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**Achieving Accountability: Prosecuting the Denial of
Humanitarian Assistance in Non-International Armed Conflict**

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Abstract

Over the past decade, the number of people in need of humanitarian assistance as a result of armed conflict has grown to unprecedented levels. The rapid and effective provision of such assistance constitutes one of the greatest challenges faced by the international community in protecting civilians and other protected persons in times of conflict. While international humanitarian law imposes extensive obligations on the parties to a conflict to grant access to humanitarian actors and facilitate the provision of relief assistance, these rules are routinely violated. This results in significant and prolonged suffering of civilian populations. If the law governing humanitarian assistance is to be better respected, those who act unlawfully must be held accountable. One of the most effective mechanisms for ensuring such accountability is prosecution of international crimes at the International Criminal Court. In its present form, however, there is no provision in the Rome Statute of the International Criminal Court which provides specifically for the prosecution of the unlawful denial of humanitarian assistance in non-international armed conflict. This paper argues that this leaves a significant gap in the accountability framework, and examines possibilities for reform.

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I Introduction

In key 2015 reports, both the Secretary-General of the United Nations (“Secretary-General”) and the International Committee of the Red Cross (ICRC) identify that the provision of rapid and unimpeded humanitarian assistance constitutes one of the most significant challenges in ensuring the protection of the civilian population and other protected persons during armed conflicts.¹ This is not a new challenge, but it is a growing one. Over the past decade the number of people in need of international humanitarian assistance has tripled, the overwhelming majority of which are civilians affected by conflict.² It is estimated that worldwide, there are 125.3 million people in need of humanitarian assistance³ and the ICRC now warns that:⁴

The international humanitarian sector is at risk of reaching breaking point. The ICRC and other impartial humanitarian organisations are facing humanitarian needs on an epic scale in an unprecedented number of concurrent crises around the world.

One of the greatest challenges faced by humanitarian actors in responding to these crises is gaining rapid and unimpeded access to those in need.⁵ Humanitarian access is a fundamental prerequisite to providing effective assistance. The barriers to gaining such access, however, are various. The nature of conflict means that reaching those in need is always likely to be a significant challenge; active hostilities inevitably make the provision of assistance incredibly difficult. In many cases, however, the challenges to gaining access

¹ *Report of the Secretary-General on the protection of civilians in armed conflict* S/2015/453 (2015); and International Committee of the Red Cross *International humanitarian law and the challenges of contemporary armed conflict* (October 2015).

² *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 1, at [3].

³ United Nations Office for the Coordination of Humanitarian Affairs *Global Humanitarian Overview 2016: A Consolidated Appeal to Support People Affected by Disaster and Conflict* (December 2015) at 4.

⁴ International Committee of the Red Cross, above n 1, at 6.

⁵ Felix Schwendimann “The legal framework of humanitarian access in armed conflict” (2011) 93 IRRC 993 at 994; and International Committee of the Red Cross *ICRC Q&A and lexicon on humanitarian access* (June 2014) at 1.

arise as a result of deliberate obstruction by the parties to the conflict: either through attacks on humanitarian workers and facilities, bureaucratic restrictions, interference in the delivery of assistance, or as occurs in many situations, through an outright denial of access.⁶

International humanitarian law (IHL) sets out clear obligations on the parties to a conflict in relation to the provision of humanitarian assistance. Parties are required to grant access to humanitarian actors and facilitate the delivery of humanitarian assistance, unless valid reason exists.⁷ These rules are, however, routinely violated and all too often this is done with little or no accountability.⁸ The Secretary-General has highlighted, therefore, that where parties withhold consent to relief operations on arbitrary grounds, there must be consequences.⁹ There remains an “overwhelming need” to ensure that those who violate the law are held accountable for their actions; anything less “promotes a culture of impunity within which violations flourish”.¹⁰ In order to ensure that the law governing humanitarian assistance is better respected, it is critical that there is an effective legal framework for enforcement of the law and accountability when it is breached.

One of the most important mechanisms for enforcement and accountability of IHL is international criminal law (ICL) which encompasses rules that prohibit certain conduct and makes perpetrators accountable for violating these rules. In particular, the prosecution of

⁶ Swiss Federal Department of Foreign Affairs *Humanitarian Assistance in Situations of Armed Conflict: Handbook on the International Normative Framework* (version 2, December 2014) at 10; and International Committee of the Red Cross, above n 1, at 26.

⁷ Geneva Convention Relative to the Protection of Civilian Persons in Times of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention IV], arts 23, 54, 55, 56, 59 and 60; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 12 December 1977, entered into force 7 December 1978) [Additional Protocol I], arts 70 and 71; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 1125 UNTS 609 (opened for signature 12 December 1977, entered into force 7 December 1978) [Additional Protocol II]; arts 14 and 18; and Jean-Marie Henckaerts and Louise Doswald-Beck (eds) *Customary International Humanitarian Law – Volume 1: Rules* (International Committee of the Red Cross, Cambridge University Press, New York, 2009), r 55.

⁸ *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 1, at [4].

⁹ *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 1, at [7].

¹⁰ *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 1, at [7].

those who breach IHL at the International Criminal Court (ICC) is an important part of the accountability framework. The ICC was set up under the Rome Statute of the International Criminal Court (“Rome Statute”) with the intention of prosecuting those who commit the most serious crimes of international concern, and in doing so put an end to impunity and contribute to the prevention of these crimes.¹¹ Its role is particularly important because of its ability to prosecute international crimes where domestic courts are unable or unwilling.¹²

Notwithstanding the huge scale of suffering experienced by the civilian population when humanitarian assistance is unlawfully obstructed and the increased focus on the need for accountability, there is no provision in the Rome Statute which provides specifically for the prosecution of the unlawful denial of humanitarian assistance in non-international armed conflict (NIAC). This is despite the inclusion of art 8(2)(b)(xxv), applicable in international armed conflicts (IAC), which criminalises the act of “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.¹³ The majority of contemporary conflicts are non-international in character. This leaves, therefore, a significant gap in the accountability framework.

This paper argues that the Rome Statute in its current form is not sufficiently comprehensive so as to provide a robust system for enforcement of the rules governing humanitarian assistance in NIAC, and examines possibilities for reform. The discussion will proceed first in Part II by providing a background to the discussion: it outlines the concepts of humanitarian assistance and humanitarian access, examines the scale of the challenge faced by humanitarian actors in trying to access those in need in NIAC, and the impacts of the denial of humanitarian assistance. In Part III it outlines the IHL framework governing the provision of humanitarian assistance. Part V examines the possibilities for

¹¹ Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute], preamble and art 1.

¹² Rome Statute, above n 11, art 17.

¹³ Rome Statute, above n 11, art 8(2)(b)(xxv).

prosecuting the denial of humanitarian assistance in NIAC under the Rome Statute in its current form, and outlines why this regime is insufficiently robust. Finally, in Part V, possibilities for reform are discussed.

II Contemporary Conflicts: Humanitarian Crises on an Unprecedented Scale

Armed conflict is the greatest driver of humanitarian need.¹⁴ Contemporary conflicts take an extreme toll on civilian populations who are often deprived of essential goods and services as a result of the devastation caused by conflict.¹⁵ Thus, humanitarian assistance is essential to meet the most basic needs of those affected by an armed conflict.¹⁶ In many situations of conflict, humanitarian organisations become the primary providers of essential services: food, water, sanitation, health care and education.¹⁷

A Defining Humanitarian Assistance and Access

The terms “humanitarian assistance” and “humanitarian access” are not defined in IHL, and the terms have not been delineated by an international court or tribunal. Their meanings are however generally understood. “Humanitarian assistance” is often used interchangeably with other terms such as “humanitarian aid”, “humanitarian relief” and “relief action”, and refers to the provision of essential relief supplies to meet the basic human needs of those who require protection or assistance in armed conflict: food, clean drinking water, clothing, bedding, shelter, medicines and medical care.¹⁸ Generally, assistance is considered to be “humanitarian” when it is provided in accordance with the

¹⁴ United Nations Office for the Coordination of Humanitarian Affairs, above n 3, at 3.

¹⁵ *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 1, at [9].

¹⁶ International Committee of the Red Cross, above n 1, at 26.

¹⁷ United Nations Office for the Coordination of Humanitarian Affairs, above n 3, at 3.

¹⁸ Netherlands Advisory Committee on Issues of Public International Law *Advisory Report on Humanitarian Assistance* (August 2014) at 9; Heike Spieker “Humanitarian Assistance, Access in Armed Conflict and Occupation” *Max Planck Encyclopedia of Public International Law* (March 2013, online ed) at [2]; International Committee of the Red Cross, above n 1, at 28; and Swiss Federal Department of Foreign Affairs, above n 6, at 13.

core principles of humanitarian action: humanity, impartiality, neutrality and independence.¹⁹ These principles, originally derived from the Statutes of the Red Cross and Red Crescent Societies,²⁰ formally enshrined in two General Assembly Resolutions²¹ and committed to by many humanitarian organisations,²² while not strictly legally binding, are viewed by humanitarian actors as providing the foundations for humanitarian action.²³ The principle of humanity relates to the humanitarian imperative and the need to alleviate and redress human suffering wherever it is found.²⁴ “Impartiality” requires assistance to be provided on the basis of need without discriminating as to “nationality, race, religious beliefs, class or political opinions”.²⁵ Neutrality requires that assistance is provided without engaging in hostilities or taking sides in controversies of a “political, racial, religious or ideological nature”.²⁶ Finally, independence requires that humanitarian action must be autonomous from the political, economic, military or other objectives that any actor may hold.²⁷

“Humanitarian access” is generally recognised by humanitarian actors as encompassing the “dual dimensions” of both humanitarian actors’ ability to reach affected people and of affected populations’ ability to access humanitarian assistance and services.²⁸ Humanitarian organisations and other international actors stress that rapid and unimpeded

¹⁹ Statutes of the International Red Cross and Red Crescent Movement (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006), preamble; *Strengthening of the coordination of humanitarian emergency assistance of the United Nations* GA Res 46/182, A/Res/46/182 (1991) at [2]; and *Strengthening of the coordination of emergency humanitarian assistance of the United Nations* GA Res 58/114, A/Res/58/114 (2004) at preamble.

²⁰ Statutes of the International Red Cross and Red Crescent Movement, above n 19, preamble.

²¹ GA Res 46/182, above n 19, at [2]; and GA Res 58/114, above n 19, at preamble.

²² See International Committee of the Red Cross *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief* (April 2014).

²³ United Nations Office for the Coordination of Humanitarian Affairs *OCHA on Message: Humanitarian Principles* (June 2012) at 2.

²⁴ Statutes of the International Red Cross and Red Crescent Movement, above n 19, preamble.

²⁵ Statutes of the International Red Cross and Red Crescent Movement, above n 19, preamble.

²⁶ Statutes of the International Red Cross and Red Crescent Movement, above n 19, preamble.

²⁷ GA Res 58/114, above n 19, at preamble; and United Nations Office for the Coordination of Humanitarian Affairs, above n 23, at 1.

²⁸ United Nations Office for the Coordination of Humanitarian Affairs *OCHA on Message: Humanitarian Access* (version I, April 2010) at 1.

humanitarian access is a “fundamental prerequisite” to providing effective humanitarian assistance.²⁹

B Challenges Facing Humanitarian Assistance

In many cases, the key barriers to providing humanitarian assistance are security related. When hostilities are ongoing it is extremely difficult to reach populations in need, especially where the safety of humanitarian personnel cannot be guaranteed.³⁰ The nature of hostilities in contemporary NIAC brings new levels of complexity to these long-standing security concerns. Conflicts are becoming more protracted and have large geographical span, often “spilling over” into neighbouring territories and countries.³¹ This creates a significant challenge for humanitarian organisations that must attempt to reach a huge number of civilians spread over expansive areas. The increasing incidence of insurgent warfare also means that conflicts are fought in areas which are often densely populated, creating additional security concerns.³² Complexity also arises in NIAC as a result of the multitude of parties and their conflictual relations.³³ In particular, on the non-state side a myriad of armed groups frequently take part in the fighting. Often the structure of the chain of command of these groups is difficult to ascertain, and this poses a challenge both in terms of security and for engaging with such groups.³⁴

²⁹ GA Res 46/182, above n 19, at [6]; International Committee of the Red Cross, above n 1, at 26; Jean-Maurice Ripert “EU Presidency Statement – United Nations ECOSOC: Timely humanitarian assistance, including disaster risk reduction” (European Presidency Statement, 15 July 2008); “Thematic Areas: Humanitarian Access” United Nations Office for the Coordination of Humanitarian Affairs <www.unhca.org>; Swiss Federal Department of Foreign Affairs, above n 6, at 13; and Schwendimann, above n 5, at 994.

³⁰ International Committee of the Red Cross, above n 5, at 2.

³¹ International Committee of the Red Cross, above n 1, at 6; and United Nations Office for the Coordination of Humanitarian Affairs, above n 3, at 3.

³² United Nations Office for the Coordination of Humanitarian Affairs, above n 29.

³³ International Committee of the Red Cross, above n 1, at 6.

³⁴ International Committee of the Red Cross, above n 1, at 6.

In some cases, however, it is not just these practical challenges that impede the provision of effective humanitarian assistance, but deliberate obstruction by the parties to the conflict. Humanitarian assistance may be intentionally obstructed by the deliberate targeting of humanitarian workers and facilities, theft of assets, blockades, bureaucratic restrictions (such as delays in issuing of visas for humanitarian personnel), interference in the delivery of assistance, or by an outright denial of access.³⁵ In some cases, the obstruction of humanitarian relief efforts may be part of a military strategy aimed at depriving the adversary and/or the civilian population of essential supplies.³⁶ In other cases, it can be a result of complex political tensions. Humanitarian activities are sometimes denied because they are perceived as a threat to state sovereignty or governmental control.³⁷ There has been a growing perception in recent years that humanitarian aid has become more politicised.³⁸ Discussion around the notions of “humanitarian intervention” and the “responsibility to protect”, as well as an increasing number of international operations which have followed “integrated” approaches, which combine political, military and humanitarian objectives, have raised doubts in some contexts about whether humanitarian actors are driven purely by humanitarian purposes.³⁹ The ICRC notes that this has led some parties to armed conflicts to restrict or forbid humanitarian assistance.⁴⁰

C The Impacts of the Denial of Humanitarian Assistance

The denial of humanitarian access and assistance has tragic consequences for civilian populations in conflict zones. In situations in which the population is already suffering desperate levels of need, the blocking of assistance by parties to the conflict results in immense suffering. As noted by the Secretary-General, “[a]ccess for humanitarian organi[s]ations is not simply a technical requirement or bureaucratic decision for

³⁵ Swiss Federal Department of Foreign Affairs, above n 6, at 10; and International Committee of the Red Cross, above n 1, at 26.

³⁶ International Committee of the Red Cross, above n 5, at 2.

³⁷ Schwendimann, above n 5, at 994.

³⁸ International Committee of the Red Cross, above n 1, at 26.

³⁹ International Committee of the Red Cross, above n 5, at 21; and Schwendimann, above n 5, at 994.

⁴⁰ International Committee of the Red Cross, above n 5, at 21.

Governments; the denial of access prolongs suffering and kills people”.⁴¹ The conflict in Syria in particular has brought renewed attention to the impacts of the denial of humanitarian access. Now in its fifth year, the conflict has produced what the United Nations (UN) has called the “biggest humanitarian emergency of our era”.⁴² As at January 2016, it is estimated that 13.5 million Syrians, including 5.5 million children, are in need of immediate humanitarian assistance.⁴³ The crisis has continued to worsen as parties on all sides of the conflict continue to obstruct the provision of assistance.⁴⁴

The Syrian government in particular has systematically impeded the provision of humanitarian assistance, both through placing severe restrictions on humanitarian access, or denying such access altogether.⁴⁵ On many occasions, the Syrian government has blocked humanitarian assistance at its borders or required UN convoys to travel indirect routes through many checkpoints to reach people in need.⁴⁶ As at 30 November 2015, of the 91 requests made by the UN in 2015 to provide humanitarian assistance, only 27 had been approved, and of those, only 13 convoys had been completed.⁴⁷ Of the 14 remaining, half of those were unable to proceed owing to a lack of approval from Syrian security forces.⁴⁸ If these convoys were able to proceed, more than 282,000 people in hard-to-reach and besieged locations could be reached.⁴⁹ Administrative procedures also continue to

⁴¹ *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 1, at [39].

⁴² The United Nations Refugee Agency “Needs soar as number of Syrian refugees tops 3 million” (press release, 29 August 2014).

⁴³ United Nations Office for the Coordination of Humanitarian Affairs, above n 3, at 4; and International Committee of the Red Cross “Syria: Humanitarian situation deteriorating as winter approaches” (News Release, 3 December 2015).

⁴⁴ *Report of the Secretary-General on the implementation of Security Council resolutions 2139 (2014), 2165 (2014) and 2191 (2014)* S/2015/962 (2015) at [30].

⁴⁵ Julia Brooks “Is there a Right to Humanitarian Assistance?” (15 July 2015) Advanced Training Program on Humanitarian Action <<http://atha.se>>.

⁴⁶ Anne Richard, US Department of State “Humanitarian Assistance and the Syria Crisis” (Remarks, 3 November 2013).

⁴⁷ *Report of the Secretary-General on the implementation of Security Council resolutions 2139 (2014), 2165 (2014) and 2191 (2014)*, above n 44, at [36].

⁴⁸ *Report of the Secretary-General on the implementation of Security Council resolutions 2139 (2014), 2165 (2014) and 2191 (2014)*, above n 44, at [36].

⁴⁹ *Report of the Secretary-General on the implementation of Security Council resolutions 2139 (2014), 2165 (2014) and 2191 (2014)*, above n 44, at [36].

delay or limit the delivery of assistance. Humanitarian agencies face significant problems in obtaining visas for their staff.⁵⁰ Other bureaucratic processes also hamper the delivery of assistance. For example, food import regulations require that import documents for humanitarian food assistance need to be notarised by the Syrian embassy in the country of the product's origin, creating significant delays.⁵¹ The government also regularly prevents international humanitarian workers from travelling within Syria, and legitimate Syrian aid agencies are often blocked from working with the international community.⁵²

It is not just government forces who have obstructed the delivery of assistance, however. Opposition fighters have prevented aid from reaching those in need, diverted supplies and carried out acts of violence against humanitarian personnel.⁵³ All the parties to the conflict have also employed siege warfare widely, “encircl[ing] densely populated areas, preventing civilians from leaving, and blocking humanitarian access”.⁵⁴ The sieges imposed have become longer and consequently, more harsh.⁵⁵ The result is that up to 4.5 million people in Syria are in “hard-to-reach” areas, including nearly 400,000 people in 15 besieged locations who do not have access to aid they urgently need.⁵⁶ The UN stated in January 2016 that it had received credible reports of people starving to death in Madaya, a town under siege by Syrian forces.⁵⁷

⁵⁰ Oxfam *Failing Syria: Assessing the impact of UN Security Council resolutions in protecting and assisting Civilians in Syria* (March 2015) at 13; and *Report of the Secretary-General on the implementation of Security Council resolutions 2139 (2014), 2165 (2014) and 2191 (2014)*, above n 44, at [39].

⁵¹ *Report of the Secretary-General on the implementation of Security Council resolutions 2139 (2014), 2165 (2014) and 2191 (2014)*, above n 44, at [38].

⁵² Oxfam, above n 50, at 13; and Richard, above n 46.

⁵³ Richard, above n 46.

⁵⁴ *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic A/HRC/30/48* (2015) at [100].

⁵⁵ *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic A/HRC/28/69* (2015) at [11].

⁵⁶ United Nations Office for the Coordination of Humanitarian Affairs “Joint Statement on hard-to-reach and besieged communities in Syria” (Joint Statement, 7 January 2016).

⁵⁷ United Nations Office for the Coordination of Humanitarian Affairs, above n 56.

The situation in Syria is a demonstration of how the policy of the obstruction of humanitarian assistance can turn a “civil conflict and disaster ... into a regional crisis of historic proportions”.⁵⁸ It highlights the sheer scale of suffering inflicted on the civilian population as a result of the systematic denial of supplies essential for their survival. This is not unique to the Syrian conflict, however. The challenges faced in gaining humanitarian access and providing effective humanitarian assistance present a significant barrier to the protection of the civilian population in nearly every current conflict. The Secretary-General has stated that gaining humanitarian access and providing much-needed assistance is a key concern currently in Afghanistan, Central African Republic, Democratic Republic of the Congo, Iraq, Libya, Mali, Nigeria, the Occupied Palestinian Territory, Pakistan, Somalia, Sudan, Syria and Yemen.⁵⁹

III Humanitarian Assistance in International Humanitarian Law

The obligations of parties to an armed conflict in relation to humanitarian access and assistance are governed by IHL, which “envisages that humanitarian assistance will be needed and regulates its provision”.⁶⁰

A An Overview of the Legal Framework

The rules governing humanitarian assistance are found in the Fourth Geneva Convention (GC IV),⁶¹ the two Additional Protocols (AP I and AP II),⁶² and customary international law. Different legal regimes apply depending on whether the assistance is offered in a situation of occupation, IAC or NIAC. The key principles, however, are the same.⁶³ Firstly,

⁵⁸ Richard, above n 46.

⁵⁹ *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 1, at [10] - [26].

⁶⁰ International Committee of the Red Cross, above n 1, at 26.

⁶¹ Geneva Convention IV, above n 7.

⁶² Additional Protocol I, above n 7; and Additional Protocol II, above n 7.

⁶³ Emanuela-Chiara Gillard “The law regulating cross-border relief operations” (2013) 95 IRRC 351 at 355; and International Committee of the Red Cross *International humanitarian law and the challenges of contemporary armed conflict* (October 2015) at 27.

the primary responsibility for the basic needs of the civilian population rests with states and parties to the conflict.⁶⁴ Secondly, where a party to the conflict is unable or unwilling to meet these needs, states and humanitarian organisations can offer to carry out relief actions that are “humanitarian and impartial in character and conducted without any adverse distinction”.⁶⁵ Such an offer cannot be considered to constitute interference in the conflict or an unfriendly act.⁶⁶ Thirdly, consent from the parties to the conflict must be obtained before such actions can be carried out.⁶⁷ Consent, however, must not be arbitrarily denied.⁶⁸ Finally, once relief actions have been agreed to, parties to the conflict and other relevant states must facilitate the rapid and unimpeded passage of relief consignments, equipment and personnel.⁶⁹

1 Situations of Occupation

The obligations of parties towards the civilian population are most extensive during a situation of occupation. Provisions in GC IV⁷⁰ and AP I⁷¹ establish a clear obligation on the part of the occupying power to ensure that the basic needs of the population under its control are met.⁷² The occupying power has the duty to ensure “to the fullest extent of the means available to it” the provision of food and medical supplies to the civilian

⁶⁴ Gillard, above n 63, at 355; International Committee of the Red Cross, above n 1, at 27; Schwendimann, above n 5, at 996; *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 1, at [39]; and GA Res 46/182, above n 19, at [4].

⁶⁵ Additional Protocol I, above n 7, art 70(1); and Additional Protocol II, above n 7, art 18(2).

⁶⁶ Additional Protocol I, above n 7, art 70(1); and Ruth Abril Stoffels “Legal regulation of humanitarian assistance in armed conflict: Achievements and gaps” (2004) 86 *IRRC* 515 at 533.

⁶⁷ Additional Protocol I, above n 7, art 70(1); and Additional Protocol II, above n 7, art 18(2).

⁶⁸ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts: Volume XII CDDH/II/SR.87* (Geneva, 1974 - 1977) at 336; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva, 1987) at 819; Henckaerts and Doswald-Beck, above n 7, r 55; and *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 1, at [39].

⁶⁹ Additional Protocol I, above n 7, art 70(2); and Henckaerts and Doswald-Beck, above n 7, r 55.

⁷⁰ Geneva Convention IV, above n 7, arts 55, 56, 59 and 60.

⁷¹ Additional Protocol I, above n 7, arts 70 and 71.

⁷² Swiss Federal Department of Foreign Affairs, above n 6, at 30.

population,⁷³ as well as clothing, bedding, means of shelter, objects necessary for religious worship and other supplies essential to survival of the civilian population.⁷⁴ If the occupying power is not in a position to fulfil these duties to the civilian population, then it “shall agree to relief schemes on behalf of the said population” and it must “facilitate these schemes by all the means at its disposal”.⁷⁵ Relief personnel must be respected, protected, and assisted to the fullest extent practicable in carrying out their mission.⁷⁶ Third states are also under an obligation to grant the free passage of relief consignments on their way to the occupied territory.⁷⁷

2 *International Armed Conflict*

In the case of an IAC, the provision of humanitarian assistance is regulated by GC IV⁷⁸ and AP I.⁷⁹ Unlike in a situation of occupation, parties are under no obligation to provide direct humanitarian assistance to the civilian population on the territory under their control.⁸⁰ They do, however, have certain duties towards the civilian population.

Pursuant to GC IV, parties and other relevant states must allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended for civilians in the territory of another state, even if the latter is its adversary.⁸¹ Free passage for consignments of essential foodstuffs, clothing and tonics for children under fifteen, expectant mothers and maternity cases must also be allowed.⁸² The scope of

⁷³ Geneva Convention IV, above n 7, art 55.

⁷⁴ Additional Protocol I, above n 7, art 69(1).

⁷⁵ Geneva Convention IV, above n 7, art 59.

⁷⁶ Additional Protocol I, above n 7, art 71; and Swiss Federal Department of Foreign Affairs, above n 6, at 33.

⁷⁷ Geneva Convention IV, above n 7, art 59.

⁷⁸ Geneva Convention IV, above n 7, arts 23 and 54.

⁷⁹ Additional Protocol I, above n 7, arts 70 and 71.

⁸⁰ Brooks, above n 45.

⁸¹ Geneva Convention IV, above n 7, art 23(1).

⁸² Geneva Convention IV, above n 7, art 23(1).

GC IV is limited, however, as it does not impose obligations on states to allow for humanitarian access to their own population.⁸³

AP I significantly strengthens this regime, and applies to all civilian populations. Where civilians are not adequately provided with supplies essential to their survival, relief actions which are “of an exclusively humanitarian and impartial nature, and which are conducted without any adverse distinction” shall be undertaken, subject to the agreement of the parties concerned.⁸⁴ Offers of relief shall not be regarded as “interference in the armed conflict or as unfriendly acts”.⁸⁵ Once relief action has been approved, the parties must “allow and facilitate rapid and unimpeded passage” of the relief consignments, equipment and personnel⁸⁶ and respect and protect the humanitarian personnel.⁸⁷

These provisions largely reflect the position at customary international law. The ICRC’s study of customary international law identifies that, in both IAC and NIAC, the parties to the conflict must “allow and facilitate rapid and unimpeded passage of the humanitarian relief for civilians in need, which is impartial in character and conducted without adverse distinction, subject to their right of control”.⁸⁸ Therefore, the obligations on parties are broadly the same, even where state parties have not ratified AP I.

⁸³ Stoffels, above n 66, at 519; and Phoebe Wynn-Pope “Humanitarian access in international humanitarian law: the case of Syria and Security Council Resolution 2139 (2014)” in Jadranka Petrovic (ed) *Accountability for Violations of International Humanitarian Law: Essays in Honour of Tim McCormack* (Routledge, New York, 2015) 117 at 121.

⁸⁴ Additional Protocol I, above n 7, art 70(1).

⁸⁵ Additional Protocol I, above n 7, art 70(1).

⁸⁶ Additional Protocol I, above n 7, art 70(2).

⁸⁷ Additional Protocol I, above n 7, art 71(2).

⁸⁸ Henckaerts and Doswald-Beck, above n 7, r 55.

3 *Non-International Armed Conflict*

In the case of a NIAC, humanitarian assistance is regulated by Common Article 3 of the Geneva Conventions (CA 3)⁸⁹ and in some cases AP II.⁹⁰ The treaty law regime in NIAC is weaker than the framework for IAC.⁹¹ No explicit rights or duties relating to humanitarian assistance are established in CA 3, though it does establish that as a minimum measure of protection, persons taking no active part in hostilities “shall in all circumstances be treated humanely”.⁹² CA 3 also establishes the right of initiative - impartial humanitarian bodies may offer their services to the parties to the conflict.⁹³

AP II provides more explicit protection for humanitarian assistance.⁹⁴ Article 18 reinforces the right of humanitarian initiative and establishes that if the civilian population is suffering undue hardship as a result of a lack of supplies essential to its survival, relief actions which are of an exclusively humanitarian and impartial nature, and which are conducted without any adverse distinction “shall be undertaken subject to the consent of the High Contracting Party concerned”.⁹⁵ While AP II does not cover all forms of NIAC, only those where organised armed groups “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”,⁹⁶

⁸⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention I], art 3; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention II], art 3; Geneva Convention Relative to the Treatment of Prisoners of War 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention III], art 3; Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention IV], art 3 [Common Article 3].

⁹⁰ Additional Protocol II, above n 7, arts 14 and 18.

⁹¹ Spieker, above n 18, at [27].

⁹² Common Article 3, above n 89, art 3(1).

⁹³ Common Article 3, above n 89, art 3(2).

⁹⁴ Rebecca Barber “Facilitating humanitarian assistance in international humanitarian and human rights law” (2009) 91 IRRC 371 at 385.

⁹⁵ Additional Protocol II, above n 7, arts 18(1) and 18(2).

⁹⁶ Additional Protocol II, above n 7, art 1(1).

in practice states do not appear to make this distinction in the context of humanitarian assistance.⁹⁷

The customary international law norms governing humanitarian assistance in NIAC mirror those applicable in IAC, strengthening the treaty regime.⁹⁸ The norms at customary international law are particularly significant where the state party to the conflict has not ratified AP II.

B Consent

It is clear that the obligations on parties to facilitate humanitarian access and assistance are extensive. The main element of complexity in the IHL regime, however, is consent. In situations of occupation, if the occupying power is unable to provide for the population, it is under an obligation to agree to the provision of humanitarian assistance.⁹⁹ In both IAC and NIAC, however, the consent of the relevant party is a prerequisite to the provision of humanitarian assistance. In IAC, the provision of humanitarian assistance is “subject to the agreement of the Parties concerned in such relief actions”¹⁰⁰ and in NIAC it is “subject to the consent of the High Contracting Party concerned”.¹⁰¹ The need for consent is reaffirmed in the ICRC’s customary law study.¹⁰² It is this requirement that has attracted the most scrutiny in recent scholarship.

1 Arbitrary Denial of Consent

While consent for the provision of humanitarian assistance is required in both IAC and NIAC, parties do not have absolute and unlimited freedom to refuse consent to relief

⁹⁷ Swiss Federal Department of Foreign Affairs, above n 6, at 33.

⁹⁸ Henckaerts and Doswald-Beck, above n 7, r 55.

⁹⁹ Geneva Convention IV, above n 7, art 59.

¹⁰⁰ Additional Protocol I, above n 7, art 70(1).

¹⁰¹ Additional Protocol II, above n 7, arts 18(1) and 18(2).

¹⁰² Henckaerts and Doswald-Beck, above n 7, r 55.

actions.¹⁰³ There is a clearly established principle that parties must not refuse to grant access or allow humanitarian operations on an arbitrary basis.¹⁰⁴ The arbitrary denial of humanitarian access or assistance is a violation of IHL.¹⁰⁵

While the principle is clear, however, to clearly outline what constitutes arbitrary denial is more difficult. There is no agreed definition of “arbitrary denial”. The term is not defined in any treaty and to date this question has not been addressed by any tribunal, human rights mechanism or fact-finding body.¹⁰⁶ This makes application of the rule particularly challenging.¹⁰⁷ What can be noted with some certainty, however, is that there will be very few situations in which it will be valid to withhold consent. Such situations might include where the state has sufficient capacity to provide relief, where the actors offering assistance are not neutral or impartial, or for reasons of military necessity, for example, where humanitarian personnel could hamper military operations or relief is being diverted by belligerents.¹⁰⁸ Beyond this, denial of consent is likely to be arbitrary.

Certainly, it is clear that denial will be arbitrary if it violates the state’s other obligations at IHL, in particular, if withholding consent would amount to a violation on the prohibition

¹⁰³ Schwendimann, above n 5, at 998; and Brooks, above n 45.

¹⁰⁴ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International law applicable in Armed Conflicts: Volume XII*, above n 68, at 336; Sandoz, Swinarski and Zimmermann, above n 68, at 819; Henckaerts and Doswald-Beck, above n 7, r 55; and *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 1, at [39]. See also other soft law instruments: United Nations High Commissioner for Refugees *Guiding Principles on Internal Displacement* E/CN.4/1998.53/Add.2 (1998); Institute of International Law *Resolution on Humanitarian Assistance* (sixteenth commission, Bruges session 2003); and Council of Europe *Council of Europe Recommendation 6 (2006) of the Committee of Ministers to member states on internally displaced persons* (2006).

¹⁰⁵ *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 1, at [39] and [61].

¹⁰⁶ Gillard, above n 63, at 360.

¹⁰⁷ Gillard, above n 63, at 355; and International Committee of the Red Cross, above n 1, at 360.

¹⁰⁸ Gillard, above n 63, at 355; International Committee of the Red Cross, above n 1, at 360; and Cedric Ryngaert “Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective” (2013) 5 *Amsterdam Law Forum* 5 at 9.

of starvation of civilians as a method of warfare.¹⁰⁹ Another example would be withholding consent to medical relief operations on the basis that medical supplies could be used to treat enemy combatants - a clear breach of the fundamental rule under IHL that all wounded and sick must receive, to the fullest extent practicable, the medical care required by their condition.¹¹⁰ It has also been suggested that withholding consent that is “likely to endanger the fundamental human rights” of affected civilians may be considered arbitrary.¹¹¹ In many cases, determining whether consent has been arbitrarily withheld requires a balancing of legitimate military considerations with humanitarian ones. It has, therefore, been suggested that the principle of proportionality under human rights law may offer guidance.¹¹² A refusal in a situation where the suffering of the civilian population would outweigh even legitimate military concerns would be considered arbitrary.¹¹³

Further research and refinement of this principle is necessary. The United Nations Office for the Coordination of Humanitarian Affairs is currently, at the request of the Secretary-General, working on creating clarifying guidelines on the principle of arbitrary denial, and these will be particularly useful for providing further guidance on this issue.¹¹⁴

¹⁰⁹ Additional Protocol I, above n 7, art 54(1); Henckaerts and Doswald-Beck, above n 7, r 53; Gillard, above n 63, at 355; International Committee of the Red Cross, above n 1, at 360; Swiss Federal Department of Foreign Affairs, above n 6, at 26; Schwendimann, above n 5, at 999; and Barber, above n 94, at 387.

¹¹⁰ Additional Protocol I, above n 7, art 10; Additional Protocol II, above n 7, art 7; Henckaerts and Doswald-Beck, above n 7, r 110; and Gillard, above n 63, at 361.

¹¹¹ Gillard, above n 63, at 361.

¹¹² This is the approach taken in the: International Institute of Humanitarian Law *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Livorno, 12 June 1994) at para 102(b); and Program on Humanitarian Policy and Conflict Research at Harvard University *HPCR Manual on International Law Applicable to Air and Missile Warfare* (Bern, 15 May 2009) at r 157(b). See also Michael Bothe “Relief Actions: The Position of the Recipient State” in Frtis Kalshoven (ed) *Assisting the Victims of Armed Conflict and Other Disasters: Papers Delivered at the International Conference on Humanitarian Assistance in Armed Conflict, The Hague, 22 – 24 June 1988* (Martinus Nijhoff Publishers, Dordrecht, 1989) 91 at 95.

¹¹³ Gillard, above n 63, at 362.

¹¹⁴ Gillard, above n 63, at 355; and International Committee of the Red Cross, above n 1, at 360.

2 *Consent and Non-State Armed Groups*

In IAC, AP I requires the consent of “the Parties concerned in such relief actions”.¹¹⁵ This includes the state party in whose territory the operations will be implemented, any states from whose territory a relief action is undertaken, and states through whose territory the relief operations must transit.¹¹⁶ The position in NIAC, however, is more complex. In particular, a divergence of views exists on the question of whether the consent of a state is still required in a NIAC for the provision of assistance to areas no longer under governmental control. Governmental reluctance to grant consent is likely to be greatest when relief is destined for insurgent-controlled areas, making this question particularly pertinent.¹¹⁷ The Syrian conflict has brought new rigour to this debate, and prompted by the government’s consistent refusal to grant consent, it has been argued that only the consent of the non-state group is required to access areas no longer under state control.¹¹⁸

The orthodox position is that state consent is required, even when humanitarian assistance is being provided to areas outside state control. CA 3 provides that humanitarian assistance may be offered to the “Parties to the conflict”, but is silent on the question of whose consent is required.¹¹⁹ AP II, however, explicitly requires the consent of the “High Contracting Party concerned” to relief actions, and it is argued that it is difficult to read this as referring to anyone other than the state concerned.¹²⁰ This is the interpretation adopted by the ICRC which states that “consent should be sought from the State in whose territory a NIAC is taking place, including for relief activities to be undertaken in areas over which the State has lost control”¹²¹ as well as a number of other commentators who argue that this position largely reflects state practice.¹²²

¹¹⁵ Additional Protocol I, above n 7, art 70(1).

¹¹⁶ Gillard, above n 63, at 364.

¹¹⁷ Yoram Dinstein *Non-International Conflicts in International Law* (Cambridge University Press, Cambridge, 2014) at 152.

¹¹⁸ See for example: Françoise Bouchet-Saulnier “Consent to humanitarian access: An obligation triggered by territorial control, not States’ rights” (2014) 96 IRRC 207.

¹¹⁹ Common Article 3, above n 89, art 3(2).

¹²⁰ Additional Protocol II, above n 7, art 18(2); and Stoffels, above n 66, at 535.

¹²¹ International Committee of the Red Cross, above n 1, at 28.

¹²² See for example: Gillard, above n 63, at 355; and Schwendimann, above n 5, at 1001.

Increasingly, this interpretation has been challenged by those who reason that IHL stresses the obligations of parties to a conflict to allow and facilitate humanitarian assistance, and as such it does not require a strict interpretation of the consent requirement, but instead a focus on the needs of the civilian population.¹²³ These commentators argue that in light of the principle of the equality of belligerents, CA 3's silence as to whose consent is required puts state and non-state groups on an equal footing, and allows relief operations in territory no longer under state control to be carried out with the consent of the non-state group alone.¹²⁴ While AP II requires the consent of the "High Contracting Party concerned" it has been argued that in many cases AP II does not apply where the state is not a party to the protocol, and that even under AP II state consent is only required if relief consignments have to transit through state-controlled territory, otherwise the state could not be considered to be "concerned".¹²⁵ While some contend that this view is not endorsed by States, the number of third States that have either supported cross-border assistance or acquiesced in circumstances such as Myanmar and Sudan, may suggest otherwise.¹²⁶ The legal position remains contested. From a practical perspective the agreement of non-state armed groups is required to implement humanitarian operations safely. Whether or not this replaces the legal requirement to also gain state consent, however, is unclear.

¹²³ Jérémie Labbé and Tilman Rodenhäuser "Cross-border Humanitarian Aid in Syria has Legal Basis but Few Precedents" (10 May 2013) IPI Global Observatory <<http://theglobalobservatory.org>>.

¹²⁴ International Committee of the Red Cross, above n 1, at 28; Gillard, above n 63, at 355; and Tilman Rodenhäuser and Jonathan Somer "The Security Council and Humanitarian Relief in Opposition-Held Territories" (12 August 2014) EJIL:Talk! Blog of the European Journal of International Law <www.ejiltalk.org>.

¹²⁵ This view has been supported by the former President of the International Humanitarian Fact Finding Commission and co-author of an authoritative commentary on the Additional Protocols to the Geneva Conventions, Michael Bothe, in an unpublished study provided to the UN. See Kersten Knipp "Assad cannot legally deny humanitarian aid, study finds" *Deutsche Welle* (online ed, Bonn, 7 May 2014).

¹²⁶ Rodenhäuser and Somer, above n 124.

3 *Consequences of Arbitrarily Denying Consent*

While the rule at customary international law prohibiting the arbitrary denial of consent to humanitarian operations is well-established, consensus on the legal consequences of the violation of this norm is not.

(a) Security Council Action

It is clear that where a party denies consent to humanitarian operations in breach of its obligations under IHL, the Security Council may circumvent the consent requirement by passing a binding resolution requiring the parties concerned to consent to humanitarian relief operations.¹²⁷ On a small number of occasions, the Security Council has taken such action. Generally, this has taken the form of resolutions which require the parties to create security conditions conducive to the delivery of assistance, rather than actually requiring the affected state to allow access.¹²⁸ In this respect then, the Security Council's response to the situation in Syria has marked an important departure from previous practice. For the first time, the Security Council has, in a number of resolutions, demanded that all parties allow rapid, safe and unhindered access for UN humanitarian agencies, including across conflict lines and across borders.¹²⁹

The implementation of these resolutions has, however, been less than comprehensive. In the November 2015 report on the implementation of resolutions 2139, 2165 and 2191, the Secretary-General noted that the delivery of humanitarian access has remained extremely

¹²⁷ Gillard, above n 63, at 359; Yoram Dinstein "The Right to Humanitarian Assistance" (2000) 54 *Naval Law Coll Rev* 77 at 86.

¹²⁸ For example Bosnia and Herzegovina: *Security Council Resolution 752* SC Res 752, S/Res/752 (1992); *Security Council Resolution 757* SC Res 757, S/Res/757 (1992); and *Security Council Resolution 770* SC Res 770, S/Res/770 (1992); Somalia: *On measures to create a secure environment for humanitarian relief operations in Somalia* SC Res 794, S/Res/794 (1992); and Northern Iraq: *Security Council Resolution 688* SC Res 688, S/Res/688 (1991). See also Gillard, above n 63, at 378; Netherlands Advisory Committee on Issues of Public International Law, above n 18, at 23; and Dinstein, above n 127, at 86.

¹²⁹ *Security Council Resolution 2139* SC Res 2139, S/Res/2139 (2014) at [6]; *Resolution on the humanitarian situation in the Syrian Arab Republic and the establishment of a monitoring mechanism* SC Res 2165, S/Res/2165 (2014) at [2]; and *Resolution on the humanitarian situation in the Syrian Arab Republic and the establishment of a monitoring mechanism* SC Res 2191, S/Res/2191 (2014) at [2].

challenging. Both government forces and non-state armed groups continue to obstruct humanitarian access and assistance and the situation is not improving.¹³⁰ The level of access for humanitarian agencies and the inability of those in need to obtain essential humanitarian supplies and services “remains unacceptable”.¹³¹ As the situation in Syria has demonstrated, therefore, Security Council circumvention of the consent requirement is not necessarily a wholly effective enforcement mechanism.

(b) Unauthorised Relief Operations

The more difficult question is whether, in situations where consent is denied arbitrarily, it is lawful for states or humanitarian organisations to conduct unauthorised relief operations. Again, this question has been the subject of considerable recent discussion in the context of the Syrian conflict. As the humanitarian crisis in Syria escalated, in large part as a result of what has been widely recognised as the arbitrary denial of consent to humanitarian assistance by the government,¹³² some humanitarian organisations (notably Médecins Sans Frontières) continued clandestine operations without authorisation, sparking considerable debate.¹³³

Traditionally, literature on this issue has focussed on whether, in situations where consent is arbitrarily withheld, unauthorised relief operations are permissible on the basis either of states’ duty under Common Article 1 of the Geneva Conventions (CA 1)¹³⁴ to “ensure

¹³⁰ *Report of the Secretary-General on the implementation of Security Council resolutions 2139(2014), 2165(2014) and 2191(2014)*, above n 44, at [33] – [45] and [60].

¹³¹ *Report of the Secretary-General on the implementation of Security Council resolutions 2139(2014), 2165(2014) and 2191(2014)*, above n 44, at [60].

¹³² See for example: comments from the Valerie Amos, UN Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator who has described the “continued withholding of consent to cross-border and cross-line relief operations” as “arbitrary and unjustified” in “There is no legal barrier to UN cross-border operations in Syria” *The Guardian* (online ed, London, 28 April 2014).

¹³³ Brooks, above n 45.

¹³⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention I], art 1; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention II], art 1; Geneva Convention Relative to the Treatment of

respect” for IHL, or on the grounds of counter-measures or necessity. It is generally acknowledged, however, that in most situations it is unlikely that any of these grounds will provide legal justification for an unauthorised relief operation.¹³⁵ First, it is widely agreed that CA 1 cannot be relied upon as a basis for breaching other rules of international law and as such, it cannot justify the violation of sovereignty and territorial integrity which results from unauthorised operations.¹³⁶ In regards to countermeasures, carrying out unauthorised relief operations cannot be considered a lawful countermeasure because firstly, such operations do not serve the purpose of a counter-measure - they are a performance of the obligations of the state, rather than an inducement for the state to comply with its obligations.¹³⁷ Secondly, countermeasures may only be invoked by a state or international organisation directly affected by the violation.¹³⁸ The harm suffered by the state or organisation whose offer of assistance has been rejected is minimal, it is the civilian population who suffers.¹³⁹ Finally, necessity may be invoked by a state or international organisation (1) if an otherwise wrongful act was the only way for it to safeguard an essential interest against a grave and imminent peril; (2) the act does not seriously impair an essential interest of the injured state or of the international community; and (3) the act is the only way of preserving the essential interest.¹⁴⁰ Certainly, preventing suffering of the civilian population could be considered an essential interest of the international

Prisoners of War 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention III], art 1; Geneva Convention Relative to the Protection of Civilian Persons in Times of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950) [Geneva Convention IV], art 1; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1125 UNTS 3 (opened for signature 12 December 1977, entered into force 7 December 1978) [Additional Protocol I], art 1(4) [Common Article 1].

¹³⁵ See for example: Gillard, above n 63, at 355; Ryngaert, above n 108, at 12; and Netherlands Advisory Committee on Issues of Public International Law, above n 18, at 22.

¹³⁶ Gillard, above n 63, at 371.

¹³⁷ International Law Commission *Responsibility of States for Internationally Wrongful Acts* A/56/10 (2001), art 49; International Law Commission *Responsibility of International Organisations* A/66/10 (2011), art 51; Gillard, above n 63, at 372; and Stoffels, above n 66, at 536.

¹³⁸ *Responsibility of States for Internationally Wrongful Acts*, above n 137, art 49; and *Responsibility of International Organisations*, above n 137, art 51.

¹³⁹ Gillard, above n 63, at 372; and Stoffels, above n 66, at 536.

¹⁴⁰ *Responsibility of States for Internationally Wrongful Acts*, above n 137, art 25; and *Responsibility of International Organisations*, above n 137, art 25.

community. In some situations, therefore necessity could be invoked to justify a one-off relief operation to a population in extreme need where no alternatives existed.¹⁴¹ In such a case, while the unauthorised operation would impair the essential interest of territorial integrity, this would not inevitably be to the serious degree precluded by the rule. Necessity would not, however, justify unauthorised operations on a wider basis.¹⁴² As a general rule, therefore, unauthorised operations will not be legal.

More recently, however, debate has focussed on whether a new rule of customary law has formed which, in line with other trends in international law such as the development of the “responsibility to protect”, downplays or dispenses altogether with the requirement of consent, allowing unauthorised humanitarian operations where consent has been arbitrarily denied.¹⁴³ Authors have pointed to the increasingly strong emphasis that has been placed on the obligations of states to facilitate humanitarian action in recent General Assembly and Security Council resolutions, as well as the lack of international response to unauthorised aid operations as evidence that an international norm is developing that supports the legality of such operations.¹⁴⁴ Notably, in 2014, a group of legal experts pronounced in an open letter published in *The Guardian* that due to Syria’s arbitrary denial of humanitarian access “there is no legal barrier to the UN directly undertaking cross-border operations and supporting NGOs to undertake them as well” arguing that, “where consent is withheld for arbitrary reasons, the operation is lawful without consent”.¹⁴⁵

This approach is far from being universally accepted, however. The argument that state consent is no longer significant or required is not generally seen to be an accurate reflection of current state practice and *opinio juris*.¹⁴⁶ The ICRC’s 2004 study of customary

¹⁴¹ Gillard, above n 63, at 373; and Stoffels, above n 66, at 373.

¹⁴² Gillard, above n 63, at 373; and Stoffels, above n 66 at 373.

¹⁴³ International Committee of the Red Cross, above n 1, at 27; Ryngaert, above n 108, at 13; and Barber, above n 94, at 396 – 397.

¹⁴⁴ Stoffels, above n 66, at 536; and Barber, above n 94, at 390.

¹⁴⁵ “There is no legal barrier to UN cross-border operations in Syria”, above n 132.

¹⁴⁶ Naz Modirzadeh “Guest Post: Strong Words, Weak Arguments – A Response to the Open Letter to the UN on Humanitarian Access to Syria (Part 1)” (12 May 2014) *Opinio Juris* <<http://opiniojuris.org>>.

international law recognises state consent as a necessary requirement,¹⁴⁷ and the ICRC restated this position more recently, reinforcing that “what is clear ... is that the consent of the parties to the conflict must be sought and obtained before impartial humanitarian organisations can operate and undertake humanitarian activities”.¹⁴⁸ Furthermore, even if consent was no longer a legal requirement, unauthorised operations pose significant safety concerns. Humanitarian actors are unarmed, and rely on negotiation and trust to move through conflict zones.¹⁴⁹ Any perception that humanitarian actors will not genuinely seek to gain consent would likely hinder the work of humanitarian organisations in all contexts.¹⁵⁰ It seems clear, therefore, that to date “a ‘right to access’ has not crystallised in customary international law”.¹⁵¹ Agreement of the state concerned remains a mandatory precondition.

C Conclusion on the Legal Framework

IHL imposes extensive obligations on the parties to a conflict to grant access to humanitarian organisations where humanitarian assistance is required. While there is ongoing debate as to firstly, the requirement for state consent for the provision of assistance to areas outside state control in NIAC, and secondly the legality of unauthorised operations where consent is arbitrarily withheld, as a general rule consent from the parties is required before humanitarian operations may take place. Importantly however, parties must not deny consent arbitrarily. To do so is a breach of IHL.

¹⁴⁷ Henckaerts and Doswald-Beck, above n 7, r 55.

¹⁴⁸ International Committee of the Red Cross, above n 1, at 27.

¹⁴⁹ Modirzadeh, above n 146.

¹⁵⁰ Modirzadeh, above n 146; and Netherlands Advisory Committee on Issues of Public International Law, above n 18, at 23.

¹⁵¹ Heike Spieker “The Right to Give and Receive Humanitarian Assistance” in Hans-Joachim Heintze and Andrej Zwitter (eds) *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism* (Springer, Heidelberg, 2011) 7 at 18.

IV Prosecuting the Denial of Humanitarian Assistance in Non-International Armed Conflict

While IHL imposes rigorous obligations on parties to ensure full and effective humanitarian access and assistance, these rules are routinely violated. The biggest challenge faced by IHL is that it should be better respected.¹⁵² As such, the Secretary-General has highlighted that “protecting [those in need] from harm, and preserving their dignity, in particular by upholding international law and seeking accountability for violations, should be at the very top of the international community’s agenda”.¹⁵³

A International Criminal Prosecution as an Enforcement Mechanism for International Humanitarian Law

One of the most important mechanisms available for ensuring such accountability is the prosecution for breaches of IHL as international crimes.¹⁵⁴ The credibility of IHL and its effective implementation relies in large part on the ability of the international community to hold those who act unlawfully criminally responsible. Breaches of IHL may constitute any one of the three core international crimes: war crimes, crimes against humanity and genocide. Most directly linked to underlying IHL norms, however, are war crimes. War crimes attach criminal liability to the most serious breaches of IHL: those listed as “grave breaches” under the Geneva Conventions (“GCs”) and AP I, as well as other serious breaches of IHL to which individual criminal responsibility attaches, either under an international instrument or at customary international law.¹⁵⁵

¹⁵² International Committee of the Red Cross, above n 1, at 7.

¹⁵³ *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 1, at [3].

¹⁵⁴ Marco Sassoli “Humanitarian Law and International Criminal Law” in Antonio Cassese (ed) *The Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009) 111 at 111; and Helen Durham and Eve Massingham “Moving from the mechanisms of accountability to a culture of accountability” in Jadranka Petrovic (ed) *Accountability for Violations of International Humanitarian Law – Essays in Honour of Tim McCormack* (Routledge, London, 2015) 267 at 269.

¹⁵⁵ Wynn-Pope, above n 83, at 131; and Swiss Federal Department of Foreign Affairs, above n 6, at 52.

In ensuring prosecution for such crimes, the ICC plays a particularly critical role. The Court has jurisdiction over “the most serious crimes of international concern”¹⁵⁶ with the intention of “put[ting] an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”.¹⁵⁷ The ICC has the ability to prosecute, even where national jurisdictions are unable or unwilling to do so,¹⁵⁸ and as such the existence of the ICC has signalled the seriousness with which the international community seeks to affirm accountability and responsibility for international crimes, and has “raised global expectations that impunity for atrocity is no longer acceptable”.¹⁵⁹

B Possibilities for Prosecution under the Current Regime

If those who unlawfully deny humanitarian assistance are to be held accountable, there must be a comprehensive legal regime allowing for the enforcement of individual criminal responsibility for these violations. The Rome Statute in its current form, however, fails to establish a sufficiently comprehensive framework for accountability.

The denial of humanitarian assistance is not listed as a grave breach of the GCs or AP I. Neither the International Criminal Tribunal for the former Yugoslavia (ICTY) nor the International Criminal Tribunal for Rwanda (ICTR) made specific provision for violations relating to humanitarian assistance (though neither statute provided an exhaustive list of war crimes).¹⁶⁰ Finally, and most importantly, there is no specific war crime addressing the denial of humanitarian access or assistance in NIAC in the Rome Statute. This is despite

¹⁵⁶ Rome Statute, above n 11, art 1.

¹⁵⁷ Rome Statute, above n 11, preamble.

¹⁵⁸ Rome Statute, above n 11, art 17; and Antonio Cassese “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law” (1998) 9 EJIL 2 at 19.

¹⁵⁹ Tim McCormack “The contribution of the International Criminal Court to increasing respect for international humanitarian law” (2008) 27 The University of Tasmania Law Review 22 at 39. See also: Gideon Boas “What is international criminal justice?” in Gideon Boas, William Schabas and Michael Scharf (eds) *International Criminal Justice: Legitimacy and Coherence* (Edward Elgar, Cheltenham, 2012); and Durham and Massingham, above n 154, at 281.

¹⁶⁰ Stoffels, above n 66, at 531.

the fact that in IAC, starvation of the civilian population is a war crime. Article 8(2)(b)(xxv) criminalises the act of:

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

There is no equivalent provision in the Rome Statute applicable in situations of NIAC.

Notably, it is a war crime in both IAC and NIAC to:¹⁶¹

intentionally direct[...] 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, so long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

These provisions are important in the protection of humanitarian assistance. They apply, however, only to attacks on humanitarian personnel and objects, and not to the enforcement of the right to access and assistance itself.¹⁶² “Attack” is not defined in the elements of crimes, but the Trial Chamber in *Katanga* defined “attack”, in the context art 8(2)(e)(i) as “acts of violence against the adversary”.¹⁶³ Arbitrarily denying consent to humanitarian access, blocking relief consignments from reaching those in need, or preventing humanitarian personnel from carrying out their mission while leaving them unharmed, would not fall within this particular war crime.¹⁶⁴

¹⁶¹ Rome Statute, above n 11, arts 8(2)(b)(iii) and 8(2)(e)(iii).

¹⁶² Wynn-Pope, above n 83, at 133.

¹⁶³ *The Prosecutor v Germain Katanga (Judgment)* ICC Trial Chamber II ICC-01/04-01/07, 7 March 2014 [*Katanga*] at [798].

¹⁶⁴ Rogier Bartels “Denying Humanitarian Access as an International Crime in Times of Non-International Armed Conflict: The Challenges to Prosecute and Some Proposals for the Future” (2015) 48 ILR 281 at 299; and Jokaim Dungal “A Right to Humanitarian Assistance in Internal Armed Conflicts Respecting Sovereignty, Neutrality and Legitimacy: Practical Proposals to Practical Problems” (2004) *The Journal of Humanitarian Assistance* <<http://sites.tufts.edu/jha/>>.

Therefore, the unlawful denial of humanitarian access or assistance in a NIAC will only be able to be prosecuted at the ICC where the underlying act constitutes the actus reus for another offence. There is no precedent from either the international ad hoc tribunals or the ICC for the prosecution of the denial of humanitarian assistance as a war crime. In theory, however, it is possible that the denial of humanitarian assistance could form the basis of a prosecution for the crime of “violence to life and person” under art 8(2)(c)(i), “committing outrages upon personal dignity” under art 8(2)(c)(ii), or for a crime against humanity or genocide.¹⁶⁵

1 Article 8(2)(c)(i) Violence to Life and Person

The first possibility for prosecuting the unlawful denial of humanitarian assistance would be under art 8(2)(c)(i), under which “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” constitutes a war crime. This provision has its legal basis in CA 3 and the obligation to treat all those who are not participating in hostilities humanely.¹⁶⁶ The provision gives murder, cruel treatment and torture as examples of prohibited conduct, this list however is non-exhaustive.¹⁶⁷ Murder and cruel-treatment are most likely to be the types of prohibited conduct under which the denial of humanitarian assistance could be charged.

(a) Murder

The conduct requirement for murder under art 8(2)(c)(i) requires that “the perpetrator killed one or more persons”.¹⁶⁸ This can be committed by either act or omission,¹⁶⁹ and the necessary intent will exist where the perpetrator acted deliberately or failed to act (1) in

¹⁶⁵ See for example: Christa Rottensteiner “The denial of humanitarian access as a crime under international law” (1999) 81 IRRC 552 <www.icrc.org>; Swiss Federal Department of Foreign Affairs, above n 6, at 49 – 55; Wynn-Pope, above n 83, at 131 – 134; and Bartels, above n 164, at 299 – 305.

¹⁶⁶ *Katanga*, above n 163, at [785].

¹⁶⁷ Knut Dörmann (ed) *Elements of War Crimes under the Rome Statute of the International Criminal Court – Sources and Commentary* (Cambridge, Cambridge University Press, 2003) at 394.

¹⁶⁸ International Criminal Court *Elements of Crimes* (2011), art 8(2)(c)(i)-1 at element 1.

¹⁶⁹ *Katanga*, above n 163, at [786].

order to cause the death of one or more persons or (2) where he or she was aware that death would occur in the ordinary course of events.¹⁷⁰ Therefore, if civilians or other protected persons die as a result of the unlawful denial of humanitarian access or assistance, it may be possible that this act constitutes murder for the purposes of art 8(2)(c)(i).¹⁷¹

In the ICRC Commentary to GC IV, Pictet discusses this possibility in the context of detainees unlawfully deprived of essential goods, stating that “it seems ... 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”.¹⁷² There is however, no precedent for prosecuting the denial of humanitarian assistance as the war crime of murder. The issue has to date not come before the ICC, and in the ICTY, while depriving inmates of food and other vital services in detention centres constituted the basis of the war crimes of “wilfully causing great suffering or serious injury”, “cruel treatment” and “inhuman acts”, these acts were not indicted as the basis for a charge of murder.¹⁷³ In theory, however, where the other elements of the crime are satisfied, it would seem that if the denial of humanitarian assistance resulted in the death of those not participating in hostilities, this could form the basis of a charge of the war crime of murder.¹⁷⁴

(b) Cruel Treatment

It is also possible that the unlawful denial of humanitarian assistance could form the basis of a “cruel treatment” charge under art 8(2)(c)(i).¹⁷⁵ The conduct requirement is that “the

¹⁷⁰ *Katanga*, above n 163, at [793].

¹⁷¹ Wynn-Pope, above n 83, at 134.

¹⁷² Jean Pictet *Commentary on the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, Geneva, 1952) at 597.

¹⁷³ *The Prosecutor v Dragan Nikolić (Judgment)* ICTY Trial Chamber II IT-94-2-T, 18 December 2003; *The Prosecutor v Milorad Krnojelac (Judgment)* ICTY Trial Chamber II IT-97-25-T, 15 March 2002; and *The Prosecutor v Zejnil Delalić, Zdravko Mucić (also known as “Pavo”), Hazim Delić, Esad Landžo (also known as “Zenga”) (Judgment)* ICTY Trial Chamber II IT-96-21-T, 16 November 1998 [*Delalić*].

¹⁷⁴ Rottensteiner, above n 165.

¹⁷⁵ Wynn-Pope, above n 83, at 134.

perpetrator inflicted severe physical or mental pain or suffering upon one or more persons”.¹⁷⁶ The ICC has not yet delivered a judgment which deals with this charge. The jurisprudence of the ICTY, however, suggests that this provision will be construed broadly. The ICTY has noted that cruel treatment, which has the same meaning as “inhuman treatment” in the context of the grave breaches provisions of the GCs,¹⁷⁷ is a “general concept” and that “no narrow or special treatment is ... [to be] given to the phrase”.¹⁷⁸ It must always be assessed “on the basis of all the particularities of the concrete situation”.¹⁷⁹ Cruel treatment encompasses the offence of torture, also indictable under art 8(2)(c)(i), but requires a lower level of suffering¹⁸⁰ and does not have the same purposive requirement.¹⁸¹

It seems possible, therefore, that depriving civilians or other protected persons of the necessities of life through the denial of humanitarian assistance could constitute the infliction of severe mental or physical pain or suffering, and therefore the crime of cruel treatment.¹⁸² The ICTY Trial Chamber held in *Delalić* that the “creation and maintenance of an atmosphere of terror” in a prison camp “by itself and *a fortiori*, together with the deprivation of adequate food, water, sleeping and toilet facilities and medical care constitute[d] the offence of cruel treatment”.¹⁸³ Again this is not precedent for the prosecution of the denial of humanitarian assistance per se, but comparison can be drawn with the underlying act of denying protected persons access to objects indispensable to their survival.

¹⁷⁶ *Elements of Crimes*, above n 168, art 8(2)(c)(i)-3 at element 1.

¹⁷⁷ *Delalić*, above n 173, at [443].

¹⁷⁸ *Prosecutor v. Dusko Tadić (also known as “Dule”)* (Judgment) ICTY Trial Chamber II IT-94-1-T, 7 May 1997 at [725] – [726].

¹⁷⁹ *Tadić*, above n 178, at [724].

¹⁸⁰ *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić and Dragoljub Prcać (Judgment)* ICTY Trial Chamber I IT-98-30/1-T, 2 November 2001 [Kvočka et al] at [161].

¹⁸¹ *Delalić*, above n 173, at [552].

¹⁸² Rottensteiner, above n 165.

¹⁸³ *Delalić*, above n 173, at [1119].

2 Article 8(2)(c)(ii) Committing Outrages Upon Personal Dignity

The denial of humanitarian access and assistance could also constitute the basis of an indictment under art 8(2)(c)(ii) “committing outrages upon personal dignity, in particular humiliating and degrading treatment”.¹⁸⁴ In order to establish a charge under this provision it must be shown that (1) the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons; and (2) the severity of the humiliation, degradation or other violation was of such degree as to be generally recognised as an outrage upon personal dignity.¹⁸⁵

Exactly what constitutes an “outrage upon personal dignity” is not easy to delineate.¹⁸⁶ The crime is to be construed broadly.¹⁸⁷ As noted by the prosecutor at the ICTY, “the safeguarding of personal dignity was intended to be flexible enough to encompass any act or omission that degrades, humiliates, or attacks the integrity of the victim”.¹⁸⁸ What must be shown, however, is that the treatment in question constituted an assault on a person’s dignity¹⁸⁹ and caused “serious humiliation or degradation to the victim”.¹⁹⁰ It is possible therefore that the denial of humanitarian assistance could form the basis of a charge under art 8(2)(c)(ii) where the denial degrades, humiliates or attacks the integrity of the victims.

3 Crimes against Humanity and Genocide

In addition to the war crimes provisions under art 8, it is also possible that the unlawful denial of humanitarian assistance could constitute the basis of a prosecution for a crime against humanity or genocide.

¹⁸⁴ Wynn-Pope, above n 83, at 134.

¹⁸⁵ *Elements of Crimes*, above n 168, art 8(2)(c)(ii) at elements 1 and 2.

¹⁸⁶ Lindsay Moir “Violations of Common Article 3 of the Geneva Conventions” in José Doria, Hans-Peter Gasser and Mahmoud Cherif Bassiouni (eds) *The Legal Regime of the International Criminal Court – Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff, Leiden, 2009) 619 at 627.

¹⁸⁷ Moir, above n 186, at 628.

¹⁸⁸ Prosecutor’s Pre-Trial Brief *The Prosecutor v Dragoljub Kunarac* ICTY IT-96-23-PT, 9 December 1999 at 28 ff.

¹⁸⁹ Dörmann, above n 167, at 316.

¹⁹⁰ *The Prosecutor v Zlatko Aleksovski* (Judgment) ICTY Trial Chamber I IT-95-14/1-T, 25 June 1999 at [95].

The denial of humanitarian assistance could constitute the crime against humanity of murder,¹⁹¹ extermination,¹⁹² persecution¹⁹³ or “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”¹⁹⁴ where the denial was committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.¹⁹⁵ Of particular note is the crime of extermination under art 7(1)(b), which includes “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”.¹⁹⁶ There is precedent from the ICTY which confirms that the denial of humanitarian access can constitute a crime against humanity. In *Krstić*, it was found that the blocking of aid convoys was part of the “creation of a humanitarian crisis as a prelude to the forcible transfer of the Bosnian Muslim civilians”¹⁹⁷ and constituted the crime of inhuman acts.¹⁹⁸

Finally, it is also possible that the denial of humanitarian assistance could in some limited situations be prosecuted as an act of genocide. Under art 6 of the Rome Statute, genocide may be committed in IAC or NIAC and means:¹⁹⁹

Any of the following acts committed with the 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;

¹⁹¹ Rome Statute, above n 11, art 7(1)(a).

¹⁹² Rome Statute, above n 11, art 7(1)(b).

¹⁹³ Rome Statute, above n 11, art 7(1)(h).

¹⁹⁴ Rome Statute, above n 11, art 7(1).

¹⁹⁵ Rome Statute, above n 11, art 7(1)(k).

¹⁹⁶ Rome Statute, above n 11, art 7(2)(b).

¹⁹⁷ *The Prosecutor v Radislav Krstić (Judgment)* ICTY Trial Chamber I IT-98-33-T, 2 August 2001 at [615].

¹⁹⁸ *Krstić*, above n 197, at [618] and [653].

¹⁹⁹ Rome Statute, above n 11, art 6.

- (e) Forcibly transferring children of the group to another group.

Articles 6(a) – 6(c) are most likely to be relevant to the denial of humanitarian assistance. If the result of the denial of humanitarian assistance is that members of a particular national, ethnical, racial or religious group die or suffer serious bodily or mental harm as a result of the unlawful denial of humanitarian assistance, or if the denial of assistance constituted the deliberate deprivation of the conditions of life calculated to bring about their physical destruction, it could form the basis of a prosecution for genocide. Art 6(c) is particularly relevant, as the Elements of Crimes detail that “certain conditions of life” may include “deliberate deprivation of resources indispensable for survival, such as food or medical services”.²⁰⁰ Importantly however, any of the forms of prohibited conduct under art 6 must be carried out accompanied by the specific intent “to destroy, in whole or in part, a national, ethnical, racial or religious group”.²⁰¹ In extreme situations therefore, the unlawful denial of humanitarian assistance could form the basis of a genocide prosecution.

C The Limitations of the Current Legal Regime

Therefore, while there is no war crime provision in the Rome Statute specifically criminalising the denial of humanitarian assistance in NIAC, it is possible that such conduct could be prosecuted at the ICC under other provisions. The legal regime in its current form, however, falls far short of establishing a robust mechanism for accountability. Reliance on prosecuting the denial of humanitarian assistance under the pre-existing provisions in arts 6, 7 and 8, rather than having a provision which specifically criminalises the unlawful denial of humanitarian assistance as a war crime within the court’s jurisdiction, is problematic for a number of reasons.

²⁰⁰ *Elements of Crimes*, above n 168, art 6(c) at element 4.

²⁰¹ Rome Statute, above n 11, art 6.

1 Limited Applicability of the Provisions

The first and most serious limitation of the legal regime in its current form is that while in some situations the denial of humanitarian assistance will be able to be prosecuted under existing provisions in arts 6, 7 and 8 of the Rome Statute, these provisions will not allow for prosecution in every situation in which humanitarian assistance is denied unlawfully. The scope of application of these provisions is necessarily more limited than that of a provision that specifically criminalises the unlawful denial of humanitarian assistance. In order to prosecute perpetrators successfully under arts 8(2)(c)(i) or (ii), or under arts 6 or 7, there are additional elements that must be proven, beyond simply showing that humanitarian assistance was denied unlawfully in breach of IHL, with the necessary intention and knowledge.

(a) Articles 8(2)(c)(i) and 8(2)(c)(ii)

The key limitation to prosecuting the denial of humanitarian assistance under arts 8(2)(c)(i) and (ii) is that both provisions are result crimes. This means that in order to successfully prosecute for murder under art 8(2)(c)(i), the denial of humanitarian assistance must result in the death of one or more protected persons.²⁰² In order to prosecute cruel treatment under 8(2)(c)(i), it must be shown that the denial of humanitarian assistance resulted in one or more protected persons suffering severe physical or mental pain or suffering.²⁰³ Finally, in order to prosecute for outrages upon personal dignity under art 8(2)(c)(ii), the denial of humanitarian assistance must have resulted in the humiliation, degradation or violation of dignity of one or more protected persons.²⁰⁴ As such, these provisions criminalise the result caused by the denial of humanitarian assistance, rather than the act of denial itself. This can be contrasted to art 8(2)(b)(xxv), which criminalises the starvation of civilians (for example, by impeding relief supplies) in IAC. Art 8(2)(b)(xxv) has no result requirement;

²⁰² *Elements of Crimes*, above n 168, art 8(2)(c)(i)-1 at element 1.

²⁰³ *Elements of Crimes*, above n 168, art 8(2)(c)(i)-3 at element 1.

²⁰⁴ *Elements of Crimes*, above n 168, art 8(2)(c)(ii) at element 1.

it does not need to be shown that any civilians actually starved, only that this was the intention of the perpetrator.²⁰⁵

These result requirements significantly limit the situations in which arts 8(2)(c)(i) and (ii) may be used to prosecute the unlawful denial of humanitarian assistance. In many instances it will be very difficult to show that there was a direct link between the act of denying humanitarian assistance and a certain result, for example the death of a person or a group of people.²⁰⁶ Even where it can be shown that some individuals suffered directly as a result of the perpetrator's denial of humanitarian assistance, the subsequent prosecution and sentence is unlikely to reflect the scale of suffering of the civilian population as a whole.

This point is borne out clearly in the case of General Galić, the Bosnian Serb commander responsible for the siege of Sarajevo, which lasted nearly four years and left the population in “a state of medieval deprivation in which they were in constant fear of death”.²⁰⁷ One of the tactics of this siege was to impede the provision of humanitarian assistance, leaving the population to suffer “from widespread starvation [and a] generalised shortage of medicine”.²⁰⁸ When brought before the ICTY, Galić was not charged with any offence relating to the use of starvation or the denial of the necessities of life.²⁰⁹ Riordan opines that the reason for this “may be quite simple”.²¹⁰ The Fenrick Report which investigated war crimes in the former Yugoslavia had noted that “as no one appears to have died of starvation, cold or dehydration in Sarajevo, it is unlikely anyone could be held liable for

²⁰⁵ Michael Cottier “Article 8: War Crimes – Starvation of civilians as a method of warfare” in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court - Observers' Notes, Article by Article* (2nd ed, Beck, Munich, 2008) 458 at 465.

²⁰⁶ Wynn-Pope, above n 76, at 135.

²⁰⁷ *Prosecutor v Stanislav Galić (Judgment)* ICTY Trial Chamber I IT-98-29-T, 5 December 2003 at [2].

²⁰⁸ *Prosecutor v Stanislav Galić (Separate and Partially Dissenting Opinion of Judge Nieto-Navia)* ICTY Trial Chamber I IT-98-29-T, 5 December 2003 at [8].

²⁰⁹ Kevin Riordan “Shelling, Sniping and Starvation: The Law of Armed Conflict and the Lessons of the Siege of Sarajevo” (2010) 41 VUWLR 149 at 172.

²¹⁰ Riordan, above n 209, at 172.

using starvation of civilians as a method of warfare during the siege”.²¹¹ As has been noted, it is now clear that to prosecute starvation of civilians as a method of warfare (in IAC) at the ICC, it does not need to be shown that anyone actually starved, only that this was the intention of the perpetrator. The *Galić* case is an example, however, of the challenge that arises where accountability is dependent on a particular consequence of the unlawful denial of humanitarian assistance being proven, rather than the denial itself. The same issue would be very likely to arise where prosecution was attempted under arts 8(2)(c)(i) or (ii).

The result requirement is also likely to be particularly limiting in the case of art 8(2)(c)(ii), where it must be shown that the perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons to such degree as to be “an outrage upon personal dignity”.²¹² While the term “outrage upon personal dignity” is not clearly delineated, examples in IHL sources and human rights case law provide some guidance. Examples of outrages upon personal dignity may include enforced prostitution,²¹³ indecent assault,²¹⁴ and apartheid and other inhuman and degrading practices based on racial discrimination.²¹⁵ Examples from human rights case law include forms of racial discrimination,²¹⁶ arbitrary prison practices aimed at humiliating prisoners and making them feel insecure,²¹⁷ and subjecting female prisoners to humiliation in the form of hanging naked from handcuffs or being forced to maintain a certain position for long periods of time.²¹⁸ The focus of the provision is, therefore, quite specific. The act of the perpetrator must not only cause suffering, but suffering which in an essential way undermines the personal dignity of the victim, for example through an attack on their race, ethnicity, gender or sexuality. While it is possible that in some instances, a perpetrator may deny a victim food or other objects

²¹¹ Riordan, above n 209, at 172; and Canadian War Crimes Investigation Team *On-Site Report* (August 1993) [Fenrick Report] at [50].

²¹² *Elements of Crimes*, above n 168, art 8(2)(c)(ii) at elements 1 and 2.

²¹³ Additional Protocol I, above n 7, art 75(2)(b).

²¹⁴ Additional Protocol I, above n 7, art 75(2)(b).

²¹⁵ Additional Protocol II, above n 7, art 85(4)(c).

²¹⁶ *East African Asians v United Kingdom* (1973) 3 EHRR 76 (ECHR) at 76.

²¹⁷ United Nations Human Rights Committee *Hiber Conteris v Uruguay* Communication No 139/1983 A/40/40 (1985) at [9.2] – [10].

²¹⁸ United Nations Human Rights Committee *Lucía Arzuaga Gilboa v Uruguay* Communication no 147/1983 CCPR/C/OP/2 (1990) at [4.3] and [14].

indispensable to their survival, in circumstances where more broadly the victim suffers serious humiliation or degradation, this is only likely to be a small number of instances. Therefore, art 8(2)(c)(ii) is only likely to provide an avenue for prosecution in very particular cases.

(b) Crimes against Humanity and Genocide

The prosecution of the denial of humanitarian assistance as a crime against humanity or genocide poses even more considerable issues in terms of the scope of applicability of the provisions in the Rome Statute. There are additional jurisdictional hurdles which must be met to bring a prosecution for either a crime against humanity or genocide. The chapeau elements required for an act to be a war crime are (1) the existence of an armed conflict and (2) a nexus between the act and the armed conflict.²¹⁹ In principle, there are no other jurisdictional requirements or gravity thresholds which must be met. While the Rome Statute states that the Court shall have jurisdiction in respect of war crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”,²²⁰ this is practical guidance for the court and the prosecutor, rather than a jurisdictional requirement.²²¹ In theory therefore, an isolated act could amount to a war crime.²²² Both crimes against humanity and genocide, however, have additional requirements which must be met before the ICC can exercise jurisdiction.

In order to be a crime against humanity an act must be committed as “part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.²²³ Therefore, in addition to showing that the denial of humanitarian assistance was unlawful under IHL, it would also have to be shown that the denial was carried out as part of a wider pattern of conduct, which was widespread or systematic. Moreover, under the

²¹⁹ *Elements of Crimes*, above n 168, art 8.

²²⁰ Rome Statute, above n 11, art 8(1).

²²¹ Michael Cottier “Article 8: War Crimes – Introduction/General Remarks” in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court - Observers’ Notes, Article by Article* (2nd ed, Beck, Munich, 2008) 283 at 299 – 300.

²²² *Elements of Crimes*, above n 168, art 8.

²²³ Rome Statute, above n 11, art 7(1).

Rome Statute, crimes against humanity require a certain level of organisation. The act constituting the crime must be carried out “pursuant to or in furtherance of a state or organi[s]ational policy to commit such an attack”.²²⁴ The ICC pre-trial judges have been divided in their views as to the level of organisation necessary for a non-state actor to be able to commit crimes as part of an “organi[s]ational policy”. The current view from *Katanga* is that an organisational policy may be pursued by “any group with the capability to commit a widespread or systematic attack against a civilian population”.²²⁵ This seems to require three qualities of any organisation: (1) it is a group; (2) with a defined structure; and (3) a shared purpose.²²⁶ This adds another threshold which must be met, over and above showing that IHL has been breached, in order to criminalise the denial of humanitarian assistance in cases where the perpetrator comes from a non-state group. Finally, and in respect of the crime against humanity of extermination, while art 7(1)(b) only requires the killing of “one or more persons”, the conduct must take place as part of “a mass killing of members of a civilian population”.²²⁷

The crime of genocide also has additional jurisdictional requirements which must be met before a prosecution can be taken at the ICC. The legal concept of genocide is narrowly circumscribed.²²⁸ In order to prosecute the denial of humanitarian access as genocide, the conduct must be accompanied by the specific intent to destroy, in whole or in part a national, ethnical, racial or religious group²²⁹ and furthermore, it must be shown that “the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”.²³⁰ As to the scale of the destruction, the ad hoc tribunals have opined that “[i]f a group is targeted in part, the

²²⁴ *Elements of Crimes*, above n 168, art 7 at introduction.

²²⁵ *The Prosecutor v Germain Katanga (Decision on the Confirmation of the Charges)* ICC Pre-Trial Chamber I ICC-01/04-01/07, 30 September 2008 at [396].

²²⁶ Charles Chernor Jalloh “(Re)Defining Crimes against Humanity for a *Jus Post Bellum* World” in Larry May and Elizabeth Endenberg (eds) *Jus Post Bellum and Transitional Justice* (Cambridge University Press, New York, 2013) 113 at 142.

²²⁷ *Elements of Crimes*, above n 168, art 7(1)(b) at element 2.

²²⁸ Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst *An Introduction to International Criminal Law and Procedure* (3rd ed, Cambridge University Press, Cambridge, 2014) at 205.

²²⁹ Rome Statute, above n 11, art 6.

²³⁰ *Elements of Crimes*, above n 168, art 6.

portion targeted must be significant enough to have an impact on the group as a whole”.²³¹ In order to be prosecuted as the crime of genocide, therefore, the perpetrator must unlawfully impede the provision of humanitarian assistance with the specific intention to destroy in whole or in part a national, ethnical, racial or religious group, and the conduct must take place within a manifest pattern of similar conduct. Thus, only in very extreme cases will the denial of humanitarian access or assistance constitute the crime of genocide.²³²

(c) Conclusion on the Limited Applicability of the Current Legal Regime

The possibilities for the prosecution under the current legal regime are therefore far more limited than they would be if there was a war crime provision which dealt specifically with the denial of humanitarian assistance. The current provisions under arts 6, 7 and 8 are not grounded in the IHL norms governing the obligations of parties in respect of the provision of humanitarian assistance. In order to successfully prosecute the unlawful denial of humanitarian assistance, additional elements must be proven, in addition to showing that the perpetrator breached IHL with the requisite intent and knowledge. This significantly limits the situations in which the unlawful denial of humanitarian assistance can be prosecuted at the ICC, leaving a substantial gap in the accountability framework.

2 *The Expressive Function of International Crimes*

The second key limitation of the legal regime in its current form is that the omission of a provision specifically criminalising the denial of humanitarian assistance severely limits the ability of the Rome Statute to perform its expressive function.

The function of the ICL framework is essentially an expressive one: to project a set of norms through trials, punishments and jurisprudence, very different to those that

²³¹ *Prosecutor v Radislav Krstić (Judgment)* ICTY Appeals Chamber IT-98-33-A, 19 April 20014 at [8].

²³² Swiss Federal Department of Foreign Affairs, above n 6, at 55.

characterised the culture of impunity of the past.²³³ The inclusion of international crimes in instruments such as the Rome Statute is central to the performance of this expressive function. The criminalisation of particular conduct emphasises the seriousness with which the international community views such conduct and develops a sense of collective outrage against such violations of the law. This helps to ensure, not just legal enforcement of international law, but also helps to create a culture of political enforcement. The ability of the international community to, in no uncertain terms, label certain breaches of IHL as war crimes, prosecutable at the ICC, lends great mobilising power to the response to those violations. The omission from the Rome Statute of a provision specifically criminalising the denial of humanitarian assistance marks, therefore, a considerable weakness in the enforcement and accountability regime. At the present time, there is no expression in the Rome Statute, the most important instrument within the ICL framework, of the seriousness with which the international community considers the act of unlawfully denying humanitarian assistance in NIAC.

Furthermore, it is only where offences are fairly labelled that the expressive function of international crimes can be engaged effectively. Fair labelling requires charging a prohibited form of conduct in a manner that best matches the alleged behaviour.²³⁴ A proper label for an offence reflects “both the *essence* and the *totality* of the criminal conduct”: the interests invaded, the gravity of the harm, the mechanisms of the injury, and the offender’s mental state.²³⁵ Only with a proper label will a prosecution reflect the true nature and gravity of the wrongdoing. With this in mind, there is a significant concern that even in situations where the unlawful denial of humanitarian assistance can be prosecuted under present provisions, these prosecutions will not have the same expressive or norm-projecting effect as a prosecution under a specific provision. Prosecuting the denial of humanitarian assistance under arts 8(2)(c)(i) or (ii) or under provisions in arts 6 or 7, will not allow for

²³³ Cryer, Friman, Robinson and Wilmschurst, above n 228, at 37; and David Luban “After the Honeymoon: Reflections on the Current State of International Criminal Justice” (2013) 11 JICJ 505 at 509.

²³⁴ Bartels, above n 164, at 306; and Darryl Robinson “The Identity Crisis of International Criminal Law” (2008) 21 LJIL 925 at 927.

²³⁵ David Nersessian “Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity” (2007) 43 SJIL 221 at 255 – 256.

an accurate expression the perpetrator's conduct. For example, in a situation in which it could be shown that the denial of humanitarian assistance had resulted directly in the death of protected persons, the perpetrator could be charged for murder under art 8(2)(c)(i). The perpetrator would not enjoy impunity for their actions. A charge for murder, however, would still fail to act as an accurate expression of the nature and gravity of their conduct. Certainly, murder is an incredibly serious offence. However, the prosecution of a perpetrator for the death of an individual or a small number of individuals as a result of the denial of humanitarian assistance will in many cases fail to reflect the true scale of the suffering experienced by the civilian population as a whole, as well as the scale of the breach of IHL. This considerably weakens the system of accountability. In order to truly reflect the nature and the gravity of the offence, the denial of humanitarian assistance must be prosecuted as just that.

3 Active Prosecution

The third key limitation of the current legal regime is that, in relying on provisions which are not specifically focussed on the denial of humanitarian assistance for prosecution of these breaches, the Rome Statute fails to foster a culture of active prosecution. The function of a provision specifically addressing the denial of humanitarian assistance would extend, not just to giving expression to the seriousness with which the international community regards such conduct generally, but it would also signal to the prosecutor at the ICC that state parties consider the prosecution of the unlawful denial of humanitarian assistance to be a particular priority.²³⁶

In prior conflicts, widespread and often well-documented instances of the denial of humanitarian assistance have not been widely used as a basis for prosecution.²³⁷ For example, while the Special Rapporteur of the Commission on Human Rights for the Former Yugoslavia drew attention to the severe impacts which the interference with humanitarian

²³⁶ Cryer, Friman, Robinson and Wilmschurst, above n 228, at 37.

²³⁷ Rottensteiner, above n 165; and Wynn-Pope, above n 83, at 135.

aid was having on the civilian population, this was never prosecuted at the ICTY.²³⁸ There are of course any number of reasons why this may have been the case. As has been discussed in the context of *Galić*, in some cases this may be because it is difficult to prove a direct relationship between the denial of humanitarian assistance and the particular consequences required for prosecution under result-based provisions.²³⁹ The fact that the denial of humanitarian assistance has not been widely used as the basis for prosecutions to date, however, may also be indicative of the fact that other grave violations of international law have traditionally been viewed as more serious and therefore a greater priority for prosecution.²⁴⁰ This possibility is disturbing, given the scale of civilian suffering in contemporary NIAC as a result of the unlawful obstruction of humanitarian assistance.

In its current form, the Rome Statute fails to signal to those making prosecutorial decisions that the unlawful denial of humanitarian assistance should be a particular focus. Certainly, the lack of a provision specifically criminalising the unlawful denial of humanitarian assistance is not the only factor in this pattern of a failure to prosecute, but it is an important one. The inclusion of a specific crime in the Rome Statute would be an important step in establishing the denial of humanitarian assistance as a priority for prosecution.

D The Need for Reform

It is clear, therefore, that the Rome Statute in its current form fails to establish a robust mechanism for accountability. While in some cases the denial of humanitarian assistance

²³⁸ Tadeusz Mazowiecki *Situation of Human Rights in the Territory of the Former Yugoslavia: Sixth periodic report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 32 of Commission resolution 1993/7 of 23 February 1993* E/CN.4/1994/110 (1994) at 12 - 14; and Tadeusz Mazowiecki *Situation of Human Rights in the Territory of the Former Yugoslavia: Fifth periodic report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 32 of Commission resolution 1993/7 of 23 February 1993* E/CN.4/1994/47 (1993) at [52], [66], [93] and [227].

²³⁹ Rottensteiner, above n 165; Wynn-Pope, above n 83, at 135.

²⁴⁰ Rottensteiner, above n 165; Wynn-Pope, above n 83, at 135.

in NIAC will be able to be prosecuted under the war crimes provisions in arts 8(2)(c)(i) or (ii), or as a crime against humanity or in some extreme cases, the crime of genocide, the scope of applicability of these existing provisions is limited. There will be many instances of serious breaches of the IHL norms governing the provision of humanitarian assistance which cannot be prosecuted under the present regime. In addition to this, reliance on prosecuting the denial of humanitarian assistance under more general provisions also limits the ability of the Rome Statute to perform its important expressive function, and fails to encourage active prosecution. The failure to include a provision in the Rome Statute dealing specifically with the denial of humanitarian assistance in NIAC is a significant weakness in the accountability regime and results in a significant disparity between the protections afforded in IAC and NIAC.²⁴¹

V Recommendations for Reform

In order to ensure an effective legal mechanism for enforcement of IHL and accountability for those who unlawfully deny access or impede humanitarian assistance, there is clear need for a new war crime provision in art 8(2)(e) of the Rome Statute, drafted specifically to address the arbitrary denial of humanitarian assistance in NIAC. This part examines what shape this reform should take. It discusses first what guidance can be drawn from the 2010 reform of art 8. Secondly, it examines two key possibilities for amendment of the Rome Statute: the adoption of an equivalent provision to art 8(2)(b)(xxv) applicable in NIAC, or the drafting of a new provision.

A Precedent for Reform

²⁴¹ Cryer, Friman, Robinson and Wilmschurst, above n 228, at 274; and Lindsay Moir “Particular Issues Regarding War Crimes in Internal Armed Conflicts” in José Doria, Hans-Peter Gasser and Mahmoud Cherif Baasiouni (eds) *The Legal Regime of the International Criminal Court – Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff Publishers, Leiden, 2009) 611 at 615.

On 10 June 2010, the first amendment to the Rome Statute was adopted by consensus in Kampala.²⁴² The amendment expanded the ICC's existing jurisdiction in IAC over the war crimes of employing poison or poisoned weapons; employing asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices; and employing bullets which expand or flatten easily in the human body, to also be applicable in NIAC.²⁴³ This historic moment concerned a modest amendment to the provisions on war crimes, but it is important in a number of respects: first it demonstrates that gaining consensus on reform of the Rome Statute is possible, secondly it shows a commitment of state parties to the principle that if weapons (or perhaps methods) of warfare are prohibited in IAC they should also be prohibited in NIAC, and finally it provides important guidance for future reform.²⁴⁴

The success of the Kampala amendment has been put down, in large part, to its "limited ... ambition".²⁴⁵ The amendment did not seek to create new crimes, but simply to give the court jurisdiction over crimes already recognised at customary international law.²⁴⁶ It was also strongly emphasised during the negotiations process that the crimes would simply mirror those already applicable in IAC.²⁴⁷ More ambitious proposals to ban weapons more commonly used in modern warfare such as blinding laser weapons, cluster munitions and anti-personnel mines were dropped.²⁴⁸ The experience at Kampala seems to suggest, therefore, that amendments to the Rome Statute, and more specifically amendments to art 8, are most likely to be successful where they seek to codify conduct already criminalised at customary international law, especially where that conduct is already criminalised in IAC under the Rome Statute. This is important to keep in mind when considering the shape

²⁴² *Amendments to Article 8 of the Rome Statute* Resolution RC/Res.5, RC/11 (2010).

²⁴³ Amal Alamuddin and Philippa Webb "Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute" (2010) 8 JICJ 1219 at 1220.

²⁴⁴ Roger Clark "Amendments to the Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June 2010" (2010) 2 GoJIL 689 at 709.

²⁴⁵ Alamuddin and Webb, above n 243, at 1240.

²⁴⁶ Alamuddin and Webb, above n 243, at 1224.

²⁴⁷ Alamuddin and Webb, above n 243, at 1224.

²⁴⁸ William Schabas "The ICC Review Conference: Kampala 2010: Prohibited Weapons and the Belgian Amendment: Symbolic, but of What?" (22 May 2010) The ICC Review Conference: Kampala 2010 <<http://iccreviewconference.blogspot.com>>; and Alamuddin and Webb, above n 243, at 1236.

which a reform to strengthen accountability for the denial of humanitarian assistance should take.

B Adoption of Article 8(2)(b)(xxv) in Non-International Armed Conflict

The first possibility for reform is to adopt a provision identical to art 8(2)(b)(xxv), applicable in NIAC. Article 8(2)(b)(xxv) applies in IAC and criminalises the act of “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.²⁴⁹ There are four elements to this crime: (1) the perpetrator deprived civilians of objects indispensable to their survival; (2) the perpetrator intended to starve civilians as a method of warfare; (3) the conduct took place in the context of and was associated with an IAC; and (4) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.²⁵⁰ The only alteration that would be required to make the provision applicable in NIAC would be to change the reference to “international armed conflict” in the Elements of Crimes to “armed conflict not of an international character”. The experience at Kampala suggests that in practical terms, this form of amendment would be the most likely to be successful. No new provision would need to be drafted as the conduct is already criminalised in IAC, and it can be convincingly argued that such an amendment would not seek to create a new international crime, but only expand the ICC’s jurisdiction to include conduct already criminalised at customary international law.

1 Customary Status of the Criminalisation of Starvation in Non-International Armed Conflict

There is widespread consensus in favour of the view that the starvation of the civilian population as a method of warfare in NIAC is already criminalised at customary

²⁴⁹ Rome Statute, above n 11, art 8(2)(b)(xxv).

²⁵⁰ *Elements of Crimes*, above n 168, art 8(2)(b)(xxv) at elements 1 – 4.

international law.²⁵¹ Prima facie, the exclusion of this crime from art 8(2)(e) tends to suggest otherwise. Generally, where there are provisions which are only found under the headings of IAC in the Rome Statute, their absence in the law of NIAC can be explained (unless they are provisions which by their very content can apply only to IAC) by a legislative timidity of the drafters, preferring to exclude a criminalisation which had not yet reached a sufficient level of political acceptance.²⁵² The omission of a provision equivalent to art 8(2)(b)(xxv) in art 8(2)(e) is particularly conspicuous, however, because it is not clear that it was excluded as a result of a lack of political consensus as to its customary status. The “starvation of civilians” as a war crime in NIAC was included as an option in both the draft texts produced by the 1997 and the 1998 Preparatory Committees²⁵³ and many delegations favoured its inclusion.²⁵⁴ There was no specific debate as to the inclusion of such a provision at the Rome Conference (where discussions were focussed for the most part on whether war crimes for NIAC should be included at all)²⁵⁵ and the drafting history does not provide any guidance in this respect.²⁵⁶ As such, it cannot be stated with certainty why this option was not included in the final text.²⁵⁷ This is significant.

²⁵¹ Jelena Pejic “The right to food in situations of armed conflict: the legal framework” (2001) 83 IRRC 1097 at 1100 and 1106; Swiss Federal Department of Foreign Affairs, above n 6, at 53; Schwendimann, above n 5, at 1005; and Cryer, Friman, Robinson and Wilmshurst, above n 228, at 274.

²⁵² Robert Kolb “International Humanitarian Law and its Implementation by the Court” in Eds José Doria, Hans-Peter Gasser and Mahmoud Cherif Bassiouni *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Martinus Nijhoff Publishers, Leiden, 2009) 1015 at 1019; Cottier, above n 221, at 287 - 288; and Cryer, Friman, Robinson and Wilmshurst, above n 228, at 271.

²⁵³ *Draft statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court A/CONF.183/2/Add.1 and Corr.1* (1998) reproduced in Mahmoud Cherif Bassiouni *The Legislative History of the International Criminal Court: Volume II – An Article-by-Article Evolution of the Statute* (Transnational Publishers, New York, 2005) at 66; *Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997 A/AC.249/1997/L.9/Rev.1* (1997) reproduced in Mahmoud Cherif Bassiouni *The Legislative History of the International Criminal Court: Volume II – An Article-by-Article Evolution of the Statute* (Transnational Publishers Inc, New York, 2005) at 83.

²⁵⁴ Cottier, above n 205, at 459.

²⁵⁵ Thomas Graditzky “War Crime Issues Before the Rome Diplomatic Conference on the Establishment of an International Criminal Court” in Olympia Bekou and Robert Cryer (eds) *The International Criminal Court* (Ashgate Dartmouth, Wiltshire, 2004) 127 at 139.

²⁵⁶ Bartels, above n 164, at 296 and 298.

²⁵⁷ Cottier, above n 205, at 459.

The failure to include a provision criminalising starvation in NIAC does not necessarily signal a lack of customary status.

In fact, there is a compelling argument that it does have such a status. Firstly, it is clear that the underlying prohibition on starvation of the civilian population as a method of warfare in IHL has customary international law status. Article 14 of AP II proscribes the “[s]tarvation of civilians as a method of combat” in NIAC²⁵⁸ and the ICRC’s study of customary international law sets out that “the use of starvation of the civilian population as a method of warfare is prohibited” in both IAC and NIAC.²⁵⁹ The second question therefore is whether the violation of the IHL norm prohibiting the starvation of civilians entails individual criminal responsibility under customary international law in NIAC. Again, there is strong evidence that it does.

The ICRC has stated that while the use of starvation of the civilian population as a method of warfare is not listed in the Rome Statute as a war crime, there is a significant body of state practice which highlights its serious nature, and as such “a court would have sufficient basis to conclude that such acts in a non-international armed conflict are a war crimes”.²⁶⁰ This is a view echoed by a number of commentators.²⁶¹ Firstly, there is a wealth of evidence to suggest that the starvation of the civilian population is viewed by the international community, not only as a violation of customary international law, but as a very serious violation.²⁶² There is extensive state practice expressing outrage at such acts in NIAC. It is particularly noteworthy that the UN Commission of Experts included a breach of art 14 of AP II in its interim report on the “massive and systematic violations” of IHL in Rwanda.²⁶³ Secondly, the starvation of the civilian population as a method of warfare in NIAC also

²⁵⁸ Additional Protocol II, above n 7, art 14.

²⁵⁹ Henckaerts and Doswald-Beck, above n 7, r 53.

²⁶⁰ Henckaerts and Doswald-Beck, above n 7, r 156.

²⁶¹ Pejic, above n 251, at 1100 and 1106; Swiss Federal Department of Foreign Affairs, above n 6, at 53; Schwendimann, above n 5, at 1005; and Cryer, Friman, Robinson and Wilmshurst, above n 228, at 274.

²⁶² Henckaerts and Doswald-Beck, above n 7, r 156.

²⁶³ Henckaerts and Doswald-Beck, above n 7, r 156; and *Preliminary Report of the Independent Commission of Experts established in accordance with Security Council resolution 935* SC Res 1994/1125, S/1994/1125 (1994) at annex.

constitutes a war crime under several national legislations, including those of Azerbaijan, Belarus, Bosnia and Herzegovina, Croatia, Ethiopia, Germany, Lithuania and Slovenia.²⁶⁴ The failure of other states to criminalise the starvation of the civilian population as a war crime in NIAC may, in many cases, be explained by the fact that many states simply adopt the provisions of the Rome Statute verbatim in their national legislation. Finally, there is also precedent for the prosecution of the starvation of the civilian population. The prohibition on starvation under art 14 AP II, as incorporated in Croatian domestic law, was also applied by a Croatian district court in *Perišić and Others*.²⁶⁵

There is a very strong argument, therefore, that the use of starvation as a method of warfare in NIAC is already criminalised at customary international law. This makes the chance for successful reform particularly promising. To adopt a provision equivalent to art 8(2)(b)(xxv) in NIAC would simply involve adopting a provision in NIAC already applicable in IAC, and recognised as being criminalised at customary international law.

C A Revised Provision

A second, more ambitious option for reform is to draft a new provision in the Rome Statute, specifically criminalising the unlawful denial of humanitarian assistance, independently of the criminalisation of the use of starvation as a method of warfare. Certainly, the adoption of a provision equivalent to art 8(2)(b)(xxv) would be a significant step forward in ensuring accountability of those who arbitrarily deny humanitarian access and assistance. There are however some potential limitations to the scope of the provision, which to date has not been included in any indictment.²⁶⁶

²⁶⁴ Jean-Marie Henckaerts and Louise Doswald-Beck (eds) *Customary International Humanitarian Law – Volume II: Practice Part I* (International Committee of the Red Cross, Cambridge University Press, New York, 2009), r 53.

²⁶⁵ *Perišić and Others* [1997] District Court of Zadar, Croatia.

²⁶⁶ Gillard, above n 63, at 374.

1 Limited Scope of Article 8(2)(b)(xxv)?

The crime of the starvation of civilians under art 8(2)(b)(xxv) criminalises “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.²⁶⁷ There are two key elements which must be proven: (1) the perpetrator deprived civilians of objects indispensable to their survival; and (2) the perpetrator intended to starve civilians as a method of warfare.²⁶⁸

(a) Objective Element

In general terms, the objective element of art 8(2)(b)(xxv) does not pose any particular problem in regards to prosecuting the denial of humanitarian assistance. The prohibited conduct is that “the perpetrator deprived civilians of objects indispensable to their survival”.²⁶⁹ It is clear from the drafting process of the Elements of Crimes that “objects indispensable to their survival” should be construed broadly, extending beyond just food and water, including for example: medical supplies, basic shelter and clothing critical for survival.²⁷⁰ The act of “depriving” may be done in a number of ways and must in large part be interpreted in light of art 54 AP I. The perpetrator may “deprive” civilians by “attacking, destroying, rendering useless, or removing indispensable objects”,²⁷¹ by “impeding relief supplies as provided for under the Geneva Conventions”,²⁷² or through a qualified failure to fulfil a duty under IHL, for example the duties on an occupying power to provide for the population under its control.²⁷³ These are not, however, closed categories. It is also important to note that there is no result requirement; it is not necessary to show that anyone

²⁶⁷ Rome Statute, above n 11, art 8(2)(b)(xxv).

²⁶⁸ *Elements of Crimes*, above n 168, art 8(2)(b)(xxv) at elements 1 and 2.

²⁶⁹ *Elements of Crimes*, above n 168, art 8(2)(b)(xxv) at element 1.

²⁷⁰ Cottier, above n 205, at 461; and Louise Doswald-Beck, Robert Kolpin and Knut Dörmann *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press, Cambridge, 2003) at 363.

²⁷¹ Additional Protocol I, above n 7, art 54(2).

²⁷² Rome Statute, above n 11, art 8(2)(b)(xxv); and Cottier, above n 205, at 462.

²⁷³ Cottier, above n 205, at 462.

actually died from starvation.²⁷⁴ In broad terms then, the objective element of the crime appears well-suited to the prosecution of the denial of humanitarian assistance.

Two specific concerns do arise, however, in regards to the drafting of the objective element. First, the reference to “civilians” is problematic. The commentary to art 8(2)(b)(xxv) makes it clear that “civilians” is to be read broadly; it applies to any civilian population, not just those finding themselves on an adverse party’s territory.²⁷⁵ Under IHL, however, humanitarian activities must benefit all persons who may be in need of assistance or protection. This is not limited to civilians, and must also include wounded and sick fighters, prisoners of war, and persons otherwise deprived of their liberty in relation to the armed conflict.²⁷⁶ These groups of people would seem to be excluded from the provision in art 8(2)(b)(xxv), with the Trial Chamber finding in *Katanga* that civilians for the purposes of art 8(2)(c)(i) are, “persons who are not members of either State or non-state armed forces”.²⁷⁷ The provision in the Rome Statute, therefore, fails to align with the full scope of the underlying IHL rule. Where a perpetrator denies humanitarian access to persons who were not civilians, but were otherwise hors de combat, this would likely not be covered by a provision equivalent to art 8(2)(b)(xxv).

The other concern arising from the wording of the objective element of art 8(2)(b)(xxv) is that in giving the example of wilfully impeding relief supplies, the statute refers to relief supplies “as provided for under the Geneva Conventions”. This reference to the Geneva Conventions is difficult, as both the prohibition of starvation and the most robust provisions on humanitarian assistance are found in the APs, and in the case of NIAC, in customary international law, rather than in the Conventions.²⁷⁸ Commentators generally seem to accept that despite this reference to the Geneva Conventions, humanitarian assistance provided under the provisions in the APs and customary international law could be

²⁷⁴ Doswald-Beck, Kolpin and Dörmann, above n 270, at 364; and Cottier, above n 205, at 465.

²⁷⁵ Cottier, above n 205, at 462.

²⁷⁶ International Committee of the Red Cross, above n 1, at 28.

²⁷⁷ *Katanga*, above n 163, at [788].

²⁷⁸ Bartels, above n 164, at 293.

subsumed under the more general formula of “objects indispensable to their survival”.²⁷⁹ It is possible this could present difficulties however, and in this respect the drafting of art 8(2)(b)(xxv) fails to accurately reflect the full scope of the underlying rules governing humanitarian assistance under IHL.

(b) Subjective Element

Secondly, and more fundamentally, concern arises as to the scope of a provision equivalent to art 8(2)(b)(xxv) in terms of the subjective element of the crime. In order to satisfy the mens rea requirement, it must be shown first that the perpetrator intended to deprive civilians of objects indispensable to their survival.²⁸⁰ In addition to this, a special intent to starve the civilian population as a method of warfare must also be shown. While “starvation” is to be construed broadly, covering the deprivation not just of food and water, but also other objects insofar as they are vital to the civilians’ survival,²⁸¹ the perpetrator must intend to use starvation “as a method of warfare”.²⁸² This may prove problematic.

The scope of “intentionally using starvation of civilians as a method of warfare” is not clearly defined. Cottier’s commentary on art 8(2)(b)(xxv) explains that:²⁸³

the crime must be committed with the intent to use the starvation as a *method of warfare*, that is, to deliberately provoke, increase or prolong the starvation by deprivation of objects indispensable for the survival with an aim to gain a military advantage.

Examples given by Cottier of “military advantage” include using starvation to achieve a speedier subjection of a besieged town or village, or to pressure the adversary to accept some other aim of the attacker. Another example may be to deprive civilians of

²⁷⁹ Cottier, above n 205, at 462.

²⁸⁰ Rome Statute, above n 11, art 30; Cottier, above n 205, at 465.

²⁸¹ Doswald-Beck, Kolpin and Dörmann, above n 270, at 363 - 364; and Cottier, above n 205, at 460 – 461.

²⁸² *Elements of Crimes*, above 168, art 8(2)(b)(xxv) at element 2.

²⁸³ Cottier, above n 205, at 465.

indispensable goods in order to force them to move out of a certain area in order to facilitate control.²⁸⁴

In many cases, the intention to use starvation as a means to gain military advantage will be quite clear. In Syria, for example, it is widely recognised that many of the parties to the conflict use siege warfare, a corollary of which is often the blocking of humanitarian assistance, as a means of forcing a population to surrender or suffer starvation.²⁸⁵ In other situations, however, this intention to gain a specific military advantage may be less clear, raising concern that this special intent requirement may limit the instances in which prosecution for the denial of humanitarian assistance will be available under a provision equivalent to art 8(2)(b)(xxv). There may be other motivations, particularly in NIAC, to deny humanitarian assistance which cannot be linked directly to a specific military advantage. For example, humanitarian assistance may be denied as a means of gaining political advantage, leverage at negotiations, a perceived need to protect national sovereignty, or driven by another motive such as ethnic cleansing. Certainly it can be argued that “use of starvation as a method of warfare” might be read in broader terms than requiring direct military advantage. The prohibition on destroying objects indispensable to the survival of the civilian population under art 54(2), a corollary on the prohibition of starvation, states that it is prohibited to attack objects indispensable to the survival of the civilian population “for the specific purpose of denying them for their sustenance value ... whatever the motive”.²⁸⁶ This may suggest that a broader reading is applicable to the prohibition on starvation generally.²⁸⁷ Fleck, in the *Handbook of International Humanitarian Law* also seems to adopt a broader reading, stating that starvation of civilians as a method of warfare is prohibited, and “thus, deliberately to starve civilians is unlawful”.²⁸⁸ The ICRC commentary also perhaps suggests a broader reading, noting that

²⁸⁴ Cottier, above n 205, at 466.

²⁸⁵ *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic A/HRC/30/48* (2015) at [100].

²⁸⁶ Additional Protocol I, above n 7, art 54(2).

²⁸⁷ Cottier, above n 205, at 466.

²⁸⁸ Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (2nd edition, Oxford University Press, Oxford, 2008) at 243.

starvation as a method of warfare is “to provoke it deliberately, causing the population to suffer hunger” and that “starvation is referred to here as a method of warfare, i.e., as a weapon to annihilate or weaken the population”.²⁸⁹ It is possible therefore that so long as the starvation is deliberate, and not simply an unintended consequence of the armed conflict, this specific intent may be satisfied.²⁹⁰ It is of course also true that in many cases, “what may seem to be an incidental effect of an armed conflict may prove to be a covert method of combat”.²⁹¹

Despite this potential for a broad reading, the problem remains that the scope of the specific intent to starve the population as a method of warfare remains unclear, and it is possible that where civilians are deprived of objects indispensable to their survival for reasons other than seeking to gain a direct military advantage, such conduct would not fall within this provision.²⁹² In that case, the scope of the criminal provision would not accurately reflect the full scope of the IHL rules under which the denial of humanitarian assistance is unlawful, regardless of the perpetrator’s motivation.

2 Customary Status of the Criminalisation of the Denial of Humanitarian Assistance

In essence, these issues with the scope of the provision arise because art 8(2)(b)(xxv) was not drafted to specifically address the unlawful denial of humanitarian assistance. Rather than being grounded in the IHL provisions governing the provision of humanitarian assistance, art 8(2)(b)(xxv) is grounded in the IHL prohibition on the starvation of the civilian population, contained in art 54 of AP I.²⁹³ The prohibited conduct is depriving

²⁸⁹ Claud Pilloud, Yves Sandoz, Christophe Swinarski and Bruno Zimmermann *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross, Martinus Nijhoff, Geneva, 1987) at 653; and The Turkel Commission *The Public Commission to Examine the Maritime Incident of 31 May 2010: Report – Part One* (January 2010) at [76].

²⁹⁰ Cottier, above n 205, at 466.

²⁹¹ Sandesh Sivakumaran *The Law of Non-International Armed Conflict* (Oxford University Press, Croydon, 2012) at 424.

²⁹² Cottier, above n 205, at 462.

²⁹³ Michael Bothe “War Crimes” in Antonio Cassese, Paola Gaeta, John R W D Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary Volume I* (Oxford University Press, Oxford, 2002) 379 at 402 – 403.

civilians of objects indispensable to their survival, coupled with an intention to starve civilians as a method of warfare. The unlawful denial of humanitarian assistance is one way in which this act of depriving may be carried out, but it is not the key focus of the provision. The reference to “wilfully impeding relief supplies” includes the IHL provisions governing humanitarian assistance as a kind of addendum to the criminalisation on the use of starvation as a method of warfare. This is a reflection of the fact that traditionally the rules on humanitarian assistance were viewed as a corollary to the prohibition on the starvation of the civilian population. There is a strong case however to argue that the unlawful denial of humanitarian assistance is criminalised at international law, independently of other underlying prohibitions in IHL, and as such should stand in its own provision in the Rome Statute.

The underlying IHL prohibition of the arbitrary denial of humanitarian access in NIAC has clear customary international law status, as reflected in the ICRC study of customary international law,²⁹⁴ and there is also evidence to suggest that the criminalisation of the denial of humanitarian assistance, independent of the criminalisation of starvation of civilians, has attained customary status. There is extensive practice of both states and international organisations expressing outrage at the obstruction of humanitarian assistance in NIAC, independent of references to the IHL rules prohibiting starvation.²⁹⁵ In many cases this practice highlights the serious nature of breaches of these provisions under IHL. UN bodies have described the obstruction of humanitarian assistance as a “threat to international peace and security”²⁹⁶, “a serious violation of international humanitarian law”²⁹⁷, “an outrage”²⁹⁸ and “a threat to human life that constitutes an offence to human

²⁹⁴ Henckaerts and Doswald-Beck, above n 7, r 55.

²⁹⁵ Henckaerts and Doswald-Beck, above n 264, r 55.

²⁹⁶ SC Res 794, above n 128, at preamble.

²⁹⁷ *Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)* GA Res 49/196, A/Res/49/196 (1994) at subs 14; and *Situation of human rights in the Republic of Bosnia and Herzegovina, in the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)* UNCHR Res 1995/89, E/CN.4/RES/1995/89 (1995) at subs 17.

²⁹⁸ *Situation of human rights in the Sudan* GA Res 52/140, A/Res/52/140 (1998) at [2].

dignity”.²⁹⁹ In other cases the practice condemning the deliberate impediment of relief consignments specifically emphasises that those who commit or order the commission of such acts must be held individually responsible.³⁰⁰ The inclusion of “wilfully impeding relief supplies” in art 8(2)(b)(xxv) also indicates that it is considered seriously, at least in IAC, despite the problems with drafting that have been highlighted. Interestingly, the 1996 Preparatory Committee had first considered including a war crime of “starving of the civilian population and prevention of humanitarian assistance from reaching them” in the draft text of the Rome Statute.³⁰¹ This was changed in the preparatory committee session of February 1997 however to “starvation of civilians”,³⁰² and then in the December 1997 session to the wording that appears in the final version of art 8(2)(b)(xxv).³⁰³ It is clear then that the international community considers the unlawful denial of humanitarian assistance to be a particularly serious breach of IHL, and in many cases has highlighted the need for individual responsibility for that conduct.

There is also relevant state practice at a domestic level. The vast majority of state legislation simply adopts the war crimes of the ICC. However, there are notable exceptions which focus explicitly on the denial of humanitarian assistance itself, and some of these extend to NIAC as well as IAC. Germany’s legislation punishes anyone who, in connection with an

²⁹⁹ *Situation of human rights in the Sudan* GA Res 1996/73, A/Res/1996/73 (1996) at preamble.

³⁰⁰ *Security Council Resolution 787* SC Res 787 S/Res/787 (1992) at [5]; *United Nations Security Council Statement by the President S/25162* (1993) at 1; *Situation of human rights in the Sudan* GA Res 52/140, A/Res/52/140 (1997) at [2]; *Situation of human rights in the Sudan* UNCHR Res 1995/77, E/CN.4/RES/1995/77 (1995) at [18]; and *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 1, at [7] and [39].

³⁰¹ *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume I* A/51/22 (1996); and *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume II* A/51/22 (1996) reproduced in Mahmoud Cherif Bassiouni *The Legislative History of the International Criminal Court: Volume II – An Article-by-Article Evolution of the Statute* (Transnational Publishers, New York, 2005) at 91.

³⁰² *Decisions Taken by the Preparatory Committee at its Session Held from 4 – 15 August 1997* A/AC.249/1997/L.8/Rev.1 (1997) reproduced in Mahmoud Cherif Bassiouni *The Legislative History of the International Criminal Court: Volume II – An Article-by-Article Evolution of the Statute* (Transnational Publishers Inc, New York, 2005) at 96; and *Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997*, above n 253, at 87.

³⁰³ Cottier, above n 205, at 459.

IAC or NIAC, “impedes relief supplies, in contravention of international humanitarian law”.³⁰⁴ Norway’s Military Penal Code criminalises “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions”.³⁰⁵ In addition, the Draft Amendments to the Penal Code of El Salvador and Nicaragua’s Draft Penal Code criminalise “anyone who [during an international or internal armed conflict] obstructs or impedes the medical, sanitary or relief personnel ... in the realisation of their ... humanitarian tasks which, in accordance with the rules of international humanitarian law, may or shall be conducted”.³⁰⁶ There is a strong case to argue, therefore, that the denial of humanitarian assistance in breach of IHL is criminalised at customary international law, independent of the rules on starvation.

3 A Proposal

The most desirable option for reform, therefore, would be a provision grounded solely in the IHL rules on humanitarian assistance, criminalising the unlawful denial of humanitarian access and assistance. A new provision should be inserted in art 8(2)(e) criminalising, in NIAC, the act of “intentionally impeding the provision of humanitarian assistance in contravention of international humanitarian law”. This crime would have four elements:

- (1) The perpetrator impeded the provision of humanitarian assistance. This includes denying access to humanitarian actors or any other form of obstruction.
- (2) This impediment was in contravention of international humanitarian law.
- (3) The conduct took place in the context of and was associated with an armed conflict not of an international character.
- (4) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

³⁰⁴ Law Introducing the International Crimes Code 2002 (Germany), art 1, subs 11(1)(5).

³⁰⁵ Military Penal Code as amended 1902 (Norway), subs 108.

³⁰⁶ Draft Amendments to the Penal Code 1998 (El Salvador), art “Omisión y obstaculización de medidas de socorro y asistencia humanitaria”; and Draft Penal Code 1999 (Nicaragua), art 463.

A specific provision of this nature would criminalise all instances of the intentional denial of humanitarian assistance, where that conduct is prohibited by IHL. This would encompass all the IHL rules governing the provision of humanitarian assistance in the GCs, the APs and customary international law. There would be no additional requirements or elements which would need to be proven beyond the breach of the underlying IHL rule and the requisite intention. As a result, the scope of the criminalisation would mirror the scope of the IHL rules governing the provision of humanitarian assistance, ensuring a robust mechanism for accountability. Such a provision would perform an important expressive function, articulating clearly the seriousness with which the international community views this conduct and firmly establish the unlawful denial of humanitarian assistance as a priority for prosecution.

In practical terms it may be that inserting a new provision of this nature would be more challenging in terms of gaining consensus than simply adopting a provision identical to art 8(2)(b)(xxv), applicable in NIAC. However, as has been outlined there is in fact a strong argument to say that the criminalisation of the unlawful denial of humanitarian assistance already has customary law status. As such, state parties would not be being asked to create a new crime at international law, but simply to extend the jurisdiction of the ICC to include a crime which is already recognised at customary international law.

VI Conclusion

The unlawful denial of humanitarian assistance causes significant and prolonged suffering of civilian populations. The numbers of those in need of humanitarian assistance as a result of armed conflict are unprecedented, and yet parties to conflicts routinely violate their IHL obligations, blocking humanitarian actors from gaining access to those in need and obstructing humanitarian assistance. Arbitrarily denying humanitarian access and depriving civilians of objects indispensable to their survival by intentionally impeding relief supplies is a violation of IHL. There must be accountability for such acts, and as has been highlighted by the Secretary-General, seeking this accountability “should be at the

very top of the international community's agenda".³⁰⁷ Individual criminal responsibility is one of the most important tools in the international community's armoury for ensuring such accountability. In particular, the ICC is critical to IHL's enforcement because of its ability to prosecute individuals where states are either unable or unwilling. As such, a robust legal framework for the enforcement of IHL and accountability for its breaches requires that the denial of humanitarian assistance is able to be prosecuted at the ICC.

Under the current war crimes provisions of the Rome Statute, however, there is no specific offence under which the denial of humanitarian assistance in NIAC may be prosecuted. This leaves a considerable gap in the accountability framework. While in some cases the obstruction of humanitarian assistance may be prosecuted under other provisions in arts 6, 7 or 8, this paper has argued that this is undesirable. These provisions are limited in their scope, meaning that not every instance of the unlawful denial of humanitarian assistance will be able to be prosecuted, and additionally these provisions do not perform their expressive function or encourage active prosecution as effectively as would a provision directed specifically at the denial of humanitarian access.

If the prevailing culture of disrespect for the rules of IHL governing humanitarian assistance is going to be effectively challenged, reform of art 8 of the Rome Statute is necessary. This paper has discussed two possibilities for reform. The first option is to insert a provision identical to art 8(2)(b)(xxv) into art 8(2)(e), extending the court's jurisdiction over the war crime of starvation of civilians in situations of NIAC. This would provide a considerably more robust accountability mechanism than exists presently, and given the lessons learnt from the 2010 reform of the Rome Statute, is likely to be the easiest to execute in practical terms. The second, and more desirable possibility for reform, however, would be to draft a new provision for insertion in art 8(2)(e) which criminalises the unlawful impediment of humanitarian assistance, independently of the criminalisation of starvation of civilians. Such a provision would be grounded solely in the underlying IHL prohibitions on the unlawful denial of assistance and as a result would have a scope

³⁰⁷ *Report of the Secretary-General on the protection of civilians in armed conflict*, above n 3, at [3].

aligning directly with IHL. The consequence of this would be that where the court's jurisdictional requirements are met, all instances of the unlawful denial of humanitarian assistance would be prosecutable at the ICC. A new war crimes provision in the Rome Statute would establish a robust accountability regime and offer the true possibility of an end to impunity.

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