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

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

Keywords: humanitarian relief, unlawful impediment, Security Council role, confidence building

1. Introduction

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

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[1] See, for example, Dapo Akande and Emanuela-Chiara Gillard, 'Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict', United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), October 2016 ('Oxford Guidance'); 'ICRC Q&A and Lexicon on Humanitarian Access' (2014) 96(893) *International Review of the Red Cross* 359; Swiss Federal Department of Foreign Affairs, 'Humanitarian Access in Situations of Armed Conflict: Handbook on the Normative Framework', 2011.
[2] It should be noted that international human rights law and, in particular, the rights relating to physical integrity and to an adequate standard of life (in terms of rights to food, water and shelter, and to health) are also of relevance to humanitarian relief operations in situations of armed conflict. This article focuses exclusively on IHL.

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to compliance, attention has focused principally on ways of holding accountable parties to armed conflict that obstruct humanitarian relief operations and persons responsible therefor by the imposition of targeted sanctions and the establishment of individual international criminal responsibility.[3]

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

This article aims to highlight some of the difficulties that may arise in promoting compliance with the rules of IHL that deal with humanitarian relief operations. The article does not purport to provide a comprehensive examination of the law regarding relief operations,[4] but the next section (Section 2) provides a brief summary of the rules of IHL in this area. An understanding of these rules is essential when conducting relief operations, and all the more so when trying to establish accountability for their violation. Section 3 discusses when these rules can be considered as having been violated and, consequently, humanitarian relief operations unlawfully impeded. The following section presents some of the approaches currently adopted for establishing accountability for violation of these rules and notes some of the problems they face. Section 5 of the article steps away from the details of the law to highlight some operational and policy concerns raised by an approach to promoting compliance with this area of IHL that focuses on accountability. It ends with some recent examples of practical mechanisms which attempt to address the reservations of parties to armed conflict to consent to and facilitate humanitarian relief operations, and achieve the law's objective of providing humanitarian assistance for people in need.

[3] See, for example, 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 *Israel Law Review* 281.

[4] For an overview of the law in this area see, for example, 'Oxford Guidance' (n 1); Flavia Lattanzi, 'Humanitarian Assistance' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 231; Felix Schwendimann, 'The Legal Framework of Humanitarian Access in Armed Conflict' (2011) 93(844) *International Review of the Red Cross* 993; Heike Spieker, 'Humanitarian Assistance, Access in Armed Conflict and Occupation' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013); Ruth Abril Stoffels, 'Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps' (2004) 86(855) *International Review of the Red Cross* 515.

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

The treaty rules of IHL regulating collective humanitarian relief operations for civilians[5] in situations of international armed conflict and occupation are found principally in Articles 23 and 59 of the Fourth Geneva Convention of 1949,[6] and Articles 69 to 71 of the First Additional Protocol thereto of 1977 (Additional Protocol I).[7] The rules applicable in non-international conflicts are found in Common Article 3(2) to the Geneva Conventions of 1949 and Article 18 of the Second Additional Protocol thereto of 1977 (Additional Protocol II).[8] Customary law rules apply alongside these treaty provisions. According to the study on customary law undertaken by the International Committee of the Red Cross (ICRC), these treaty rules are mirrored in customary law applicable in both types of conflict.[9]

The rules of IHL that regulate humanitarian relief operations are, for the most part, the same in both international and non-international conflicts. Primary responsibility for meeting the needs of civilians lies with the party to the conflict in whose effective control they find themselves.[10] If this party is unable or unwilling to meet these needs, offers may be made to carry out relief actions that are humanitarian and impartial in character and conducted without any adverse distinction.[11] The consent of affected states is required.[12] However, states have no latitude to withhold consent to offers to conduct humanitarian relief operations in two situations, the first of which is in situations of occupation. If an occupying power is not in a position to ensure the adequate provision of supplies essential for the survival of the civilian population of the occupied territory, it must accept offers to conduct relief operations that are humanitarian and impartial in character.[13] Second, the United Nations Security Council may adopt binding measures requiring parties to consent to humanitarian relief operations or, more radically, to impose relief operations.

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

[6] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), arts 23, 59.

[7] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I), arts 69–71.

[8] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31, art 3; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85, art 3; Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III), art 3; GC IV (n 6) art 3 (Common Article 3); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (AP II), art 18.

[9] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules* (International Committee of the Red Cross and Cambridge University Press 2005, revised 2009) (ICRC Study), r 55.

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

[11] Common Article 3 (n 8); AP I (n 7) art 70(1); AP II (n 8) art 18(2).

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

[13] GC IV (n 6) art 59.

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Such measures will alter the otherwise applicable rules of IHL.[14] In all other situations consent is required, but it may not be withheld arbitrarily.[15] Once consent has been obtained, parties to an armed conflict[16] must allow and facilitate rapid and unimpeded passage of supplies, equipment and personnel involved in the humanitarian relief operations. They may prescribe technical arrangements under which such passage is permitted.[17]

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

Recently attention has focused on the first step, principally because of a small number of situations where the affected state did not consent to humanitarian relief operations being conducted, despite the existence of severe needs. Most frequently, however, problems arise at the second stage: states have accepted offers to conduct humanitarian relief operations but subsequently fail to do what is required or necessary to allow and facilitate their rapid and unimpeded passage.[18]

3. UNLAWFUL IMPEDING OF HUMANITARIAN RELIEF OPERATIONS

As will be discussed in Section 4.1 below, the Rome Statute of the International Criminal Court (ICC Statute) includes the war crime of '[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions'.[19] The expression 'wilfully impeding relief supplies' does not appear in IHL treaties. While the expression 'wilful impeding'

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

[15] In relation to international armed conflicts see Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949* (International Committee of the Red Cross and Martinus Nijhoff 1987) (ICRC Commentary to the Additional Protocols), para 2805, and Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974–77 (Official Records), Vol XII, CDDH/II/SR.87, paras 27–31. In relation to non-international armed conflicts see ICRC Commentary to the Additional Protocols, ibid para 4885, and Official Records, Vol VII, CDDH/SR.53, 156–57. See also *Commentary on the First Geneva Convention* (2nd edn, Cambridge University Press 2016) paras 832–43, and 'Oxford Guidance' (n 1) paras 45–47.

[16] This article addresses only the obligations of parties to an armed conflict. For a discussion of the obligations of non-belligerent states, see 'Oxford Guidance' (n 1) s H.

[17] In relation to situations of occupation powers see GC IV (n 6) arts 59 and 61; in relation to other situations of international armed conflict see AP I (n 7) art 70(2)–(4). Neither Common Article 3 (n 8) nor AP II (n 8) art 18(2) address this aspect of humanitarian relief operations, but the rules in AP I on this issue are considered customary and applicable in both international and non-international armed conflicts: ICRC Study (n 9) rr 55, 56.

[18] For examples, see UNSC, Report of the Secretary-General on the Protection of Civilians in Armed Conflict (29 May 2009), UN Doc S/2009/277, Annex 'Constraints on Humanitarian Access'; UNSC, Report of the Secretary-General on the Protection of Civilians in Armed Conflict (11 November 2010), UN Doc S/2010/579, Annex 'Constraints on Humanitarian Access'; and Report of the Secretary-General on the Protection of Civilians in Armed Conflict (22 May 2012), UN Doc S/2012/376, Annex 'Constraints on Humanitarian Access'.

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

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

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

3.1. CONSENT WITHHELD IN VIOLATION OF INTERNATIONAL LAW

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

Second, consent is withheld unlawfully when states whose consent is required withhold it arbitrarily. Essentially, consent is withheld arbitrarily in three situations:[20]

- If it is withheld in circumstances that result in the violation by a state of its obligations under international law with respect to the civilian population in question. One clear example would be withholding consent in situations where the civilian population is inadequately supplied and the state intends to cause, contribute to, or perpetuate starvation. This would violate the prohibition on starvation of the civilian population as a method of warfare.[21] Another example would be withholding consent to medical relief operations. The wounded and sick – including enemy combatants – must receive, to the fullest extent practicable and with the least possible delay, the medical care required by their condition. No distinction may be made on any grounds other than medical grounds.[22]

[20] For a fuller analysis of what amounts to arbitrary withholding of consent to humanitarian relief operations see 'Oxford Guidance' (n 1) s E, and Dapo Akande and Emanuela-Chiara Gillard, 'Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict' (2016) 92 *International Law Studies* 483.
[21] AP I (n 7) art 54(1); AP II (n 8) art 14.
[22] AP I (n 7) art 10; AP II (n 8) art 7.

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- If the withholding of consent violates the principles of necessity and proportionality. Where consent to relief operations is withheld for a legitimate reason, it will nonetheless be arbitrary if it exceeds what is necessary in the circumstances, and thus is disproportionate. Limitations in terms of time, duration, location, and affected goods and services must not go beyond what is absolutely necessary to achieve the legitimate aim.
- If consent is withheld in a manner that is unreasonable, unjust, lacking in predictability or that is otherwise inappropriate.

3.2. Violation of the Obligation to Allow and Facilitate Rapid and Unimpeded Passage of Humanitarian Relief Supplies, Equipment and Personnel

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

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

3.2.1. What Parties are Required to do to Allow and Facilitate Rapid and Unimpeded Passage of Humanitarian Relief Supplies, Equipment and Personnel

Once consent has been obtained, passage of humanitarian relief supplies, equipment and personnel into the country and movement within it must be as rapid as possible in the circumstances, taking into account, for example, the state of roads and other necessary infrastructure, and the location of active hostilities.[23]

The requirement that passage be unimpeded means that parties must refrain from harassment and should reduce administrative procedures and other formalities as far as possible, dispensing with any that are superfluous.[24]

IHL treaties set out a number of specific measures with regard to the obligation of parties to allow and facilitate passage. Parties may not divert relief consignments from their intended purpose or delay their forwarding, except in cases of urgent necessity in the interests of the civilian population concerned.[25] In addition, restrictions may be imposed on the activities and the freedom of movement of humanitarian relief personnel only in the event of imperative military

[23] ICRC Commentary to the Additional Protocols (n 15) para 2829, commentary to art 70.
[24] ibid.
[25] AP I (n 7) art 70(3)(c).

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necessity, such as in the case of a military operation in a particular location. Even in such circumstances restrictions may be imposed only temporarily.[26] In situations of occupation, humanitarian relief consignments must be exempt from all charges, taxes or customs unless these are necessary in the interests of the economy of the occupied territory.[27]

Beyond the measures specifically mentioned in IHL treaties, parties to an armed conflict may discharge the obligation to allow and facilitate rapid and unimpeded passage in a variety of ways. While it is possible to identify practical measures that states could take to facilitate passage,[28] the fact that they are not mentioned in IHL treaties makes it difficult to assert that just because a party has not taken a particular measure (such as simplified visa procedures or waiving customs inspections) it has not complied with the obligation to allow and facilitate rapid and unimpeded passage. As discussed in Section 3.2.2 below, it is necessary to consider the effect of the failure to adopt the measure.

3.2.2. WHAT PARTIES ARE ENTITLED TO DO: TECHNICAL ARRANGEMENTS

While parties to an armed conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment and personnel, they are entitled to prescribe technical arrangements for such passage.[29] These arrangements can serve a number of purposes. They may enable parties to assure themselves that relief consignments are exclusively humanitarian; they may prevent humanitarian relief convoys from being endangered or from hampering military operations; and they may ensure that humanitarian relief supplies and equipment meet minimum health and safety standards.

Technical arrangements may include the search of consignments to check that they do not contain weapons, other military equipment or items that may be used for military purposes; or the requirement that relief convoys use prescribed routes at specific times to ensure that they do not hamper, and are not endangered by military operations. Parties to an armed conflict may make passage of humanitarian relief consignments conditional on their distribution under the local supervision of an impartial organisation or on other measures to guarantee that the supplies will reach their intended beneficiaries.[30]

As with measures to allow and facilitate rapid and unimpeded passage of relief consignments, parties also have a degree of discretion with regard to technical arrangements. However, those arrangements must be applied in good faith and their imposition or effect must not be arbitrary within the meaning set out in Section 3.1 above. In addition, the nature, extent and impact of such

[26] ibid art 71(3).
[27] GC IV (n 6) art 61.
[28] For examples, see 'Oxford Guidance' (n 1) s E.
[29] GC IV (n 6) art 59 and AP I (n 7) art 70(3). According to the ICRC Study (n 9) r 55 and commentary thereto, the same entitlement also exists in situations of non-international armed conflict.
[30] AP I (n 7) art 70(3)(b).

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arrangements must not prevent the rapid delivery of humanitarian assistance in a manner that is impartial in character, and conducted without any adverse distinction.[31]

3.2.3. When has the Obligation to Allow and Facilitate Rapid and Unimpeded Passage of Humanitarian Supplies, Equipment and Personnel been Violated?

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

The issue should not be analysed in terms of the bilateral relationship between each actor authorised to carry out humanitarian relief operations and the party to the armed conflict required to allow and facilitate their rapid and unimpeded passage. Instead, since (as stated in Section 2 above) the rules of IHL relating to humanitarian relief operations only come into play when civilians are inadequately provided with essential supplies,[32] the key consideration should be the outstanding needs of the civilian population.

It is not sufficient that the activities of a particular actor have been impeded, even if severely. Instead, the impact on the civilian population of the impediments on all those authorised to operate must be considered. If they are such as to leave the civilian population as a whole, or segments thereof – either in specific locations or particular groups – without essential relief items or specific services for prolonged periods of time, then the party can be considered to have violated the obligation to allow and facilitate rapid and unimpeded passage of relief operations and, therefore, to have unlawfully impeded humanitarian relief operations.

4. Current Approaches to Establishing Accountability for Unlawfully Impeding Humanitarian Relief Operations

Recognising the frequent reliance by civilians on humanitarian relief operations, the suffering caused when these are impeded, and the fact that in certain contexts parties to armed conflict

[31] That the ability to impose technical arrangements is subject to an overriding duty not to prevent rapid delivery of humanitarian assistance in a principled manner is evident from the fact that AP I (n 7) art 70(3)(a), providing for technical arrangements, is stipulated as applying to passage 'in accordance with' AP I art 70(2), containing the obligation for rapid and unimpeded passage. Furthermore, AP I art 70(1) and AP II (n 8) art 18(2) make clear that the relief action provided for must be 'humanitarian and impartial' and 'conducted without any adverse distinction'.

[32] Two conditions must be met for the rules of IHL relating to humanitarian relief operations to come into play. First, civilians must be inadequately provided with essential supplies and the party to the armed conflict responsible for meeting their needs must not be providing the requisite assistance. Second, the actor offering its services must be capable of carrying out relief operations that are exclusively humanitarian and impartial in character and conducted without any adverse distinction: AP I (n 7) art 70. See also ICRC Commentary to the Additional Protocols (n 15) paras 4877–83 (referring to AP II (n 8) art 18), and UN General Assembly, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons (11 August 2010), UN Doc A/65/282, para 81.

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are depriving civilian populations of assistance as a deliberate policy, efforts have been made to hold accountable those responsible for unlawfully impeding relief operations under a number of different mechanisms. These include international criminal responsibility under the ICC Statute, listing under United Nations sanctions regimes, and reporting under the monitoring and reporting mechanism on grave violations of children's rights in situations of armed conflict.

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

4.1. THE WAR CRIME IN THE ICC STATUTE[33]

Under the ICC Statute '[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions' is a war crime in international armed conflicts.[34]

The formulation of the war crime appears to be a combination of the prohibition against starvation of the civilian population[35] and of the rules of IHL regulating humanitarian relief operations. As is the case for other war crimes under the ICC Statute which combine prohibitions, this approach impairs the clarity of the crime.[36] In the present case, while the prohibition against starvation of the civilian population as a method of warfare is relatively clear, the same cannot be said with regard to the rules regulating humanitarian relief operations and, in particular (as discussed in Section 3.2 above), whether impediments amount to a violation of IHL, let alone a war crime. This lack of clarity is regrettably carried through to the war crime.

4.1.1. PROHIBITION AGAINST STARVATION AS A METHOD OF WARFARE

While there is clarity as to the key elements of the prohibition against starvation of the civilian population as a method of warfare and the related war crime, one element warrants highlighting.

[33] For a recent and comprehensive analysis of relevant international criminal law see Bartels (n 3).

[34] ICC Statute (n 19) art 8(2)(b)(xxv). Under the ICC Statute the war crime exists only in relation to international armed conflicts, even though the underlying prohibition on starvation of the civilian population as a method of warfare exists in both international and non-international armed conflicts. It is unclear why it was also not included in the list of war crimes in non-international armed conflicts, and it has been suggested that its omission was probably an oversight: see, for example, Bartels (n 3) 298. For a discussion of whether an equivalent war crime exists in relation to non-international armed conflicts see 'Oxford Guidance' (n 1) s I.1.

[35] AP I (n 7) art 54(1); AP II (n 8) art 14.

[36] See, for example, Bartels (n 3) 287.

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The prohibition requires the intent to starve the civilian population.[37] It does not cover situations where the starvation of the civilian population occurs as an unintended result of a military operation with other objectives. An example would be an attack on a bridge used by military forces which prevents humanitarian relief from reaching civilians in need. In such cases the lawfulness of the adverse impact of such measures on the civilian population must be determined by a proportionality assessment: the expected incidental loss of civilian life or injury to civilians must not be excessive in relation to the concrete and direct military advantage anticipated.

That the lawfulness of certain measures resulting in starvation is to be determined by reference to intent or on the basis of a proportionality assessment is expressly spelt out, in relation to blockades, in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* and the *Manual on Air and Missile Warfare*. Both of these documents provide that the establishment of a blockade is prohibited if its sole – or 'sole or primary' in the case of the *Manual on Air and Missile Warfare* – purpose is to starve the civilian population or to deny it other objects essential for its survival, or if the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.[38] The requirement of intent has been retained in the elements of crime of the corresponding war crime under the ICC Statute.[39]

4.1.2. Wilful Impeding of Relief Supplies as Provided under the Geneva Conventions

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

The first question relates to the rather surprising reference to the Geneva Conventions. The Fourth Geneva Convention lays down some rules regulating collective humanitarian relief operations for the civilian population – in some detail for situations of occupation in Articles 59 to 61 and, more fleetingly, in relation to other situations in Article 23.[40] However, it is Additional Protocol I that contains the prohibition on starvation and the more comprehensive rules relating to humanitarian relief operations in Articles 69 to 71 – provisions that are generally accepted as having superseded the framework of Article 23 of the Fourth Geneva Convention.[41]

[37] See, for example, ICRC Commentary to the Additional Protocols (n 15) para 2089.
[38] Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995) art 102; Program on Humanitarian Policy and Conflict Research, Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare* (2009) rr 157, 158.
[39] Elements of Crimes, ICC Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Session, 3–10 September 2002, ICC-ASP/1/3, art 8(2)(b)(xxv), element 2: 'The perpetrator intended to starve civilians as a method of warfare'. On this point see also Michael Cottier and Emilia Richard, 'Paragraph 2(b)(xxv): Starvation of Civilians as a Method of Warfare' in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck, Hart and Nomos 2016) 508, 518; Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge University Press 2003) 364.
[40] GC IV (n 6) arts 23, 59–61; GC III (n 8) arts 72–73 address individual and collective relief for prisoners of war.
[41] See, for example, ICRC Commentary to the Additional Protocols (n 15) para 2851, commentary to art 70; see also 'Oxford Guidance' (n 1) ss G.2, G.3.

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In view of this, it is not clear why the ICC Statute war crime refers exclusively to the more limited and less protective provisions of the Geneva Conventions. The issue is not addressed in the Elements of Crimes.[42] There has been speculation as to the reasons for this reference.[43] The most plausible explanation appears to be that the ICC Statute was intended only to include war crimes considered as customary at the time of its negotiation, and that violation of the rules on humanitarian relief operations in Additional Protocol I was not considered to give rise to individual criminal responsibility under customary law at that time.[44]

A second question relates to the interplay between the initial reference to starvation and the inclusion of wilful impeding of relief operations. One possible interpretation could be that, regardless of what constitutes impeding relief operations in violation of IHL, the war crime covers only those cases where the impediments give rise to needs of the same severity as starvation.

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

However, and this is the crux of the problem, while there have been some recent efforts to determine the situations in which withholding consent would be arbitrary,[45] the issue has not yet been addressed by a judicial or quasi-judicial body. Moreover, and more fundamentally still, the rules of IHL regulating humanitarian relief operations grant parties some latitude in implementing the obligation to allow rapid and unimpeded passage of humanitarian relief supplies, equipment and personnel. Consequently, in the majority of cases, it is a challenge as a matter of fact and law to determine whether this obligation has been violated. Such lack of clarity in the underlying obligations makes the related war crime equally unclear and, consequently, difficult to prosecute. Indeed, the one investigation so far that has considered impediments to humanitarian relief operations as a war crime[46] was based on the crime of '[i]ntentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian

[42] Elements of Crimes (n 39) art 8(2)(b)(xxv).
[43] See, for example, Bartels (n 3) 293–94.
[44] Author exchanges with participants in ICC Statute negotiations.
[45] See, for example, 'Oxford Guidance' (n 1) s E.
[46] Looking beyond war crimes, the ICC Prosecutor included humanitarian relief-related violations in the charge of genocide against President Al Bashir. The Prosecutor alleged that the methods of destruction of the protected group went beyond direct killing and included 'denial and hindrance of medical and other humanitarian assistance needed to sustain life in IDP camps'. In the same case the prosecution also alleged that the crime against humanity of extermination had been committed, inter alia, by 'obstruction of humanitarian aid': ICC, *The Prosecutor v Al Bashir*, Second Decision of the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09, 12 July 2010, paras 34–35.

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assistance or peacekeeping mission in accordance with the Charter of the United Nations' under Article 8(2)(b)(iii) of the ICC Statute.[47]

4.2. Basis for Listing under UN Security Council Sanctions

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

- Security Council Resolution 1844 (2008) gives the possibility of imposing sanctions for 'obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia';[48]
- Security Council Resolution 1857 (2008) refers to 'obstructing the access to or the distribution of humanitarian assistance in the eastern part of the Democratic Republic of the Congo';[49]
- Security Council Resolution 2196 (2015) refers to 'obstructing the delivery of humanitarian assistance to [the Central African Republic], or access to, or distribution of, humanitarian assistance in [the Central African Republic]';[50]
- in relation to South Sudan, the Security Council adopted, as a basis for designation, direct or indirect responsibility for, or engagement or complicity in, actions or policies that threaten the peace, security or stability of South Sudan, and included within this '[t]he obstruction of the activities of international peacekeeping, diplomatic, or humanitarian missions in South Sudan, including IGAD's Monitoring and Verification Mechanism or of the delivery or distribution of, or access to, humanitarian assistance';[51]
- most recently, a similar approach was adopted in relation to Yemen, where the Security Council emphasised that 'acts that threaten the peace, security, or stability of Yemen' and that therefore constitute a basis for designation 'may also include … obstructing the delivery of humanitarian assistance to Yemen or access to, or distribution of, humanitarian assistance in Yemen'.[52]

[47] ICC, *Situation on Registered Vessels of Comoros, Greece and Cambodia*, Article 53(1) Report, 6 November 2014, paras 111–25. That said, the war crimes of attacking persons or objects involved in a humanitarian or peacekeeping mission in ICC Statute (n 19) art 8(b)(iii) and 8(e)(iii) also raise interpretation challenges: see, for example, Magdalena Pacholska, '(Il)legality of Killing Peacekeepers: The Crime of Attacking Peacekeepers in the Jurisprudence of International Criminal Tribunals' (2015) 13 *Journal of International Criminal Justice* 43.
[48] UNSC Res 1844 (20 November 2008), UN Doc S/RES/1844, para 8(c).
[49] UNSC Res 1857 (22 December 2008), UN Doc S/RES/1857, para 4(f).
[50] UNSC Res 2196 (22 January 2015), UN Doc S/RES/2196, para 12(e).
[51] UNSC Res 2206 (3 March 2015), UN Doc S/RES/2206, para 7(f).
[52] UNSC Res 2216 (14 April 2015), UN Doc S/RES/2216, para 19.

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To date, sanctions have been imposed for obstructing the delivery of humanitarian assistance, among others, in relation to Al Shabaab in Somalia,[53] and on the anti-Balaka commander in the Central African Republic.[54]

4.3. CHILDREN AND ARMED CONFLICT MONITORING AND REPORTING MECHANISM

The third accountability mechanism that has addressed humanitarian relief operations is the monitoring and reporting mechanism on grave violations of children's rights in situations of armed conflict. In 2005, the Security Council requested the UN Secretary-General to establish a mechanism to provide information on six types of grave violation of children's rights: killing or maiming, recruitment or use by armed forces or armed groups, attacks on schools or hospitals, rape or other sexual violence, abduction, and 'denial of humanitarian access to children'.[55]

At the time of the establishment of the mechanism, parties to armed conflict found to have recruited or used children were listed in an annex to the Secretary-General's annual report on children and armed conflict. Over the years the Security Council incrementally developed the system and, by July 2015, all the other grave violations became triggers for listing, with the exception of 'denial of humanitarian access'.[56]

This is a reflection of the difficulty of determining whether denial of access in a particular situation constitutes a violation of IHL. Looking beyond purely legal considerations and as will be discussed in greater detail in Section 5 below, the non-inclusion of the access-related violation also reflects the concerns of operational humanitarian organisations about politicisation of access. While naming and shaming parties responsible for the other five grave violations may lead them to improve compliance, those who negotiate access fear that adopting such an approach towards parties to an armed conflict that impede relief operations may be counter-productive for

[53] UNSC Committee established pursuant to Resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, 'Narrative Summaries of Reasons for Listing', https://www.un.org/sc/suborg/en/sanctions/751/materials/summaries/entity/al-shabaab. The reasons for listing on this ground appear related principally to food aid diversion and kidnapping of aid workers: UNSC, Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1853 (2008) (10 March 2010), UN Doc S/2010/91, 59–67.

[54] UNSC Committee established pursuant to Resolution 2127 (2013) concerning the Central African Republic, 'Narrative Summaries of Reasons for Listing', https://www.un.org/sc/suborg/en/sanctions/2127/materials/summaries/individual/habib-soussou. The reasons for listing on this ground appear related principally to attacks against humanitarian workers and looting of supplies and equipment: Final Report of the Panel of Experts on the Central African Republic established pursuant to Security Council Resolution 2127 (2013) (29 October 2014), UN Doc S/2014/762, Annexes 59–61.

[55] UNSC Res 1612 (26 July 2005), UN Doc S/RES/1612, para 3.

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

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their negotiations. The concerns are all the more acute as the monitoring and reporting mechanism is linked to the Security Council, an eminently political body.[57]

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

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

5.1. OVER-LEGALISATION

In recent years considerable emphasis has been placed on the legal dimension of humanitarian relief operations in particular contexts. This was most marked in relation to the conflict in Syria,[58] where those wishing to conduct humanitarian relief operations faced extremely severe limitations, and humanitarian actors and states, including Security Council members, raised a series of legal questions in the apparent hope that these would provide the answer they were seeking and resolve problems of access.[59]

Legal analysis must be put in its proper context. An understanding of the law is essential for parties to a conflict and those seeking to conduct humanitarian relief operations to ensure that they act lawfully and are aware of the consequences if they fail to do so. However, in negotiations for humanitarian access the law is just the background. Unlike litigation, where an independent and impartial judicial body makes a determination of the relative merits of the legal arguments of those wishing to provide assistance and of affected states,[60] in negotiations the law provides a backdrop to guide discussions with parties to armed conflicts – discussions that are unlikely to

[57] Consultations with representatives of UN agencies involved in access negotiations.
[58] See, for example, Payam Akhavan and others, 'There is No Legal Barrier to UN Cross-Border Operations in Syria', *The Guardian*, 28 April 2014, http://www.theguardian.com/world/2014/apr/28/no-legal-barrier-un-cross-border-syria.
[59] These and other questions are addressed in Emanuela-Chiara Gillard, 'The Law Regulating Cross-Border Relief Operations' (2013) 95(890) *International Review of the Red Cross* 351.
[60] On the different roles played by international law that can be invoked see Steve Ratner, 'Beyond Courtroom Arguments: Why International Lawyers Need to Focus More on Persuasion', *EJIL: Talk!*, Pt I, 10 September 2013, http://www.ejiltalk.org/beyond-courtroom-arguments-why-international-lawyers-need-to-focus-more-on-persuasion-part-i; and Pt II, 11 September 2013, http://www.ejiltalk.org/beyond-courtroom-arguments-why-international-lawyers-need-to-focus-more-on-persuasion-part-ii.

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be legal in nature and that will be shaped by political and practical considerations. In such situations, an argument that might win the day in court might not lead to any progress in the dialogue.

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

Obtaining consent to offers to conduct humanitarian relief operations and overcoming the challenges of actually delivering assistance once consent has been granted are matters of ongoing negotiation between those seeking to provide assistance and the parties to the conflict. Such negotiations are best pursued in an incremental manner, away from the political limelight, in order to build mutual trust – actor by actor, specific need by specific need, location by location, on the basis of the specific situation and needs of civilians, rather than in a binary 'all or nothing' manner. Humanitarian actors will need to reassure parties to the conflict of the strictly humanitarian and impartial character of their services while building confidence in their neutrality. In such circumstances, it is questionable whether early threats of criminal responsibility or of the imposition of sanctions for impeding humanitarian relief operations is likely to promote compliance with the law. On the contrary, there is the real risk that it may entrench positions and close the space for dialogue rather than assist the confidence-building exercise.[61]

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

5.2. POLITICISATION

Concerns about politicisation of humanitarian assistance are even more acute. Some recent conflicts have cast considerable political light on humanitarian relief operations, the most evident of which perhaps was the push by certain states to get the Security Council to impose cross-border humanitarian relief operations in Syria.[62] Were cross-border operations actually what were needed on the ground? Had humanitarians exhausted all avenues of negotiation? Was states'

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

[62] Similar concerns were raised by the convoy sent by Russia into the Eastern Ukraine in the summer of 2014: see, for example, Alex Luhn, 'Ukraine Rebels Struggle to Reach Aid as Russian Convoy Returns Home', *The Guardian*, 23 August 2014, http://www.theguardian.com/world/2014/aug/23/donetsk-ukraine-russia-vladimir-putin.

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motivation exclusively humanitarian? Without underestimating the severity of the constraints, the intransigence of Damascus and its clear policy of not allowing medical supplies and equipment into opposition held-areas, it is legitimate to ask whether greater progress could have been achieved if efforts to negotiate humanitarian access had taken place in a separate stream, entirely distinct from political objectives and actors, including the Security Council.

Beyond Syria, in certain contexts the imposition of targeted sanctions by the Security Council on those obstructing the delivery of, access to or distribution of humanitarian assistance has been met by wariness by the humanitarians negotiating access. They were concerned that including humanitarian operations within the purview of the sanctions could jeopardise their ability to engage with the designated groups and undermine perceptions of humanitarians' neutrality.[63]

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

Similarly, there is a growing tendency for some humanitarian actors to turn too quickly to a political body for a solution without having first gone through the often frustrating and slow process of negotiating access. Political action – which can be too blunt and which does not by its very nature comply with humanitarian principles – is not a substitute for this delicate process.

5.3. Two Recent Examples of Confidence-Building Mechanisms

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

The first was established in relation to Syria, where (as just discussed) constraints to access were extremely severe, and the discussions on how to address them were politicised. Eventually, in Resolution 2165 (2014) the Security Council imposed cross-border and cross-line humanitarian relief operations carried out by United Nations agencies and their implementing partners.[64] The same resolution also established a mechanism under the authority of the UN Secretary-General to monitor the loading of all humanitarian relief consignments of the UN humanitarian agencies and their implementing partners, along with their passage into Syria, and to provide confirmation to the Syrian authorities of the humanitarian nature of the consignments.[65]

[63] See, for example, the case of Somalia discussed in Kate Mackintosh and Patrick Duplat, 'Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action', UNOCHA and Norwegian Refugee Council, July 2013, 81, https://docs.unocha.org/sites/dms/documents/ct_study_full_report.pdf.
[64] UNSC Res 2165 (n 14) para 2.
[65] ibid para 3.

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Many questions could be asked about this Resolution. There is the risk that it may be abused in future by parties reluctant to agree to humanitarian relief operations to claim that they are under no obligation to do so unless and until the Security Council 'authorises' them.[66] More immediately, questions may be raised about the Resolution's potential adverse impact on humanitarian relief operations conducted by actors other than those referred to in the Resolution. Questions could also be raised about the monitoring mechanism. Was the 'imposition' of relief operations merely a 'face-saving' deal, considering that it was accompanied by a monitoring mechanism? Or was the monitoring mechanism a recognition of Syria's ongoing entitlement to impose measures of control, including searches? What is the actual added value of the monitoring mechanism, considering that it is implemented by the United Nations and only inspects the relief consignments of the United Nations and its implementing partners? Of more operational relevance, has the mechanism actually improved the situation on the ground and allowed relief to reach the intended beneficiaries, in view, among other things, of the increasingly complex situation in Syria and the proliferation of actors?

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

A second, and more positive – in as much as it developed without the involvement of the Security Council – example relates to humanitarian relief consignments intended for Yemen in 2015. The Saudi-led coalition was overseeing the implementation of the arms embargo imposed by the Security Council[67] with such rigour that the rate at which commercial and humanitarian shipping entered was such that it was described as a 'de facto blockade'.[68] The delays in the supply of food and fuel, and the consequent shortage of electricity and water, had a severe impact on the civilian population.[69]

In response to these shortages and without the involvement of the Security Council, the UN Emergency Relief Coordinator, Yemen and the Saudi-led coalition agreed upon an arrangement exclusively for the passage of sea and air shipments of relief consignments. The passage is notified by a UN Office for the Coordination of Humanitarian Affairs-led inter-agency cell in Riyadh to the Saudi Ministries of Foreign Affairs and Defence which, in turn, notify other members of

[66] ibid para 2: the Security Council … '[d]ecides that the United Nations humanitarian agencies and their implementing partners are *authorized* to use routes across conflict lines and the border crossings …' (emphasis added).
[67] UNSC Res 2216 (n 52) para 14.
[68] Yemen: Joint NGO letter to Security Council, 19 October 2016, http://www.care.org/sites/default/files/documents/yemen-joint-unsc-letter.pdf.
[69] Human Rights Watch, 'Yemen: Coalition Blocking Desperately Needed Fuel – Tankers Wait Offshore as Civilians Go Without Water, Electricity', 10 May 2015, https://www.hrw.org/news/2015/05/10/yemen-coalition-blocking-desperately-needed-fuel; see also UNOCHA, 'Humanitarian Coordinator for Yemen, Joahnnes van der Klaauw Statement on the Situation in Yemen, 23 April 2015', *ReliefWeb*, 23 April 2015, http://reliefweb.int/report/yemen/humanitarian-coordinator-yemen-johannes-van-der-klaauw-statement-situation-yemen-23.

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the Coalition. This is a lighter arrangement than that for Syria, based on notifications, with searches being conducted only in exceptional circumstances. The arrangement is open to UN agencies and non-governmental organisations that wish to resort to it.[70]

Separately, at the request of Yemen and with the agreement of the Saudi-led coalition, the UN Secretary-General established the UN Verification and Inspection Mechanism for Yemen (UNVIM) to facilitate commercial imports to Yemen. The arrangement covers all ships carrying commercial items or bilateral assistance from states intended for Yemeni ports that are not under the control of the government of Yemen.[71]

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

6. CONCLUSION

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

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

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

[70] The ICRC and Médécins Sans Frontières have established their own arrangements. This is probably not based on a distrust of particular mechanisms but more a reflection of these organisations' distinct preference for making their own arrangements, as they are more likely to be perceived as impartial and neutral.

[71] The mechanism does not apply to ships operated or chartered by the UN or international humanitarian organisations. For details of the notification and clearance processes see UN Verification and Inspection Mechanism for Yemen, http://www.vimye.org.

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

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