and it has been suggested that its omission was probably an oversight. See, for example, Bartels (n 32), at 298. For a discussion of whether an equivalent war crime exists in relation to non-international armed conflicts see Oxford Guidance (n 1) Section I.1.

³⁴ Art 54(1) AP I and art 14 AP II.

³⁵ See, for example, Bartels (n 33) 287.

³⁶ See, for example, ICRC Commentary to the APs (n 22) para 2089.

forces than prevents humanitarian relief from reaching civilians in need. In such cases the lawfulness of the adverse impact of such measures on the civilian population must be determined by a proportionality assessment: the expected incidental loss of civilian life or injury to civilians must not be excessive in relation to the concrete and direct military advantage anticipated.

That the lawfulness of certain measures that result in starvation is to be determined by reference to intent or on the basis of a proportionality assessment is expressly spelled out in relation to blockades in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea and the Manual on Air and Missile Warfare. Both of these documents provide that the establishment of a blockade is prohibited if its sole - or 'sole or primary' in the case of the Manual on Air and Missile Warfare - purpose is to starve the civilian population or to deny it other objects essential for its survival, or if the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.³⁷ The requirement of intent has been retained in the elements of crime of the corresponding war crime under the ICC Statute.³⁸

4.1.2 Wilful impeding relief supplies as provided under the Geneva Conventions

³⁷ San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994), para 102; and Manual on International Law Applicable to Air and Missile Warfare (2009), Rules 157 and 158.

³⁸ *Elements of Crime*, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B, Article 8(2)(b)(xxv), War crime of starvation as a method of warfare, Element 2, '[t]he perpetrator intended to starve civilians as a method of warfare.' On this point see also Michael Cottier and Emilia Richard, 'Paragraph 2(b)(xxv): Starvation of civilians as a method of warfare' in Otto Triffterer and Kai Ambos, *Rome Statute of the International Criminal Court – A Commentary* (3rd ed, C.H.Beck, Hart and Nomos, 2016) 508, 518; and Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press 2003), 364.

The second part of the war crime, which appears to give a specific example of this prohibited method of warfare, ‘including wilfully impeding relief supplies as provided for under the Geneva Conventions’, raises a number of questions.

The first question relates to the rather surprising reference to the Geneva Conventions. The Fourth Geneva Convention lays down some rules regulating collective humanitarian relief operations for the civilian population, in some detail for situations of occupation in Articles 59 to 61, and, more fleetingly, in relation to other situations in Article 23.³⁹ However, it is Additional Protocol I that contains the prohibition on starvation and the more comprehensive rules on humanitarian relief operations in Articles 69 to 71; provisions that are generally accepted as having superseded the framework of Article 23 GC IV.⁴⁰

In view of this, it is unclear why the ICC Statute war crime refers exclusively to the more limited and less protective provisions of the Geneva Conventions. The issue is not addressed in the Elements of Crimes.⁴¹ There has been speculation as to the reasons for this reference.⁴² The most plausible explanation appears to be that the ICC Statute was intended to only include war crimes considered as customary at the time of its negotiation, and that violation of the rules on humanitarian relief operations in Additional Protocol I was not considered as giving rise to individual criminal responsibility under customary law at that time.⁴³

A second question relates to the interplay between the initial reference to starvation and the inclusion of wilful impeding of relief operations. One possible interpretation could be that, regardless of what constitutes impeding relief

³⁹ Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949 (entered into force 21 October 1950) 75 UNTS 135 addresses individual and collective relief for prisoners of war.

⁴⁰ See, for example, ICRC Commentary to the APs (n 22), para 2851. See also Oxford Guidance (n 1), Sections G.2 and G.3.

⁴¹ Elements of Crime (n 38), Article 8(2)(b)(xxv), War crime of starvation as a method of warfare.

⁴² See, for example Bartels (n 33) 293-294.

⁴³ Author exchanges with participants in ICC Statute negotiations.

operations in violation of IHL, the war crime only covers those cases where the impediments give rise to needs of the same severity as starvation.

Finally, there is the question of the use of the expression ‘wilfully impeding’ without making clear that it only relates to such impeding as would be unlawful. The Elements of Crime for the war crime focus on the prohibition of starvation and do not provide guidance on what amounts to ‘wilfully impeding’. As discussed in Section 3 above, the expression does not appear in IHL treaties, and impeding will be unlawful in two situations: first, unlawfully withholding consent; and, second, once consent has been obtained, failing to comply with the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment and personnel.

However, and this is the crux of the problem, while there have been some recent efforts to determine the situations in which withholding consent would be arbitrary,⁴⁴ the issue has not been addressed by a judicial or quasi-judicial body yet. Moreover, and more fundamentally still, the rules of IHL regulating humanitarian relief operations grant parties some latitude in implementing the obligation to allow rapid and unimpeded passage of humanitarian relief supplies, equipment and personnel. Consequently, in the majority of cases, it is a challenge as a matter of fact and law to determine whether this obligation has been violated. Such lack of clarity in the underlying obligations makes the related war crime equally unclear and, consequently, difficult to prosecute. Indeed, the one investigation so far that has considered impediments to humanitarian relief operations as a war crime⁴⁵ has been based on the crime of ‘[i]ntentionally

⁴⁴ See, for example, *Oxford Guidance* (n 1), Section E.

⁴⁵ Looking beyond war crimes, the ICC Prosecutor included humanitarian relief-related violations in the charge of genocide against President Al Bashir. The Prosecutor alleged that the methods of destruction of the protected group went beyond direct killing and included ‘denial and hindrance of medical and other humanitarian assistance needed to sustain life in IDP camps’. In the same case the Prosecution also alleged that the crime against humanity of extermination had been committed *inter alia* by ‘obstruction of humanitarian aid’. ICC, *The Prosecutor v Al Bashir*, No ICC-02/05-01/09, Second Decision of the Prosecution’s Application for a Warrant of Arrest, 12 July 2010, para 34.

directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations' under Article 8(2)(b)(iii) ICC Statute.⁴⁶

4. 2. Basis for listing under UN Security Council sanctions

In addition to prosecutions for international crimes, targeted sanctions are a second way of establishing accountability for those impeding humanitarian relief operations. The UN Security Council has determined that the obstruction of humanitarian activities or of access to humanitarian assistance can constitute a basis for imposing targeted sanctions in relation to a number of recent conflicts. By 2016, five Security Council sanction regimes include this ground, formulated in slightly different ways:

- Security Council resolution 1844 (2008) gives the possibility of imposing sanctions for 'obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia';⁴⁷
- Security Council resolution 1857 (2008) refers to 'obstructing the access to or the distribution of humanitarian assistance in the eastern part of the Democratic Republic of the Congo';⁴⁸
- Security Council resolution 2196 (2015) refers to 'obstructing the delivery of humanitarian assistance to [the Central African Republic], or access to,

⁴⁶ ICC, Situation on Registered Vessels of Comoros, Greece and Cambodia, Article 53(1) Report, 6 November 2014. This said, the war crimes of attacking persons or objects involved in a humanitarian or peacekeeping mission in Art 8(b)(iii) and Art 8(e)(iii) ICC Statute also raise interpretation challenges. See, for example, Magdalena Pacholska, '(Il)legality of Killing Peacekeepers: The Crime of Attacking Peacekeepers in the Jurisprudence of International Criminal Tribunals', *Journal of International Criminal Justice*, (2015) 13(1) 43.

⁴⁷ UNSC Res 1844(2008), 20 November 2008, UN Doc S/RES/1844 (2008), operative para 8(c).

⁴⁸ UNSC Res 1857(2008), 22 December 2008, UN Doc S/RES/1857 (2008), operative para 4(f).

- or distribution of, humanitarian assistance in [the Central African Republic]’;⁴⁹
- in relation to South Sudan, the Security Council adopted as a basis for designation direct or indirect responsibility for, or engagement or complicity in, actions or policies that threaten the peace, security or stability of South Sudan, and included within this ‘[t]he obstruction of the activities of international peacekeeping, diplomatic, or humanitarian missions in South Sudan, including IGAD’s Monitoring and Verification Mechanism or of the delivery or distribution of, or access to, humanitarian assistance’;⁵⁰
 - most recently, a similar approach was adopted in relation to Yemen, where the Security Council emphasised ‘that acts that threaten the peace, security, or stability of Yemen’ and that therefore constitute a basis for designation ‘may also include obstructing the delivery of humanitarian assistance to Yemen or access to, or distribution of, humanitarian assistance in Yemen’.⁵¹

To date sanctions have been imposed for obstructing the delivery of humanitarian assistance - among others - in relation to Al Shabaab in Somalia,⁵² and on the anti-Balaka commander in the Central African Republic.⁵³

⁴⁹ UNSC Res 2196(2015), 22 January 2015, UN Doc S/RES/2196 (2015), operative para 12(e).

⁵⁰ UNSC Res 2206(2015), 3 March 2015, UN Doc S/RES/2206 (2015), operative para 7(f).

⁵¹ UNSC Res 2216(2015), 14 April 2015, UN Doc S/RES/2216, (2015), operative para 19.

⁵² UNSC Committee established pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, *Narrative summaries of reasons for listing*, <https://www.un.org/sc/suborg/en/sanctions/751/materials/summaries/entity/al-shabaab>. The reasons for listing on this ground appear principally related to food aid diversion and kidnapping of aid workers. Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1853 (2008), 59-66, in UN Doc S/2010/91, 10 March 2010.

⁵³ UNSC Committee established pursuant to resolution 2127 (2013) concerning the Central African Republic, *Narrative summaries of reasons for listing*, <https://www.un.org/sc/suborg/en/sanctions/2127/materials/summaries/individual/habib-soussou>. The reasons for listing on this ground appear principally related to attacks against humanitarian workers and looting of supplies and equipment. Final report of the Panel of

4.3. Children and armed conflict monitoring and reporting mechanism

The third accountability mechanism that has addressed humanitarian relief operations is the monitoring and reporting mechanism on grave violations of children's rights in situations of armed conflict. In 2005, the Security Council requested the UN Secretary-General to establish a mechanism to provide information on six grave violations of children's rights: killing or maiming; recruitment or use by armed forces or armed groups; [SEP]attacks on schools or hospitals; rape or other sexual violence; [SEP]abduction; and 'denial of humanitarian access to children'.⁵⁴

At the time of the establishment of the mechanism, parties to armed conflict determined to have recruited or used children were listed in an Annex to the Secretary-General's annual report on children and armed conflict. Over the years the Security Council incrementally developed the system, and by July 2015 all the other grave violations became triggers for listing, with the exception of 'denial of humanitarian access'.⁵⁵

This is a reflection of the difficulty of determining whether denial of access in a particular situation constitutes a violation of IHL. Looking beyond purely legal considerations, and as will be discussed in greater detail in Section 5 below, the non-inclusion of the access-related violation also reflects the concerns of

Experts on the Central African Republic established pursuant to Security Council resolution 2127 (2013), Annexes 59-61, in UN Doc S/2014/762, 29 October 2014.

⁵⁴ UNSC Res 1612(2005), 26 July 2005, UN Doc S/RES/1612 (2005), operative para 3.

⁵⁵ UNSC Res 1882(2009), 4 August 2009, UN Doc S/RES/1882 (2009) operative para 3 added parties to armed conflict 'that engage, in contravention of applicable international law, in patterns of killing and maiming of children and/or rape and other sexual violence against children, in situations of armed conflict'; UNSC Res 1998(2011), 12 July 2011, UN Doc S/RES/1998 (2011) operative para 3 added parties to armed conflict 'that engage, in contravention of applicable international law; (a) in recurrent attacks on schools and/or hospitals; or (b) in recurrent attacks or threats of attacks against protected persons in relation to schools and/or hospitals in situations of armed conflict'; and UNSC Res 2225(2015), 18 June 2015, UN Doc S/RES/2225 (2015) operative para 3 added parties to armed conflict 'that engage, in contravention of applicable international law, in patterns of abduction of children in situations of armed conflict'.

operational humanitarian organisations about politicisation of access. While naming and shaming parties responsible for the other five grave violations may lead them to improve compliance, those who negotiate access fear that adopting such an approach to parties to an armed conflict that impede relief operations may be counterproductive to their negotiations. The concerns are all the more acute as the monitoring and reporting mechanism is linked to the Security Council, an eminently political body.⁵⁶

5. REFLECTIONS ON PROMOTING COMPLIANCE WITH THE RULES OF IHL REGULATING HUMANITARIAN RELIEF OPERATIONS

This final section moves away from challenges that may arise from the interpretation of the relevant legal rules in the context of seeking accountability. This section makes some general remarks about approaches to promoting compliance with the rules of IHL regulating humanitarian relief operations, whose objective is getting assistance to people in need. In seeking to achieve that aim, attention should be paid to the risks of a counter-productive ‘over-legalisation’ and ‘politicisation’ of humanitarian access – something that is fundamentally a matter of negotiation between those wishing to conduct humanitarian relief operations and parties to an armed conflict.

5.1. Over-legalisation

In recent years considerable emphasis has been put on the legal dimension of humanitarian relief operations in particular contexts. This was most marked in relation to the conflict in Syria,⁵⁷ where those wishing to conduct humanitarian relief operations faced extremely severe limitations, and humanitarian actors and states, including Security Council members, raised a series of legal questions, in

⁵⁶ Consultations with representatives of UN agencies involved in access negotiations.

⁵⁷ See, for example, ‘There is no legal barrier to UN cross-border operations in Syria’, *The Guardian*, 28 April 2014, <http://www.theguardian.com/world/2014/apr/28/no-legal-barrier-un-cross-border-syria>.

the apparent hope that these would provide the answer they were seeking and resolve access problems.⁵⁸

However, legal analysis must be put in its proper context. An understanding of the law is essential for parties to a conflict and those seeking to conduct humanitarian relief operations to ensure they act lawfully and are aware of the consequences if they fail to do so. However, in negotiations for humanitarian access the law is just the background. Unlike in litigation, where an independent and impartial judicial body makes a determination of the relative merits of the legal arguments of those wishing to provide assistance and of affected states,⁵⁹ in negotiations the law provides a backdrop to guide discussions with affected states – discussions that are unlikely to be legal in nature and that will be shaped by political and practical considerations. In such situations, an argument that might win the day in court might not lead to any progress in the dialogue.

In a similar vein, careful thought should be given to the value of invoking the threat of criminal responsibility or of sanctions to promote compliance with this particular area of the law. The threat of accountability – individual and of the party to the armed conflict responsible for the violation – plays an important role in enhancing respect for IHL. However, as a crisis is unfolding and efforts are underway to negotiate access, it should be resorted to prudently: sparingly, and at the right moment.

Obtaining consent to offers to conduct humanitarian relief operations and

⁵⁸ These and other questions are addressed in Emanuela-Chiara Gillard, 'The law regulating cross-border relief operations', *International Review of the Red Cross* (2013), 95 (890), 351.

⁵⁹ On the different roles played by international law can be invoked see Steve Ratner, 'Beyond Courtroom Arguments: Why International Lawyers Need to Focus More on Persuasion', Parts I and II, *EJIL: Talk!*, September 2013, <http://www.ejiltalk.org/beyond-courtroom-arguments-why-international-lawyers-need-to-focus-more-on-persuasion-part-i/>, and <http://www.ejiltalk.org/beyond-courtroom-arguments-why-international-lawyers-need-to-focus-more-on-persuasion-part-ii/>.

overcoming the challenges of actually delivering assistance once consent has been granted is a matter of on-going negotiation between those seeking to provide assistance and the parties to the conflict. Such negotiations are best pursued in an incremental manner, away from the political limelight, to build mutual trust – actor by actor, specific need by specific need, location by location, on the basis of civilians’ specific situation and needs, rather than in a binary, ‘all or nothing’ manner. Humanitarian actors will need to reassure parties to the conflict of the strictly humanitarian and impartial character of their services while building confidence in their neutrality. In such circumstances, it is questionable whether early threats of criminal responsibility or of the imposition of sanctions for impeding humanitarian relief operations is likely to promote compliance with the law. On the contrary, the real risk exists that it may entrench positions and close the space for dialogue than assist the confidence-building exercise.⁶⁰

This said, there are clear-cut instances where accountability should be pursued: for example, when parties to an armed conflict are using starvation of the civilian population as a method of warfare, or when the ‘impediments’ take the form of attacks against personnel participating in humanitarian relief operations or against civilians trying to access assistance.

5.2 Politicisation

Concerns about politicisation of humanitarian assistance are even more acute. Some recent conflicts have cast considerable political light on humanitarian relief operations. Perhaps most evident was the push by certain states to get the Security Council to impose cross-border humanitarian relief operations in

⁶⁰ For a discussion of similar concerns about the impact of the timing of referrals to the ICC on on-going peace mediation efforts see, for example, Ruben Reike, ‘Conflict Prevention and R2P’ in Alex Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect*, (Oxford University Press 2016) 581, 592; and Priscilla Hayner, *International Justice and the Prevention of Atrocities Case Study: Libya: The ICC Enters During War*, ECFR Background paper, November 2013, http://www.ecfr.eu/page/-/IJP_Libya.pdf.

Syria.⁶¹ Were cross-border relief operations actually what was needed operationally? Had humanitarians exhausted all avenues of negotiation? Was their motivation exclusively humanitarian? Without underestimating the severity of the constraints, Damascus' intransigence, and its clear policy of not allowing medical supplies and equipment into opposition held-areas, it is legitimate to ask whether greater progress could have been achieved if efforts to negotiate humanitarian access had taken place in a separate stream, entirely distinct from political objectives and actors, including the Security Council.

Beyond Syria, in certain contexts the imposition of targeted sanctions by the Security Council on those obstructing the delivery of humanitarian assistance, or access to, or distribution of, humanitarian assistance has been met by wariness by the humanitarians negotiating access. They were concerned that including humanitarian operations within the purview of the sanctions could jeopardise their ability to engage with the designated groups and undermine perceptions of the neutrality of humanitarians.⁶²

While, the Security Council might welcome the opportunity of being perceived as having a positive impact in situations where its efforts to restore peace or at least compliance with IHL have borne no fruit, the clear risk exists that its involvement in issues related to humanitarian access will politicise access negotiations and make them less likely to succeed.

Similarly, there is a growing tendency for some humanitarian actors to turn too quickly to a political body for a solution without having first gone through the often frustrating and slow process of negotiating access. Political action – which

⁶¹ Similar concerns were also raised by the convoy sent by Russia into the Eastern Ukraine in the summer of 2014. See, for example, Alex Luhn, 'Ukraine rebels struggle to reach aid as Russian convoy returns home', *The Guardian*, 23 August 2014, <http://www.theguardian.com/world/2014/aug/23/donetsk-ukraine-russia-vladimir-putin>.

⁶² See, for example, the case of Somalia discussed in Kate Mackintosh and Patrick Duplat, *Study of the Impact of Counter-Terrorism Measures on Principled Humanitarian Action*, July 2013, 81. https://docs.unocha.org/sites/dms/documents/ct_study_full_report.pdf.

can be too blunt and which does not by its very nature comply with humanitarian principles - is not a substitute for this delicate process.

5.3 Two recent examples of confidence-building mechanisms

All this said, it is nonetheless possible to conclude on a more positive note by referring to two recent examples of mechanisms established to build confidence between those seeking to conduct humanitarian relief operations and relevant states, and overcome reservations about agreeing to and allowing and facilitating rapid and unimpeded passage of humanitarian supplies, equipment and personnel.

The first was established in relation to Syria, where, as just discussed, constraints to access were extremely severe, and the discussion on how to address them extremely politicised. Eventually, in Resolution 2165 (2014) the Security Council imposed cross-border and cross-line humanitarian relief operations carried out by United Nations agencies and their implementing partners.⁶³ The same resolution also established a mechanism under the authority of the United Nations Secretary-General to monitor the loading of all humanitarian relief consignments of the United Nations humanitarian agencies and their implementing partners, their passage into Syria, and to provide confirmation to the Syrian authorities of the humanitarian nature of the consignments.⁶⁴

Many questions could be asked about this resolution. There is the risk that it may be abused in future by parties reluctant to agree to humanitarian relief operations to claim that they are under no obligation to do so unless and until the Security Council ‘authorises’ them.⁶⁵ More immediately, questions may be raised about the resolution’s potential adverse impact on humanitarian relief operations

⁶³ UNSC Res 2165(2014), 14 July 2014, UN Doc S/RES/2165 (2014), operative para 2.

⁶⁴ UNSC Res 2165(2014) (n 63) operative para 3.

⁶⁵ UNSC Res 2165(2014) (n 63) operative paragraph 2, the Security Council ... ‘[d]ecides that the United Nations humanitarian agencies and their implementing partners are *authorized* to use routes across conflict lines and the border crossings ...’ (Emphasis added).

conducted by actors other than those referred to in the resolution. Questions could also be raised about the monitoring mechanism. Was the ‘imposition’ of relief operations merely a ‘face-saving’ deal, considering it was accompanied by a monitoring mechanism? Or was the monitoring mechanism a recognition of Syria’s ongoing entitlement to impose measures of control, including searches? What is the actual added value of the monitoring mechanism considering it is implemented by the United Nations and only inspects the United Nations’ and its implementing partners’ relief consignments? Of more operational relevance, has the mechanism actually improved the situation on the ground and allowed relief to reach the intended beneficiaries, in view, among other things, of the increasingly complex situation within Syria and the proliferation of actors?

At present, the answers to these questions remain unclear, and are in any event beyond the scope of this article. Nonetheless, the monitoring mechanism and the operating modalities it established are a valuable precedent. In the future, parties wishing to conduct humanitarian relief operations will be able to rely on elements thereof as a blueprint to reach agreement with recalcitrant states.

A second, and more positive, inasmuch as was developed without the involvement of the Security Council, example, relates to humanitarian relief consignments intended for Yemen in 2015. The Saudi-led coalition was overseeing the implementation of the arms embargo imposed by the Security Council⁶⁶ with such rigour that the rate at which commercial and humanitarian shipping entered was such that it was described as a ‘de facto blockade’.⁶⁷ The delays in the supply of food and fuel, and the consequent shortage in electricity and water had a severe impact on the civilian population.⁶⁸

⁶⁶ UNSC Res 2216(2015), (n 51), operative para 14.

⁶⁷ Oxfam et al, open letter to the Security Council, “UN Security Council should seize opportunity to restart Yemen peace process”, 19 October 2015, <https://www.oxfam.org/en/pressroom/pressreleases/2015-10-19/un-security-council-should-seize-opportunity-restart-yemen-peace>.

⁶⁸ Human Rights Watch, *Yemen: Coalition Blocking Desperately Needed Fuel Tankers Wait Offshore as Civilians Go Without Water, Electricity*, 10 May 2015,

In response to these shortages and without the involvement of the Security Council, the UN Emergency Relief Coordinator, Yemen and the Saudi-led coalition agreed upon an arrangement exclusively for the passage of sea and air shipments of relief consignments. The passage is notified by a UN Office for the Coordination of Humanitarian Affairs-led interagency cell in Riyadh to the Saudi ministries of Foreign Affairs and Defence which, in turn, notify other members of the Coalition. This is a lighter arrangement than that for Syria, based on notifications, with searches only being conducted in exceptional circumstances. The arrangement is open to UN agencies and NGOs wishing to resort to it.⁶⁹

Separately, at the request of Yemen and with the agreement of the Saudi-led coalition, the UN Secretary-General established UNVIM, the UN Verification and Inspection Mechanism for Yemen, to facilitate commercial imports to Yemen. The arrangement covers all ships carrying commercial items or bilateral assistance from states intended for Yemeni ports that are not under the control of the government of Yemen.⁷⁰

Without suggesting that the nature of and motivation for the impediments to passage of humanitarian relief consignments into Yemen were as severe or comparable to those in Syria, the arrangements that were established show what can be achieved through discrete and exclusively humanitarian negotiation to reach a practical arrangement for implementing operations in a manner that addresses states' concerns but ensures the rapid and unimpeded passage of relief

<https://www.hrw.org/news/2015/05/10/yemen-coalition-blocking-desperately-needed-fuel>. See also, Humanitarian Coordinator for Yemen, Statement on the Situation in Yemen, 23 April 2015, <http://reliefweb.int/report/yemen/humanitarian-coordinator-yemen-johannes-van-der-klaauw-statement-situation-yemen-23>.

⁶⁹ The ICRC and Médecins sans Frontières have established their own arrangements. This is probably not due to distrust of particular mechanisms but more a reflection of these organisations' distinct preference for making their own arrangements, as these are more likely to be perceived as impartial and neutral.

⁷⁰ The mechanism does not apply to ships operated or chartered by the United Nations or international humanitarian organisations. For details of the notification and clearance processes see <http://www.vimye.org>.

goods and equipment.

6. Conclusion

The recent interest in the legal framework regulating humanitarian relief operations in armed conflict is extremely positive. In view of unprecedented number of people relying on humanitarian action it is essential that all stakeholders have greater familiarity with this area of IHL.

The law is the starting point and background to negotiations to carry out humanitarian relief operations and to the implementation thereof. However, it is not the sole consideration. Other factors are also important in building confidence between parties to armed conflict and those offering to conduct relief operations. Threats of accountability for having violated the law are unlikely to contribute constructively to negotiations as a crisis unfolds.

Confidence in the exclusively humanitarian character of relief operations will be central to their acceptance and facilitation by parties to armed conflict. A number of factors are likely to contribute to this including, first, the actual and perceived independence of humanitarian access negotiations from other negotiations, including political ones to end hostilities. Second, the actual and perceived independence of humanitarian action from political interests and actors, including the Security Council. Third, the implementation of relief operations in a principled manner. They must be exclusively humanitarian and impartial: they must be conducted without adverse distinction on any ground, priority being given to those in greatest need.

In circumstances where parties remain wary about agreeing to and facilitating humanitarian relief operations in accordance with IHL, operational arrangements must be established to address their concerns and build confidence. Some useful mechanisms have been developed in recent years. They are valuable precedents that should be studied to capture good practices and to identify aspects that that would benefit from improvement for reference in future crises.