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Governance • Social Development • Humanitarian • Conflict

International Legal Frameworks for Humanitarian Action

Topic Guide

Author and contributors

This GSDRC Topic Guide was written by Huma Haider and published in March 2013. Its production was supported by the UK Government, UKaid.

GSDRC appreciates the contributions of Heike Spieker, German Red Cross and University College Dublin; Bhavani Fonseka, Centre for Policy Alternatives, Sri Lanka; Ceri Hayes, Independent Gender Consultant; Michael Meyer, British Red Cross; Allehone Abebe, UNHCR Geneva; and Deborah Baglole, DFID.

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Suggested citation:

GSDRC (2013). *International legal frameworks for humanitarian action: Topic guide*. Birmingham, UK: GSDRC, University of Birmingham

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ISBN: 9780704428942

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The Legal Frameworks at a Glance

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and implications for humanitarian assistance

In this section:

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- Summary map: the legal frameworks at a glance
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 - International human rights law
 - International refugee law
 - International criminal law
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The Legal Frameworks at a Glance

Introduction

The provision of humanitarian assistance takes place in a variety of settings – under occupation, in international and internal armed conflicts, and in the event of natural or man-made disasters. Humanitarian needs are often extensive – as are challenges in delivering assistance. During the conflict in Darfur, for example, humanitarian personnel and vehicles were subject to military attacks. After the 2004 Indian Ocean tsunami, regulatory barriers to disaster relief hindered the effectiveness and efficiency of assistance.

International legal frameworks for humanitarian action not only provide guidance on how to address such situations, but can also serve as powerful tools in advocating for, and achieving, the protection of affected civilian populations. For instance, negotiations and arguments for access can be strengthened by reference to specific legal obligations of the parties to the armed conflict to permit access.

The frameworks comprise different branches of international law, the most prominent being **international humanitarian law (IHL)**, which **governs during armed conflict**. The humanitarian principles of humanity and impartiality have a basis in IHL. In addition to regulating the means and methods of warfare, IHL outlines the rights and duties of parties to an armed conflict and the potential role of humanitarian agencies regarding assistance. Occupying powers were the only parties originally obligated to provide for humanitarian assistance. Over time, however, this obligation has been extended to cover other international and internal armed conflicts, largely through international customary law. **International human rights law, international refugee law and international criminal law** can operate at the same time as IHL, combining to create a comprehensive and established legal framework for protection and assistance.

International disaster response laws, rules and principles (IDRL) is a new area of focus targeting states and humanitarian agencies operating **in disaster areas not subject to IHL**. IDRL is a fragmented collection of treaties and non-binding resolutions and guidelines. It is a weaker framework than IHL: regulatory issues are therefore more problematic in the delivery of assistance in disasters than in armed conflicts. Progress has been made, however, with new guidelines and attempts to develop a more coherent disaster framework.

The legal framework for assistance also remains unclear in other areas. One of these is the extent to which international law is binding on **non-state actors** – a particular challenge in non-international armed conflicts when armed groups control areas in which civilian populations are in need. In addition, although the **‘responsibility to protect’** has been recognised as an ‘emerging norm’, it has not developed into consistent state practice that could provide for legal interventions without state consent in order to protect civilians. This is evident in the different responses to the recent humanitarian crises in Libya and Syria, with action authorised in the former but not the latter.

Even in areas where the law is well established, **compliance** and **enforcement** are challenging. There are various methods and mechanisms to encourage compliance with IHL, such as military sanctions and disciplinary measures, fact-finding missions and individual complaints through human rights bodies. In recent years, international criminal law has emerged as an important mechanism for enforcing IHL by holding individuals to account for violations.

Summary Map: The Legal Frameworks at a Glance

What is the purpose and application?	What are the key sources of law?	What are key provisions?	What are the implications for humanitarian assistance?
International humanitarian law (IHL)			
<ul style="list-style-type: none"> Seeks to protect persons and property/objects that are (or may be) affected by armed conflict and limits the rights of parties to a conflict to use methods and means of warfare of their choice Operates only in situations of armed conflict Applies to all parties to a conflict. 	<ul style="list-style-type: none"> Key treaties: <ul style="list-style-type: none"> Hague Convention, 1907 Four Geneva Conventions, 1949 (GCs) Additional Protocols I and II, 1977 (API and APII) International customary law: outlined/indicated in 2005 ICRC study on customary IHL General principles of law: <i>jus cogens</i> norms, such as prohibitions against genocide and torture Judicial decisions and teachings: various international court decisions and advisory opinions, in particular those of the International Court of Justice. 	<ul style="list-style-type: none"> Principles of distinction; necessity and proportionality; humane treatment; non-discrimination Obligates an occupying power to ensure that populations in the occupied territory have necessities (e.g. food, medical and health supplies and services) In other international and internal armed conflicts, relief actions 'shall be undertaken' but with the consent of state parties. There is debate about whether consent is required in all circumstances. Prohibits deliberate starvation of civilians as a method of warfare Obligates states to ensure the respect and protection of relief workers Rules on access to affected populations and delivery of humanitarian assistance in international armed conflicts (e.g. entry of personnel, customs clearance, taxation of relief) Rules concerning vulnerable groups: entail both non-discrimination and positive measures. 	<p>It is the parties to the conflict who have the legal obligation and primary responsibility to provide humanitarian assistance to civilians under their control. IHL allows, however, for the possibility (with certain conditions) of relief actions to be undertaken by humanitarian organisations.</p> <p>In situations of occupation, the obligation of occupying authorities to facilitate and cooperate with relief schemes is unconditional. Despite the consent requirement in other contexts, there is growing recognition (although still contested) that, as long as there is humanitarian need and organisations and relief actions operate in accordance with humanitarian principles, governments cannot arbitrarily refuse assistance. This runs alongside arguments to recognise a right to humanitarian assistance.</p> <p>Specific provisions on access, delivery of assistance and protection of humanitarian workers aim to reduce 'red tape' and allow for the speedy delivery of relief to protected persons.</p>

What is the purpose and application?	What are the key sources of law?	What are key provisions?	What are the implications for humanitarian assistance?
International human rights law (IHRL)			
<ul style="list-style-type: none"> ■ Outlines the obligations and duties of states to respect, to protect and to fulfil human rights of those persons under their jurisdiction. It enables individuals and groups to claim certain behaviour or benefits from a state authority ■ Operates in peacetime and during armed conflict, crisis and disaster settings ■ Applies to states, but provides individuals with certain direct entitlements ■ Guidelines/regional treaties for internally displaced persons (IDPs) provide protection and assistance to IDPs. 	<ul style="list-style-type: none"> ■ Key treaties: <ul style="list-style-type: none"> – International Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights, 1966 (ICESCR) – Convention on the Prevention and Punishment of Genocide, 1948 – Other international treaties, such as the Committee on the Elimination of Discrimination against Women (CEDAW), 1979, and regional treaties, such as regional IDP conventions ■ International customary law ■ General principles of law: <i>jus cogens</i> norms ■ Judicial decisions and teachings: various decisions by human rights bodies (treaty implementing bodies); the International Court of Justice ■ Supplementary non-binding soft law, such as the Guiding Principles on Internal Displacement, 1998; guidelines and resolutions from the UN Security Council and the General Assembly on how to increase the protection of women during times of armed conflict e.g. UN Security Council Resolutions 1325, 1888 and 1889. 	<ul style="list-style-type: none"> ■ Political rights protected include rights to life, freedom from torture, freedom of movement, etc. ■ Economic and social rights protected include rights to food, housing, clothing, health, livelihood, an adequate standard of living etc. ■ No explicit reference to international humanitarian assistance ■ Allows states to derogate from certain civil and political rights in times of public emergency which threatens the nation (including war), following certain procedures. There are certain rights though (e.g. the right to life) from which no derogation is allowed. 	<p>IHRL does not explicitly address the issue of access to humanitarian assistance. Others emphasise that the right to life could indicate a minimal right to assistance; and that the various economic and social rights guaranteed create the legal space for individuals to claim the right to humanitarian assistance. This would have corresponding obligations on the part of states to provide such assistance.</p>

What is the purpose and application?	What are the key sources of law?	What are key provisions?	What are the implications for humanitarian assistance?
International refugee law			
<ul style="list-style-type: none"> Provides protection and assistance to individuals who have crossed an international border and are at risk or victims of persecution in their country of origin. Does not apply to IDPs Operates in peacetime and during armed conflict Applies to states. 	<ul style="list-style-type: none"> Key treaty: Convention on the Status of Refugees, 1951 International customary law General principles of law Judicial decisions and teachings. 	<ul style="list-style-type: none"> Defines a 'refugee' as someone externally displaced through a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' (1951 Convention). Allows for concurrent application of other instruments granting refugees rights and benefits Individuals who have engaged in certain violations of IHL may not be entitled to refugee protection. 	<p>Where a victim of armed conflict is forced to leave his or her country due to violations of IHL or IHRL, such violations could trigger refugee protection.</p> <p>IHL may in some instances afford more protection and assistance to refugees in internal armed conflicts as it binds all organised armed groups, versus solely states.</p> <p>IHRL has been important to developing protection for IDPs.</p>
International criminal law (ICL)			
<ul style="list-style-type: none"> Prohibits certain categories of conduct viewed as serious violations (primarily war crimes, crimes against humanity and genocide) and seeks to hold accountable individual perpetrators of such conduct Criminal responsibility is individualised. Superiors can under certain conditions be held responsible for actions of their subordinates under 'command responsibility' States have primary responsibility to prosecute crimes. 	<ul style="list-style-type: none"> Treaties: The statutes of international/hybrid criminal courts grant jurisdiction over war crimes (serious IHL violations), crimes against humanity and genocide. Geneva conventions and API: Obligates state parties to investigate persons accused of carrying out or ordering grave breaches of IHL International customary law General principles of law Judicial decisions and teachings: Court decisions are not simply declaratory of the law, but are important in its development and in some cases its establishment. 	<ul style="list-style-type: none"> Individuals can be held accountable for grave breaches of the GCs and serious violations of common Article 3 of the GCs The ICC Statute expands the list of war crimes under international armed conflict. It also extends individual accountability to war crimes in internal armed conflicts Serious violations of the laws and customs applicable in armed conflict includes intentionally directing attacks against personnel, vehicles, structures and materials involved in humanitarian assistance (that are entitled to civilian protection). 	<p>Private individuals can be held criminally liable for attacks against humanitarian personnel and supplies.</p>

What is the purpose and application?	What are the key sources of law?	What are key provisions?	What are the implications for humanitarian assistance?
International disaster response laws, rules and principles (IDRL)			
<ul style="list-style-type: none"> ■ Aimed at improving the international humanitarian framework covering humanitarian assistance to populations in the context of natural disasters ■ Applies to states and non-state actors. 	<ul style="list-style-type: none"> ■ Treaties: international, regional and bilateral treaties on specific sectors (e.g. health, transport), technical assistance, mutual assistance and agreements regulating humanitarian relief between the state parties ■ Non-binding UN resolutions ■ Non-binding 'Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance', 2007 ■ International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters. 	<ul style="list-style-type: none"> ■ UN General Assembly Resolutions emphasise that sovereignty is a key feature of international disaster assistance ■ The affected state has primary responsibility for all aspects of humanitarian assistance within its territory (initiation, organisation, coordination and implementation) ■ International assistance should be provided with the state's consent. 	<p>The emphasis is on the 'importance' rather than the 'right' of humanitarian assistance in disaster contexts.</p> <p>Regulatory problems in the delivery of humanitarian assistance are exacerbated in disaster contexts due to the absence of an established comprehensive legal framework and an undeveloped coordination mechanism.</p>

Concepts, Principles and Legal Provisions

An overview of the relevant legal frameworks for humanitarian action, sources of law, principles and provisions for protection and assistance

In this section:

- Introduction to international law
- Overview of international humanitarian law
- Overlapping areas of law – toward a comprehensive legal framework
- Humanitarian principles and humanitarian assistance
- References
- Resources

Concepts, Principles and Legal Provisions

Introduction to International Law

Public international law (commonly referred to as ‘international law’) governs relationships between and among entities with international legal personality: sovereign states and other international actors, such as inter-governmental organisations and individual natural persons. The legal personality attributed to these entities means that they have rights, protections, responsibilities and liabilities under international law.

What are the sources of international law?

There are four significant sources of international law, identified in Article 38 of the Statute of the International Court of Justice (ICJ):

1. **International conventions** (treaties) establish **written rules** that are binding on states that have signed and ratified the conventions. Treaties are **contractual** in nature, between and among states, and governed by international law.
2. **International custom** establishes **unwritten rules** that are binding on all states, based on general practice. Their binding power is based on **implied consent**, evidenced by (a.) virtually **uniform state practice** over time and (b.) a belief that such practice is a legal obligation (*opinio juris*). Thus, for rules to become part of international customary law, states must follow them, not out of convenience or habit, but because they **believe they are legally obligated** to do so.
3. **General principles of law recognised by civilised nations** include peremptory norms (*jus cogens*), from which **no derogation** is allowed – for example, the principles contained in the United Nations Charter that prohibit the use of force except in self-defence. There is ongoing debate, however, about which particular rules have achieved *jus cogens* status.
4. **Judicial decisions and the teachings of the most highly qualified publicists** of the various nations are subsidiary means for the determinations of rules of law. While court decisions and scholarly legal work are not sources of international law, they are considered important in recognising the law and **interpreting and developing the rules** sourced in treaties, custom and the general principles of law.

The first three of the above are recognised as the most important and well-established sources of international law. However, some states, academics and jurists highlight that court judgements, the ICJ’s advisory opinions and UN General Assembly Resolutions (often classified as ‘soft law’) are becoming increasingly influential in the development of the law. In particular, it is argued that they play a role in the establishment of customary international law. For example, the ICJ’s decisions that certain treaty provisions in international humanitarian law have the status of customary international law have sometimes led states not party to the treaty to view themselves as bound to comply with its obligations (Alvarez-Jiménez, 2011). In addition, the ICJ noted in its 1996 advisory opinion regarding the *Legality of the Threat or Use of Nuclear Weapons* that General Assembly resolutions, while not binding, may provide evidence for establishing the existence of a rule or the emergence of *opinio juris*, required for international custom (Prost and Clark, 2006).

What disciplines of international law are relevant to humanitarian assistance?

International humanitarian law

International humanitarian law (IHL) is the discipline of international law that is inspired by considerations of humanity and the mitigation of human suffering. It comprises a set of rules, established by treaty or custom, that seeks to **protect persons and property/objects that are (or may be) affected by armed conflict** and **limits the rights of parties to a conflict to use methods and means of warfare of their choice**. It has informed the development of humanitarian principles in the provision of humanitarian assistance. See the section *Overview of IHL* and, for IHL provisions pertinent to the protection of civilians and the delivery of humanitarian assistance, *Humanitarian Principles and Humanitarian Assistance*.

International human rights law

International human rights law (IHRL) comprises a set of rules, established by treaty or custom, that outlines the **obligations and duties of states to respect, protect and fulfil human rights**. It **enables individuals and groups to claim certain behaviour or benefits from government**. As will be discussed in *Overlapping Areas of Law*, IHRL contains a number of provisions relevant to humanitarian assistance, including the right to life, the rights to food and water, the rights to essential medications, medical care and sanitation, the rights to adequate clothing and other necessities, and the rights to equality and non-discrimination. Displaced persons who remain within the borders of their own country (referred to as internally displaced persons – IDPs) are not protected by international refugee law. However, they can benefit from IHRL and IHL in the case of an armed conflict. The guiding principles on internal displacement are a set of non-binding international standards, drawn largely from human rights standards, developed to provide protection and assistance to IDPs.

International refugee law

International refugee law encompasses a set of rules, established by treaty or custom, with the aim of providing protection and assistance to **individuals who have crossed an international border** and are **at risk or victims of persecution in their country of origin**. *Overlapping Areas of Law* will discuss the links between IHL, IHRL and the protection of refugees and IDPs.

International criminal law

International criminal law (ICL), a relatively new body of law, prohibits certain categories of conduct viewed as **serious atrocities** (primarily war crimes, crimes against humanity and genocide) and seeks to **hold accountable individual perpetrators** of such conduct. It functions through international *ad hoc* tribunals, mixed tribunals, the International Criminal Court and national courts. ICL will be discussed in the sections on *Overlapping Areas of Law* and *Compliance with and Enforcement of Humanitarian Law*.

International disaster response laws, rules and principles

International disaster response laws, rules and principles (IDRL) is a new area of focus aimed at expanding the international humanitarian framework to cover **humanitarian assistance to populations in the context of natural disasters**. It aims to facilitate humanitarian assistance to persons that do not benefit from the protections of IHL, relevant only in situations of armed conflict. The rules of IDRL are not based on a core treaty (or core treaties) but are derived from a broad range of sources – treaties, resolutions,

declarations, codes, guidelines, protocols and procedures. The system is complex and fragmented, but some common themes have emerged. See the section on *The Emergence of 'International Disaster Response Laws, Rules and Principles'*.

Why is international law important to humanitarian actors?

The existence of different disciplines and sources of international law relevant to humanitarian protection and assistance results in a comprehensive framework applicable to a range of circumstances. International humanitarian law has provided the basis for core humanitarian principles, such as humanity and impartiality. It can thus provide insight into, or add weight to, the principles of humanitarian assistance on which humanitarian actors rely. Such actors include not only direct providers of assistance but also local groups and communities advocating to obtain better assistance.

Many of the problems addressed in IHL treaties continue to reflect the concerns faced by humanitarian actors today. For example, IHL has addressed concerns over skewing the power balance in an armed conflict through the diversion and/or misuse of humanitarian assistance by parties to the conflict. Constrained access to populations in need in situations of armed conflict also remains a key challenge. Negotiations and arguments for access may be strengthened by reference to the specific international legal obligations of the parties to the conflict to permit access (whether based on IHL, IHRL or other disciplines of international law). These various provisions will be discussed in *Humanitarian Principles and Humanitarian Assistance*. An understanding of the different legal disciplines and their relevance and applicability to the particular situation enables stronger positions and advocacy for protection and assistance for populations in need. The success of such legal strategies is, however, context-specific and dependent on various other factors.

Overview of International Humanitarian Law

International humanitarian law comprises a set of rules, established by treaty or custom, applicable in situations of armed conflict. As noted, it is inspired by considerations of humanity and the mitigation of human suffering.

What are the aims and sources of IHL?

Aims

Although the origins of IHL can be traced to at least the nineteenth century, the principles and practices on which it is based are much older. International humanitarian law, also referred to as the law of armed conflict or the law of war, is designed to balance humanitarian concerns and military necessity. It subjects warfare to the rule of law by limiting its destructive effect and mitigating human suffering. IHL covers two key areas:

1. Protection and assistance to those affected by the hostilities
2. Regulation of the means and methods of warfare.

Sources

The sources of IHL are the same as those for international law in general:

International convention

The two main treaty sources of IHL are the **Hague Convention** (1907), setting out restrictions on the means and methods of warfare, and the four **Geneva Conventions (GCs)** (1949), providing protection to certain categories of vulnerable persons. These are the wounded and sick in armed forces in the field (GCI); the wounded, sick and shipwrecked members of armed forces at sea (GCII); prisoners of war (GCIII); and protected civilians (GC IV). The Fourth Geneva Convention is particularly relevant to humanitarian protection and assistance. It was established to prevent in future conflicts the scale of civilian suffering experienced during the two World Wars.

The two branches of law covered in the Hague and Geneva Conventions are further developed by the first two Protocols Additional to the Geneva Conventions on the protection of civilians (1977). These are referred to as **Additional Protocol I** (AP I), governing international armed conflict, and **Additional Protocol II** (AP II), governing non-international armed conflict.

The **four Geneva Conventions have achieved universal applicability** as they have been universally ratified. The Additional Protocols, however, have yet to achieve near-universal acceptance. The United States and several other significant military powers (e.g. Iran, Israel, India and Pakistan) are currently not parties to the protocols.

International custom

A comprehensive study by the International Committee of the Red Cross (ICRC) on IHL and customary law indicates that **the majority of rules enshrined in treaty law** have received widespread acceptance and have had a far-reaching effect on practice. They thus **have the force of customary law**. Some provisions in the Hague and Geneva Conventions were reflections of existing customary law, whereas others have developed into customary law. They are therefore binding on all states regardless of ratification, and also on armed opposition groups in the case of non-international armed conflict (Henckaerts, 2005). The application of customary international law is particularly significant for non-international armed conflicts, as treaty law has remained limited in this area.

General principles of law

IHL recognises a number of *jus cogens* norms, from which no derogation is allowed, for example, prohibitions against genocide and torture.

Judicial decisions and the teachings of the most highly qualified publicists as subsidiary sources

International courts have played a role in interpreting and developing IHL (examples are provided in this guide).

When does IHL apply?

International humanitarian law applies **only to situations of armed conflict**, but applies to all actors in an armed conflict. IHL **distinguishes between international armed conflict and non-international armed conflict**: a much more limited range of written rules apply to the latter. Although state practice continues to support this distinction, it has been criticised as arbitrary and impractical, given the nature

of current conflicts. However, the law has developed over the years to provide greater coverage of internal armed conflicts. Gaps in the regulation of the conduct of hostilities in AP II regulating non-international armed conflict have largely been filled through customary international law. Gaps remain in the protection framework in the aftermath of conflict. These can result in challenges in humanitarian protection and in the delivery of humanitarian assistance to populations still in need.

International armed conflict

IHL applies to **conflicts arising between sovereign states** (GCs common Art 2(1)) – including direct conflict between states, and situations in which a foreign power sends troops into a territory to support a local movement – and to situations of partial or total occupation (GCs common Art 2(2)). Additional Protocol I extends the field of application to ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination’ (API, Art 1(4)).

Occupation without military presence – Israel and the Gaza Strip

The Geneva Conventions apply to any territory occupied during international armed conflict (Common article 2). Article 42 of the Hague Convention specifies that a ‘territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.’ As such, IHL relevant to occupied territories is applicable when a territory comes under the effective control of hostile armed forces. It can, however, be difficult in practice to identify and confirm such situations. Although Israel withdrew its military forces from the Gaza Strip in 2005, this physical withdrawal of forces was not considered enough to terminate Israel’s ‘effective control’ of the territory, characteristic of occupation. This was attributed to various factors, such as the fact that the Disengagement Plan stated that Israel was to continue to exercise control over the borders of the territory and over its air space and coastal region. In addition, Israel maintained the advantage of being able to enter Palestinian territory at any time to maintain public order. The UN Secretary General thus concluded that it is possible to remain an occupying power, with consequent obligations, without a military presence on the ground (Vité, 2009).

Non-international armed conflict (NIAC)

Article 3 common to the GCs applies in the case of ‘armed conflict not of an international character’, whether **between a state and a non-state armed group or between non-state armed groups**.

In order to be classified as a NIAC – and not a case of ‘internal disturbances and tensions, such as riots, isolated and sporadic acts of violence’ (GC common Article 3, APII Art 1) – such that Article 3 and APII are applicable, the International Criminal Tribunal for the Former-Yugoslavia has indicated that two factual criteria must be satisfied:

- The **violence** must reach a **certain level of intensity** that distinguishes it from situations of internal disturbances such as riots and isolated acts of violence
- The **parties** involved must demonstrate a **certain level of organisation**.

For the first criteria, factors to consider include the collective nature of the fighting and resort to armed force by the state, the duration of the conflict, the nature of the weapons, the frequency of attacks and the number of victims. For the second criteria, it is assumed that government forces automatically fulfil the requirement. As for non-state armed groups, elements to consider include the existence of a command structure and/or internal rules, and the ability to recruit and train new combatants (Vité, 2009).

Article 1 of AP II affirmed these criteria but set a higher threshold to fulfil the criteria of **parties** involved, adding that these groups should be able to **control part of a territory**. It also restricts its application to conflicts **between a state and a non-state armed group**. This is likely to result in many armed conflicts being covered by Common Article 3 but not AP II (Vité, 2009).

What are key provisions and principles of IHL applicable to civilian protection?

The Fourth Geneva Convention focuses on the civilian population. The two additional protocols adopted in 1977 extend and strengthen civilian protection in international (AP I) and non-international (AP II) armed conflict, for example by introducing the prohibition of direct attacks against civilians. A **'civilian'** is defined as **'any person not belonging to the armed forces'**, including non-nationals and refugees (AP I, Art 50(1)).

IHL provisions and principles protecting civilians

- The principle of **distinction** protects civilian persons and civilian objects from the effects of military operations. It requires parties to an armed conflict to **distinguish at all times and under all circumstances between combatants and military objectives** on the one hand **and civilians and civilian objects** on the other – and to only target the former. It also requires that civilians lose such protection should they take a direct part in hostilities (AP I, Arts 48, 51-52, 57; AP II, 13-16). The principle of distinction has also been found by the ICRC to be reflected in state practice and thus an established norm of customary international law in both international and non-international armed conflicts (ICRC, 2005b, vol 1).
- **Necessity** and **proportionality** are established principles introduced in humanitarian law. Under IHL, a belligerent can **apply only the amount and kind of force necessary** to defeat the enemy. Further, attacks on military objects **must not cause loss of civilian life considered excessive in relation to the direct military advantage anticipated**. (AP I, Arts 35, 51(5)). Every feasible precaution must be taken by commanders to avoid civilian casualties (AP I, Arts 57, 58). The principle of proportionality has also been found by the ICRC to form part of customary international law in international and non-international armed conflicts (ICRC, 2005b, vol. 1).
- The principle of **humane treatment** requires that **civilians are treated humanely at all times** (GCIV, Art 27). Common Article 3 of the GCs prohibits violence to life and person (including cruel treatment and torture), the taking of hostages, humiliating and degrading treatment, and execution without regular trial against non-combatants, including persons *hors de combat* (wounded, sick and shipwrecked). Civilians are entitled to respect for their physical and mental

integrity, their honour, family rights, religious convictions and practices, and their manners and customs (API, Art 75(1)). This principle of humane treatment has been affirmed by the ICRC as a norm of customary international law applicable in both international and non-international armed conflicts (ICRC, 2005b, vol. 1).

- The principle of **non-discrimination** is a core principle of IHL. Adverse distinction based on race, nationality, religious belief or political opinion is prohibited in the treatment of prisoners of war (GCIII, Art 16), civilians (GCIV, Art 13, common Article 3) and persons *hors de combat* (common Article 3). All protected persons shall be treated with the same consideration by parties to the conflict, without distinction based on race, religion, sex or political opinion (common article 3, GCIV, Art 27). Each and every person affected by armed conflict is **entitled to his/her fundamental rights and guarantees, without discrimination** (API, Art 75(1)). The prohibition against adverse distinction is also considered by the ICRC to form part of customary international law in international and non-international armed conflict (ICRC, 2005b, vol. 1).
- **Women and children** are granted preferential treatment, respect and protection. Women must be protected from rape or any form of indecent assault. Children under the age of 18 must not be allowed to take part in hostilities (GCIV, Arts 24, 27; API, Arts 76-78; APII, Art 4(3)).

IHL provisions relevant to humanitarian assistance are discussed in the section of this guide on *Humanitarian Principles and Humanitarian Assistance*.

How are gender and culture treated in IHL?

Gender

IHL emphasises in various provisions in the GCs and APs the concept of formal equality and non-discrimination: protections should be provided ‘without any adverse distinction founded on sex’. For example, with regard to female prisoners of war, women are required to receive treatment ‘as favourable as that granted to men’ (GCIII, Arts 14, 16). In addition to claims of formal equality, IHL mandates special protections to women, for example providing female prisoners of war with separate dormitories from men (GCIII, Art 25); and prohibiting sexual violence against women (GCIV, Art 27; API, Art 76(2); APII, Art 4(2)).

However, the reality of women’s and men’s lived experiences of conflict has highlighted some of the gender limitations of IHL. Feminist critics have challenged IHL’s focus on male combatants and its relegation of women to the status of victims or granting them legitimacy solely as child-rearers: a study of the 42 provisions relating to women within the Geneva Conventions and the Additional Protocols found that almost half address women who are expectant or nursing mothers (Gardam and Jarvis, cited in Durham and O’Byrne, 2010). Others have argued that the issue of sexual violence against men in conflict has not yet received the attention it deserves (Lewis, cited in Durham and O’Byrne, 2010).

Applying a gender perspective to interpretations of IHL is important so as to consider the diverse experiences of both women and men in conflict situations. This can help to avoid the assumption, along with other forms of stereotyping, that women are mostly ‘victims’ and ‘losers’ in conflict and that men are always the ‘aggressors’ or ‘winners’.

‘Soft law’ has been relied on to supplement the protection of women in armed conflict. This includes: UN Security Council Resolutions 1888 and 1889 (2009), which aim to enhance the protection of women and

children against sexual violations in armed conflict; and Resolution 1325, which aims to improve the participation of women in post-conflict peacebuilding. Read together with other legal mechanisms, in particular the UN Convention for the Elimination of All Forms of Discrimination against Women (CEDAW), these can enhance interpretation and implementation of IHL. In addition, international criminal tribunals (e.g. the International Criminal Tribunals for the former Yugoslavia and Rwanda) and mixed tribunals (e.g. the Special Court for Sierra Leone) have contributed to expanding the scope of definitions of sexual violence and rape in conflict. They have effectively prosecuted sexual and gender-based crimes committed during armed conflict: there is now well-established jurisprudence on gender-based crimes. Nonetheless, there remains an urgent need to further develop constructions of gender within international humanitarian law (see Barrow, 2010).

Culture

IHL has generally not been subject to the same debates and criticisms of ‘cultural relativism’ as international human rights. Although the modern codification of IHL in the Geneva Conventions and the Additional Protocols are relatively new and European in name, the core concepts are not new and laws relating to warfare can be found in all cultures. ICRC studies (on the Middle East, Somalia, Latin America, and the Pacific, for example) have found that there are traditional and long-standing practices in various cultures that preceded, but are generally consistent with, modern IHL. It is important to respect local and cultural practices that are in line with IHL. Relying on these links and on local practices can help to promote awareness of and adherence to IHL principles among local groups and communities.

Durham (2008) cautions, however, that although traditional practices and IHL legal norms are largely compatible, it is important not to assume perfect alignment: there are areas in which legal norms and cultural practices clash. For example, violence against women is frequently legitimised by arguments of culture, yet is prohibited in IHL and other international law. In such cases, it is important to ensure that IHL is not negatively affected.

Overlapping Areas of Law – Toward a Comprehensive Legal Framework

Different areas of international law – primarily international human rights law, international refugee law and international criminal law – can operate at the same time as IHL, combining to create a comprehensive legal framework for protection and assistance. It is now generally accepted that human rights law applies during armed conflict as well as in peacetime. Civilians are often displaced as a result of armed conflict, resulting in the possibility of simultaneous application of international refugee law and IHL. International criminal law and IHL are also linked. IHL provides that persons may be held individually criminally responsible for ‘grave breaches’ of the Geneva Conventions, of Additional Protocol I and for other serious violations of the laws and customs of war (war crimes). The statutes of international criminal tribunals have established jurisdiction over war crimes.

International human rights law

International human rights law (IHRL) comprises a set of rules, established by treaty or customary law, which outlines the **obligations and duties of states to respect, to protect and to fulfil human rights**. It **enables individuals and groups to claim certain behaviour or benefits from government**. These formal legal undertakings are based on recognition that individuals have such inherent rights (Darcy, 1997).

Whereas IHL binds all parties to armed conflicts (states and organised armed groups), human rights law regulates states in their relations with individuals or groups of individuals under their jurisdiction. There is ongoing debate about whether organised armed groups (particularly those that exercise government-like functions) should also be obligated under human rights law.

IHRL's main treaty sources are the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966). Other sources include the Conventions on:

- Genocide (1948)
- Racial Discrimination (1965)
- Discrimination against Women (1979)
- Torture (1984)
- Rights of the Child (1989)
- Persons with Disabilities (2006).

The main regional instruments are: the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); the American Declaration of the Rights and Duties of Man (1948) and Convention on Human Rights (1969); and the African Charter on Human and Peoples' Rights (1981).

Human rights, humanitarianism and IHL

Human rights, humanitarianism (the humanitarian tradition) and IHL are linked: they are universal in their application and based on **recognition of shared humanity**. Three fundamental principles common to human rights law and humanitarian law are inviolability, non-discrimination and security of the person (Pictet, 1975, p. 34). These principles are the basis of a number of human rights and IHL rules, such as the right to life/protection of human life, the prohibition of torture or any inhuman or degrading treatment, the prohibition of discrimination, and basic rights to a fair trial.

Human rights, humanitarianism and IHL are also linked to **human need**, although human rights are concerned more broadly with safeguarding comprehensive aspects of an individual's physical, economic, political and social security. It is the **public and political aspect of human rights** that has often made humanitarian workers and IHL lawyers wary of delving into this area for **fear of compromising the neutrality of humanitarian work** (Darcy, 1997).

Nonetheless, there has in recent years been growing discussion of the benefits of a **rights-based approach to humanitarian assistance**. A rights-based approach redefines recipients of assistance, both women and men, as active subjects and rights-holders with entitlements (and obligations) rather than as passive victims and recipients of charity. It is designed to highlight recipients' voices, identifying their needs and priorities. It is also designed to produce a relationship of responsibility and accountability between humanitarian agencies and the people they serve, or between these same individuals and their government (Concannon and Lindstrom, 2011). The UNHCR (the UN's Refugee Agency), for example, has – along with its partners – taken steps to ensure that humanitarian assistance is organically linked with protection. Protection is defined by the Inter-Agency Standing Committee (IASC), which co-ordinates humanitarian assistance across agencies, as 'all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law, namely human rights law, international humanitarian law and refugee law'.

The interplay of IHL and IHRL

While international humanitarian law only applies during armed conflict, **human rights do not cease to be applicable in armed conflicts**. Human rights treaties, however, **allow states to derogate** from certain rights during a public emergency that threatens the nation (including a state of war), provided they fulfil certain preconditions and follow specified procedures. Some rights, though, (such as the right to life, freedom from torture, freedom of thought, equality and non-discrimination) can never be suspended. **IHL does not allow for derogation.**

The **concurrent application of international humanitarian law and international human rights law** has been expressly recognised by various international tribunals, including the International Court of Justice, the European Court of Human Rights and the Inter-American Commission on Human Rights. The ICJ observed in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* that ‘the protection of the International Covenant on Civil and Political [ICCPR] rights does not cease in times of war’ (apart from in situations of derogation).

The relationship between IHL and IHRL is thus considered to be one of complementarity (although also one of specificity, as will be discussed). Their concurrent application often leads to the same result and has the potential to offer greater individual protections (Droege, 2008). Each can enhance the other body of law to strengthen areas of relative weakness. For example, the provisions for a fair trial in IHL are vague, but IHRL can provide guidance and interpret the rules in question. It is also helpful to rely on IHRL in situations of internal armed conflict, where the treaty rules of IHL are limited (ICRC, 2005a).

The concurrent application of IHL and IHRL also raises some **challenges**, however. This is particularly so where there may be a **conflict in norms**, for example concerning the right to life. What constitutes an ‘unlawful killing’ may be very different under IHL than under IHRL. IHL permits lawful killing of combatants and adopts principles of proportionality, which allows for permissible ‘collateral damage’, whereas IHRL has stricter requirements on the protection of life (Iguyovwe, 2008). In order to address such challenges, the ICJ articulated in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* the **principle of *lex specialis***, stating that:

whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [ICCPR], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself (para 25).

The Court expanded on this position in its 2004 advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, stating that where matters fall under both IHL and IHRL:

the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law (para 106).

What is *Lex Specialis*? How is it applied?

The application of the principle of *lex specialis* is still highly debated. Nonetheless, some scholars have likened the principle to a conflict-solving rule. Where the adoption of two different approaches is possible and legitimate but may result in conflicting outcomes, it gives precedence to the approach/rule that is most adapted and tailored to the specific situation. In the case of IHL and IHRL, the principle means that under certain circumstances, the specific rules of human rights law are applied by reference to IHL standards. The closer the situation is to the battlefield, the more humanitarian law will take precedence, and vice versa. Relevant criteria could include the duration of combats, the type of weaponry used and the degree of armed resistance (Greenwood, 2010; Droege, 2008).

International refugee law

The 1951 Convention on the Status of Refugees provides the foundation for international refugee law. It defines a 'refugee' as someone who is externally displaced through a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' (Art 1). Although the Refugee Convention does not include an explicit reference to sex and/or gender, the importance of gender in shaping the experiences of refugees is increasingly recognised.

The absence of effective national protection results in the need for international protection. International refugee law applies to states that are party to the relevant treaties and to all states under customary law. Internally displaced persons, who remain within the borders of their own country, are subject to national law and applicable international law such as IHL and IHRL. IHL and IHRL are incorporated in binding regional instruments as applicable and as reflected in the *Guiding Principles on Internal Displacement* (1998). While not part of binding treaty law, the Guiding Principles establish standards for the protection of IDPs. It can be challenging, however, to encourage states to comply with non-binding frameworks. In recent years, there have been significant developments in elaborating binding legislative frameworks – including, for example, the codification of the African Union Convention for the Protection and Assistance of IDPs in Africa, and the Great Lakes Protocol on the Protection and Assistance to IDPs.

The interplay of IHL and international refugee law

Refugees caught up in armed conflict are protected under both IHL and international refugee law. Article 5 of the Refugee Convention allows for the concurrent application of the Convention and other instruments granting rights and benefits to refugees. IHL and refugee law can also apply successively. The existence of an armed conflict is not in itself sufficient criteria to qualify someone as a refugee under the Convention. Where a victim of armed conflict is forced to leave his or her country due to violations of IHL (or IHRL), however, such violations can form part of the refugee definition and become a key factor in triggering refugee protection (Jaquemet, 2001). This may be more likely where armed conflicts have an ethnic or religious dimension, as it could trigger the condition of fleeing because of fear of persecution (ICRC, 2005a). In situations where armed elements are engaging in severe violations of IHL, this could be sufficient to accept that all civilians belonging to or associated with the 'enemy' side will have a well-founded fear of persecution, without having to engage in individual determinations (Jaquemet, 2001).

Another area of overlap is exclusion. Individuals who have engaged in certain violations of IHL amounting to war crimes may be excluded from entitlement to protection as a refugee (ICRC, 2005a).

Prevention of displacement and protection of refugees under IHL

- **Prohibition of forced displacement:** Parties to a conflict are expressly prohibited from forcibly moving civilians, whether in cases of occupation (GCIV, Art 49) or non-international armed conflicts (APII, Art 17). There is an exemption under exceptional circumstances (where the security of the civilian population involved or imperative military reasons so demand). Violations of these provisions are war crimes under international criminal law (ICC Statute, Art 8).
- **Protection from the effects of hostilities in order to prevent displacement:** The prohibitions against targeting civilians and civilian property/objects, as well as duties to take precautions to spare the civilian population, are also aimed at preventing displacement (ICRC, 2005a).
- **Protection during displacement:** IHL provisions that seek to protect displaced and legally evacuated civilians include the need to ensure that any necessary evacuations are carried out under satisfactory conditions of hygiene, health, safety and nutrition; and that the displaced have appropriate accommodation and that families are not separated. Refugees also benefit from protections afforded to aliens in the territory of a party to a conflict under the GCIV (ICRC, 2005a).

Article 9 of the 1951 Convention allows for derogation from treaty provisions in times of war. Unlike international human rights law, the Convention does not provide for certain non-derogable rights. IHL can therefore be a particularly important safeguard in such situations.

Protection of refugees and displaced persons under IHRL

The core human right that applies to issues of displacement is the freedom of movement, specific in the ICCPR (Article 12). It has three elements: (i) freedom of movement within a country in which one is lawfully resident; (ii) freedom to leave any country; and (iii) the right to return to one's country. Similarly to IHL, this human rights provision outlaws forced displacement other than on exceptional grounds (such as to protect national security, public order or public health). Other related rights and entitlements include the freedom to choose one's residence, freedom from arbitrary interference in one's home, and the right to housing.

Human rights law has been particularly important to the development of policies that deal with IDPs, who are not afforded protection under international refugee law. The *Guiding Principles for Internally Displaced Persons* bring together existing human rights and humanitarian law alongside the framework for refugee law.

International criminal law

The International Criminal Court (ICC), the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), and hybrid tribunals have jurisdiction over violations of rights committed within and outside armed conflict – in particular war crimes, genocide and crimes against humanity. Crimes against humanity involve systematic and widespread violations of human rights.

Under IHL, serious violations of common Article 3 of the Geneva Conventions and AP II (governing non-international armed conflict) did not incur individual criminal liability. However, the ICTY and the ICTR have established that their jurisdiction covers both international and non-international armed conflicts. Based on this practice, the Statute of the ICC **explicitly extends individual accountability to war crimes committed in internal armed conflicts**. This includes individual accountability for rape as a constituent offence of crimes against humanity.

In order to prosecute war crimes, the existence of an armed conflict must be established. The Appeals Chamber of the ICTY in the *Tadić* case specified an armed conflict to 'exist whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State' (*Prosecutor v. Tadić*, 1995). With regard to the distinctions between international and non-international armed conflict, the ICTY has also found that certain norms of international armed conflict are applicable to non-international armed conflicts based on customary international law. For further discussion of international criminal law, see this guide's section on *Compliance with and Enforcement of International Humanitarian Law*.

Humanitarian Principles and Humanitarian Assistance

The volume of humanitarian assistance has increased significantly since the end of the Cold War, alongside the number of actors providing such assistance. Humanitarian actors are expected to base their assistance on certain fundamental humanitarian principles. They can also seek guidance for their work in various sources of international humanitarian law.

What are humanitarian principles?

In the broadest sense, humanitarian principles are rooted in international humanitarian law. In a more narrow sense, they are the principles devised to guide the work of humanitarian actors (Mackintosh, 2000). These principles are widely recognised as: humanity, neutrality, impartiality and independence.

- **Humanity:** Human suffering must be addressed whenever it is found. The purpose of humanitarian action is to protect life and health and ensure respect for human beings.
- **Neutrality:** Humanitarian actors must not take sides in hostilities or engage in controversies of a political, racial, religious or ideological nature.
- **Impartiality:** Humanitarian action must be carried out on the basis of need alone, giving priority to the most urgent cases of distress and making no distinctions on the basis of nationality, race, gender, religious belief, class or political opinions.
- **Operational Independence:** Humanitarian action must be autonomous from the political, economic, military or other objectives that any actors may hold with regard to areas where humanitarian action is being implemented.

The UN Office for the Coordination of Humanitarian Affairs (OCHA)

How are humanitarian principles treated in IHL?

The **right to humane treatment is at the core of IHL**. It is a basic obligation codified in various provisions of the Geneva Conventions and its Additional Protocols, in particular Article 27 of the Fourth Geneva Convention protecting civilians and in common Article 3 governing non-international conflicts. **As noted earlier** (in the Overview of IHL), it is also considered to be a norm under customary international law.

The law of neutrality, which stems from state practice and the Hague Conventions, is defined in international law as ‘the status of a state which is not participating in an armed conflict between other states’ (Bothe, 2008, p. 571). It encompasses the right not to be ‘adversely affected’ and the duty of non-participation. Under the Hague Convention V, humanitarian assistance for the sick and wounded is not considered to be a violation of neutrality even if it benefits only the sick and wounded from one party to the conflict (Art 14).

In more recent times, there have been concerns that diversion of humanitarian assistance and misuse of aid by parties to international and non-international conflicts can undermine the neutrality of assistance, in terms of **non-participation in hostilities (direct and indirect)**. While neutrality is not specifically mentioned in the Geneva Conventions or Additional Protocols, there are **provisions that can relate to aspects of neutrality**. Article 23 of the Fourth Geneva Convention obliges a party to allow free passage of goods through its territory intended for the civilians of another party to the conflict. However, this is only enforceable if the obligated party has no reason for fearing that these goods may be diverted or that they may result in a military advantage to the enemy. Proper control by the humanitarian organisation transporting the goods is considered essential to ensure that the goods do not indirectly advance one side of the conflict (Mackintosh, 2000).

Impartiality is needs-based provision of assistance, incorporating non-discrimination and the absence of subjective distinctions (e.g. whether an individual is innocent or guilty) (Pictet, 1958 and 1979). **As noted in the Overview of IHL**, the **principle of non-discrimination is a core principle in IHL**. Various provisions of the Geneva Conventions and Additional Protocols state the importance of equal treatment of protected persons without distinction and entitlement to fundamental rights without discrimination.

Classification as humanitarian assistance denied due to partiality – the provision of aid to the *Contras* in Nicaragua

During the 1980s, the United States government provided assistance to the *Contras*, a militia group that was opposed to the Sandinista government of Nicaragua. The government accused the US of violating international law by intervening in the internal affairs of Nicaragua. One of the defences provided by the US was that it was providing humanitarian assistance. The International Court of Justice affirmed that humanitarian assistance is not contrary to international law, but that the assistance the US provided was not humanitarian by nature. The aim of its assistance was not to prevent and alleviate human suffering. Moreover, it was provided in a discriminatory fashion, only to the *Contras* and their dependents. As such, it did not satisfy the criteria required to qualify as humanitarian assistance.

Nicaragua vs. US – Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits), ICJ Reports 1986

How is humanitarian assistance treated in IHL: What duties and rights exist?

The Geneva Conventions and Additional Protocols do not define ‘humanitarian assistance’ but provide a basic description of the rights and responsibilities of parties to the conflict and the potential role for humanitarian agencies. The provision of relief to civilian populations falls within the scope of the Fourth Geneva Convention, the two Additional Protocols and common Article 3. This includes the supply of foodstuffs, medical supplies and clothing (GCIV, Art 59), distribution of materials for educational, recreational or religious purposes (GCIV, Art 108) and measures to protect civilians and assist them to ‘recover from the immediate effects, of hostilities or disasters and also to provide conditions necessary for [their] survival’ (API, Art 61).

Since the conventions and protocols are addressed to states, they do not directly confer rights or obligations upon humanitarian agencies. Provisions in the GCs and APs describe situations in which states must allow humanitarian assistance to be delivered to civilians in their power, the forms of assistance that are entitled to protection, and the conditions which states are allowed to impose on their delivery (Mackintosh, 2000). These provisions are relevant and useful to humanitarian agencies as they provide insight and guidance into the conditions that they must meet should they seek to provide assistance. They also provide tools to argue for and to secure humanitarian access and cooperation from states, other parties to the conflict and countries that fall under the transit route for delivery of assistance.

Duty of state parties and role of humanitarian organisations

Under IHL, the **parties to the conflict have the duty and primary responsibility to provide humanitarian assistance** to civilians and civilian populations under their control. There are, however, also provisions that **allow for the possibility (with certain conditions) of humanitarian organisations undertaking relief actions**. The rules on humanitarian access and assistance can be distinguished by type of conflict:

International armed conflict (situations of occupation)

Articles 55 and 56 of GCIV provide that the occupying power has the duty to ensure food, medical supplies, medical and hospital establishments and services, and public health and hygiene to populations in the occupied territory. This duty was extended in AP I to include the duty to ensure bedding, means of shelter and other supplies essential to the survival of the civilian population (Art 69). Article 59 of the GCIV further states that:

If the whole or part of the population of an occupied territory is inadequately supplied the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them [...] Such schemes, which may be undertaken either by States or by impartial humanitarian organisations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

National Red Cross Societies or other relief societies ‘shall be able to pursue their activities’ in accordance with Red Cross principles¹ or under ‘similar conditions’ (respectively), subject to ‘temporary and exceptional measures imposed for urgent reasons of security’ (GCIV, Art 63).

¹ Red Cross fundamental principles encompass: humanity, impartiality, neutrality, independence, universality, voluntary service and unity. They are seen as an ethical framework for humanitarian action.

Thus, in situations of occupation, **the obligation of occupying authorities to facilitate and cooperate with relief schemes is unconditional**. There is a relatively wide space provided to humanitarian organisations, provided that they are impartial and operate in accordance to humanitarian principles. Article 59 of GCIV allows occupying authorities to retain a certain ‘right of control’, however, such as the right to search the relief consignments, to regulate their passage and to ensure that they are directed at the population in need (Beauchamp, 2008).

International armed conflict (outside of occupation)

Article 70(1) of API states that if the civilian population under the control of a party to the conflict is not adequately provided with relief supplies, ‘**relief actions** which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken’. This is, however, **subject to the agreement of the parties concerned** with such actions (see box below).

Additional provisions require that civilians are enabled to receive the necessary assistance. State parties are obligated to allow free and rapid passage of all relief consignments, equipment and personnel, regardless of whether they are being delivered to the civilian population of the enemy (GCIV, Art 23; API, Art 70(2)).

Non-international armed conflict

Provisions on humanitarian assistance are the least developed in this context. Common Article 3 simply provides that ‘**an impartial humanitarian body, such as the [ICRC], may offer its services** to the Parties to the conflict’.

Article 18(1) of Additional Protocol II adds that domestic relief societies, such as National Red Cross/ Red Crescent Societies, may ‘offer their services’ as may the civilian population itself. International relief is addressed in Article 18(2), which states that where the civilian population ‘is suffering undue hardship owing to a lack of supplies essential for its survival, such as foodstuffs and medical supplies, relief actions [...] of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken’. Similar to the international conflicts outside of occupation, this **is subject to the consent of the state party concerned** (see box below). In this context, it entails the state giving consent for assistance to the insurgent side. Although it is difficult to determine the threshold of ‘undue hardship’, ICRC commentary on the Additional Protocols suggests that the ‘usual standard of living of the population concerned’ should be taken into consideration (p. 1479).

For discussion on provision of humanitarian assistance to areas outside of government control and negotiating access with non-state parties to a conflict, see this guide’s section on *IHL and Humanitarian Assistance Involving Non-State Armed Groups*.

The issue of state consent to relief actions (outside of occupation) – reliance on international customary law

The combination of statements that relief actions ‘shall be undertaken’ but with the agreement or consent of state parties has resulted in debate over the extent to which parties to both international and non-international armed conflicts are obligated to accept assistance. State practice, however, does not emphasise the requirement of consent. The view is that so long as there is humanitarian need and organisations and relief actions meet the requisites of being humanitarian and impartial in character and without adverse distinction, governments cannot arbitrarily refuse assistance. This is particularly the case in extreme situations, where a lack of supplies would result in starvation. Article 54 of AP I prohibits the starvation of civilians as a method of combat. The ICRC’s study found that it was a norm of customary international law in international and non-international conflicts that governments cannot arbitrarily refuse assistance. Even in cases outside of starvation, the study also found that parties to the conflict are obligated to allow and facilitate humanitarian assistance in any kind of conflict where civilians are in need (subject to their right to exercise control over relief actions). This is based on practice in the field, various UN resolutions and other sources. While this position has been supported by various scholars, there is still debate on the issue. The work of the International Law Commission on customary law in the context of disasters also aims to establish a norm of state responsibility to not arbitrarily refuse assistance – see this guide’s section on *recent developments in IDRL* (ICRC 2005b; Pejic, 2011; Mackintosh, 2000).

Right of civilians to receive assistance

While most provisions are expressed in terms of the duties of parties to the conflict to provide or allow for relief, Article 30 of the Fourth Geneva Conventions grants protected persons ‘every facility for making application to [international and national relief organisations] that might assist them’. There is debate about whether these provisions can translate into a right to (appeal for) assistance. In addition, Article 62 provides that ‘protected persons in occupied territories shall be permitted to receive the individual relief consignments sent to them’, subject to security issues.

There is **support for such civilian entitlements under customary international law**. There is practice that indicates not only that parties to the conflict are obligated to accept humanitarian assistance but that also points to recognition that civilians in need are entitled to receive humanitarian relief necessary to their survival (ICRC, 2005b; Spieker, 2012).

How is humanitarian assistance regulated under IHL?

IHL offers some **specific rules on access and delivery** of humanitarian assistance in international armed conflicts. For example, it outlines the obligations of domestic authorities concerning the transfer of relief consignments; restricts the possibility of their diversion; and regulates the participation of humanitarian personnel. The aim is to reduce 'red tape' as much as possible and allow for the speedy delivery of relief to protected persons.

- Parties to an international armed conflict and other transit states are required to **allow free passage** to medical supplies, items for religious worship, and religious goods intended for civilians of other parties to the conflict, even if from the enemy side. They must also allow 'consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases'. This is subject to the condition that the party is satisfied that the consignments are unlikely to be diverted, particularly for military purposes (GCIV, Art 23).
- Such **consignments must be forwarded as quickly as possible, subject to 'technical arrangements'** under the control of the power permitting free passage (GCIV, Art 23). The ICRC Commentary to the Fourth Geneva Convention interprets 'technical arrangements' as allowing the state party to check the consignments and to arrange for their delivery at particular times and on particular routes.
- Relief consignments must be 'exempt in occupied territory from all charges, taxes or customs duties unless these are necessary in the interests of the economy of the territory'. In addition, the occupying power must facilitate their free passage and rapid distribution (GCIV, Art 61). These duties apply not only to the occupying power, but also to states of transit.
- **Humanitarian organisations must be granted all facilities possible** such that they can carry out their humanitarian functions (GCIV, Art 30).

There are few treaty rules that address conditions of access and delivery of humanitarian assistance in non-international armed conflicts. The ICRC's customary law study asserts, however, that there is **enough practice to justify extending the requirement that the party in control must facilitate free passage and rapid distribution of relief in situations of occupation to other situations of international and internal conflict**. In addition, this study notes that the freedom of movement of authorised relief personnel essential to fulfil their humanitarian functions is required under customary international law (ICRC, 2005b). It is still debatable, however, whether there is enough practice to find a 'right to access' under customary law (Spieker, 2011).

The treatment of vulnerable groups

Another important aspect of the regulation of protection and humanitarian assistance is addressing the special needs of vulnerable groups. This entails both non-discrimination and positive measures to ensure that these special needs are addressed in relief actions. Parties to the conflict are specifically obligated to:

- Grant children, expectant mothers, maternity cases and nursing mothers special treatment and protection and to give them priority in the distribution of relief consignments (API, Art 70(1))

- Provide for free passage of 'essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases' (GCIV, Art 23)
- Provide children with the care and aid needed, which is a fundamental guarantee of human treatment (APII, Art 4(3))
- Ensure that children under fifteen who are orphaned or separated from their families are provided with 'maintenance', access to education and the ability to exercise religion (GCIV, Art 24).

Protection of humanitarian workers

Civilian personnel involved in humanitarian assistance are subject to the **general protections applicable to civilians** of states not party to the conflict. They are also granted specific protections. Various provisions in the Geneva Conventions and Additional Protocols prohibit attacks upon medical units, hospitals and medical personnel. Additional Protocol I extends **specific protection to all relief personnel**, obligating states to ensure the respect and protection of relief workers (Art 71(2)). This same provision is not contained in Additional Protocol II. The ICRC's customary law study found, however, that such requirements are part of international customary law and thus also apply in non-international armed conflicts (ICRC, 2005b). This conclusion is reinforced by the protections afforded to humanitarian personnel and objects under the Convention on the Safety of United Nations and Associated Personnel and the inclusion of deliberate attacks against 'personnel, installations, material, units or vehicles involved in a humanitarian assistance' as a war crime in international and internal armed conflicts in the Rome Statute of the International Criminal Court (Article 8(2)).

Attacks against humanitarian personnel in Darfur – violations of various aspects of IHL

The conflict in Darfur that began in 2003 (and concluded with the 2011 Darfur Peace Agreement) was considered to be primarily a civil war. As such the applicable IHL rules comprised of common Article 3 of the Geneva Conventions, AP II, and customary law. During the conflict, there were frequent reports of military attacks against humanitarian personnel and vehicles from all parties to the conflict, which hindered the delivery of humanitarian assistance. These acts were considered by reporting agencies, including the UN Security Monitoring Panel on Sudan, to be likely breaches of IHL for the following reasons: (1.) such military attacks are contrary to the prohibition of targeting civilians and civilian objects; (2.) attacking humanitarian relief personnel and objects used for humanitarian relief operations is specifically prohibited; (3.) starvation of the civilian population (by hindering relief operations), if conducted intentionally as a method of warfare, is also prohibited; and (4.) even if there is no deliberate attempt to cause starvation (and/or no risk of starvation), such attacks could still be a violation of IHL if they are contrary to the requirements of proportionality and adoption of precautionary measures (Yihdego, 2009).

What is the relevance of human rights law to humanitarian assistance?

With a few exceptions, the key human rights instruments do not explicitly refer to international humanitarian assistance. As such, it can be argued that there is no general right to receive such assistance under IHRL. Others emphasise that international and regional human rights instruments set out many related rights, such as the rights to life, food, housing, clothing, health livelihood, and an adequate standard of living. The International Covenant on Economic, Social and Cultural Rights is particularly relevant. State parties to this treaty are obligated to use the maximum of their available resources – including international assistance – to progressively achieve the full realisation of the rights recognised in the Covenant. While the right to life could indicate a minimal right to assistance, the various economic and social rights guaranteed in international human rights law can create the legal space for individuals to claim the right to humanitarian assistance, with corresponding obligations on the part of states to provide such assistance. However, this argument remains contested (Fisher, 2007).

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Challenges, Traps and Debates

A briefing on current policy and implementation issues, challenges and debates

In this section:

- The emergence of ‘international disaster response laws, rules and principles’
- IHL and humanitarian assistance involving non-state armed groups
- The responsibility to protect
- Compliance with and enforcement of international humanitarian law
- References
- Resources

Challenges, Traps and Debates

The Emergence of ‘International Disaster Response Laws, Rules and Principles’

Operating specifically in the context of armed conflict, international humanitarian law covers only part of the regime of humanitarian assistance. The growing number of disasters and their humanitarian impacts has prompted the need for a framework that addresses the responsibilities of states and humanitarian agencies in disaster settings. This has led to the emergence of international disaster response laws, rules and principles (IDRL), comprised of a collection of international instruments addressing various aspects of post-disaster humanitarian relief. It aims to cover a broad range of rules, including issues related to initiation of disaster assistance, consent, access, conditions of assistance, and movement of personnel and materials (Todres, 2011).

Differing contexts – disasters and armed conflicts

There is often a greater expectation in the case of disasters than in armed conflicts that domestic authorities will take the primary role in international humanitarian aid efforts and will not only facilitate access, but also coordinate it and monitor its effectiveness. In addition, given the longer establishment of IHL, there is much broader acceptance and clarification of the specific rights and obligations in armed conflict. There are fewer conditions that can legitimately be imposed on international humanitarian organisations before allowing them access in conflict settings.

In terms of regulatory concerns, many of the same issues are faced in both disaster and conflict environments. These include regulatory barriers, such as bureaucratic delays in the entry of personnel, goods and equipment; and regulatory gaps, such as the absence of mechanisms to facilitate efficient domestic legal recognition of international organisations. There are also differences, however, for example concerns over security, which may not be as relevant in some disaster situations.

In mixed situations, **where there is both a disaster and ongoing armed conflict** – for example the 2004 tsunami in Sri Lanka, **IHL is the governing law**. Even if the need for relief is prompted by a natural disaster rather than by ongoing fighting, the obligations of the parties to the conflict in an armed conflict setting remain the same (Fisher, 2007).

What are the main sources of IDRL?

IDRL is not a comprehensive or unified framework. There are no core international treaties, such as the Geneva Conventions and Additional Protocols under IHL. Rather, it consists of a fragmented and piecemeal collection of **various international, regional and bilateral treaties, non-binding resolutions, declarations, codes, guidelines, protocols and procedures**. This includes relevant provisions of international treaties in other areas of law, such as international human rights law, international refugee law and IHL (in the case of conflict situations).

Treaties

These largely comprise bilateral treaties, covering various areas such as technical assistance, mutual assistance and agreements regulating humanitarian relief between the two state parties. The latter two

tend to involve formal rules for the initiation and termination of assistance; and provisions for reducing regulatory barriers (involving e.g. visas and work permits and customs control for relief personal and goods). Regional treaties have largely been adopted for mutual disaster assistance and are in place in the Americas, Asia and Europe.

There are a limited number of multilateral treaties. Like other bilateral treaties, they are often focused on a particular sector of operations such as health, telecommunications and transport. The global, but sectoral, Tampere Convention of 1998, for example, commits parties to reduce regulatory barriers and restrictions on the use, import and export of telecommunications equipment for disaster relief (Bannon, 2008; Fisher, 2007). Some global treaties are specific to particular types of disasters, including environmental treaties and treaties concerning industrial or nuclear accidents. Although these global treaties are legally binding, many are limited in utility as few states have ratified them or they are very limited in scope, geographic reach, or enforceability. In addition, few treaties address international actors other than states or UN agencies (Heath, 2011; Todres, 2011).

International custom

It has been argued that there is a right to receive humanitarian assistance in disaster situations under customary international law. Sources relied upon include the ‘Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief’ which states that there is a right to receive and to offer humanitarian assistance. In addition, the right to a healthy environment as an aspect of the fundamental right to life has been relied upon not only to demonstrate a right to assistance under IHRL but also as part of customary international law.

However, for practice to develop into customary law there must be an indication of extensive and uniform state practice and a belief that such actions are required by law. In contrast, states have often responded to disasters on a case-by-case basis. It is also doubtful whether actions of non-state actors can be relied upon to satisfy the requirements of international custom (de Urioste, 2006-7).

UN resolutions (soft law)

The **instruments with the broadest scope in IDRL are non-binding** recommendations, declarations and guidelines. This includes the ‘Measures to Expedite International Relief’, endorsed by the UN General Assembly and the International Conference of the Red Cross in 1977. The General Assembly also passed Resolution 36/225 in 1981, which called for strengthening the UN’s capacity to respond to disasters; and Resolution 46/182 in 1992, which called for a ‘strengthening of the coordination of emergency humanitarian assistance of the United Nations system’. Around the same time, the office that would later become the Office for the Coordination of Humanitarian Affairs (OCHA) was created. In 2002, the General Assembly adopted Resolution 57/150, which reaffirmed resolution 46/182 and provided for strengthening the effectiveness and coordination of international urban search and rescue assistance.

IDRL Guidelines

The International Federation of Red Cross and Red Crescent Societies adopted in 2007 the ‘Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance’ (see [recent developments in IDRL](#) below). They are considered to be a significant development to the IDRL framework, with the potential to contribute to the development of norms under customary international law.

How is humanitarian assistance treated in IDRL: What duties and rights exist?

These various instruments that comprise IDRL do not impose a duty on affected states to accept international assistance. UN General Assembly Resolution 36/225 emphasises that **sovereignty remains a key feature of international disaster assistance**. Resolution 46/182 specifies that the **affected state has the primary responsibility for all aspects of humanitarian assistance** within its territory (initiation, organisation, coordination and implementation) and that international assistance should be **provided with the state's consent**. These and other General Assembly resolutions have tended to focus on the 'importance' rather than the 'right' of humanitarian assistance in disaster contexts (Fisher, 2010).

Eburn (2011) suggests four scenarios where the deployment of disaster assistance without the prior consent of the affected state could be justified. These are: (i.) where a state is unable or unwilling to provide relief; (ii.) where there is no effective government of the affected state; (iii.) where action by the intervening state is aimed at preventing the spread of a hazard into its own territory; and (iv.) under the auspices of the UN in order to deal with a threat to international peace and security. All of these situations would be rare. In addition, intervening without the consent of the state party would make it extremely challenging to deliver assistance effectively.

Cyclone Nargis in Burma – arguments for intervention without consent

In 2008, Cyclone Nargis devastated Burma, leaving over 130,000 people dead and many in need of humanitarian assistance. However, the Burmese government refused access to the affected population by states and NGOs that were ready and willing to assist, while at the same time being slow to take responsibility itself. There were fears that without access, infectious disease would spread and the lives of many more thousands would be endangered. Arguments were made that states should be able to use force to protect the population in Burma from human rights abuses, considered here to be failure on the part of the state to assist the affected community (see the [section on R2P](#)). This was done in 1992, when the UN Security Council endorsed military action in Somalia to facilitate the delivery of humanitarian assistance. In that case, the conflict was providing a significant barrier to delivery. Ultimately, in the case of Burma, intense diplomatic efforts were partially successful at securing limited access to the affected populations and the international community was able to find non-coercive ways to pressure the government into participating in a coordinated, humanitarian response. Although many problems remained and progress was slow, this was considered to be a better alternative than forced humanitarian assistance in the context of a disaster (Eburn, 2010; Barber, 2009).

What are the gaps in IDRL and related problems?

While regulatory problems in the delivery of humanitarian assistance exist in both disaster and conflict settings, they are exacerbated in the former due to the absence of an established comprehensive legal framework and an undeveloped disaster response and coordination mechanism. Common problems identified include the following:

Initiation / barriers to entry

In cases of major disaster, it is very rare that a state will refuse international assistance (the case of Burma was a unique situation). Instead, the more common problem is delay in the issuance of a formal request for such assistance or in the response to international offers. This could be due to weaknesses in national procedures and regulations for needs assessment and decision-making (Fisher, 2007).

Legal facilities for operation

Even where consent is given for humanitarian operations, there are often problems with visas and travel restrictions. Disaster personnel are often granted entry on tourist or other temporary visas, which can cause subsequent problems with renewal and efforts to obtain work permits. Customs formalities are also a frequent problem, with relief goods held up for long periods of time waiting for clearance. The recognition of domestic legal status is another common problem for international relief providers, particularly for NGOs and foreign Red Cross or Red Crescent societies. The processes are often too slow or difficult to negotiate in emergency settings. Unregistered organisations face various problems, including difficulty opening bank accounts, hiring staff, obtaining visas for workers and tax exemptions. Bilateral agreements, negotiated in advance of an emergency, can be of significant assistance in addressing these issues. Without an agreement in place, there is little guidance at the international level beyond the general obligation to facilitate aid (Mosquini, 2011; Bannon, 2008; Fisher, 2007).

Regulation of coordination and quality

Although affected states are expected to play the leading role in disaster settings, they have in some cases adopted a 'hands-off' approach, which has resulted in uneven and uncoordinated international efforts. International legal regulation of the quality of humanitarian assistance is also considered weak. This is due in part to states' reluctance to create legal frameworks that could threaten control over their borders; and concern by humanitarian actors that quality control regulations could result in loss of independence and freedom of action (Fisher, 2010).

Regulatory barriers and lack of coordination in post-tsunami disaster relief

Following the devastating 2004 Indian Ocean earthquake and tsunami, many countries in the region were in need of humanitarian assistance. There were various regulatory and co-ordination problems, however, that resulted in ineffective and inefficient delivery of assistance. During relief efforts in Indonesia and Thailand, relief personnel were consistently required to exit and re-enter the country during their operations to renew their visas, with substantial expense and loss of time. Customs formalities were also a problem, with extensive delay in clearance of consignments in Indonesia and Sri Lanka and ultimately wasted perishable food and medications. Even where relevant treaties were in place, for example the Tampere Convention (ratified by Sri Lanka) to deal with telecommunications equipment, there is no indication that any of the provisions were specifically invoked during the relief operation. Domestic registration processes were also a problem in Thailand, with foreign NGOs unsuccessful at getting information about the registration process from governmental sources even months after the disaster struck. In Sri Lanka, the government introduced various new structures that overlapped with existing structures for relief efforts, resulting in duplication and bureaucratic barriers. There was little government consultation, coordination and information sharing with local groups and communities, which also led to inefficient duplication and lack of tailoring to local needs. Many humanitarian agencies were also unfamiliar with local contexts and conflict dynamics, resulting in ineffective interventions (CPA, 2007; Bannon, 2008; Fisher, 2007).

What are recent developments in IDRL?

Although IDRL is still in a nascent stage and gaps remain in its framework, progress has been made. The adoption of the 'Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance' (**IDRL Guidelines**) by the International Federation of Red Cross and Red Crescent Societies in 2007 is considered to be a significant development. Although these guidelines are non-binding, they are comprehensive in geographic scope, relevant for all sectors and for all types of disasters, and address both state and non-state actors. They aim to foster international agreement on how to address key issues specific to disaster settings. They define the responsibilities of affected states (reinforcing that primary responsibility lies with affected states) and offer a set of recommendations to governments for preparing their domestic laws and systems to manage international assistance during relief efforts. This includes encouraging legal facilities for operation, such as visa, customs and transport facilitation, tax exemptions, and a simplified process for acquiring temporary domestic legal personality. These facilities are conditional on ongoing compliance by humanitarian actors with core humanitarian principles and minimum standards drawn from widely recognised sources, such as the Code of Conduct.

The substance of the guidelines is drawn primarily from international laws, rules, norms and principles; and from lessons and good practice from the field. The guidelines have achieved broad international support. State parties to the Geneva Conventions adopted these guidelines at the International Conference of the Red Cross and Red Crescent in 2007. Moreover, several countries have already

adopted new regulations or administrative rules based on or inspired by the guidelines (Mosquini, 2011; Fisher, 2010; Bannon, 2008).

The International Law Commission (ILC), an expert body of the UN charged with codifying customary international law, has also been engaging in advancing the framework for disaster response. Its **programme on the 'Protection of Persons in the Event of Disasters'** is aimed at developing a legally binding framework at the global level (Mosquini, 2011). Draft articles include attention to humanitarian principles; the duty of states to seek assistance when their national response capacity is exceeded; the duty not to arbitrarily withhold consent to external assistance; and the right of the international community to offer assistance.

IHL and Humanitarian Assistance Involving Non-State Armed Groups

Since the mid-1990s, IHL has expanded its coverage of non-international armed conflicts. Various treaties have been drafted or revised to regulate states and armed groups party to such conflicts. Customary international law has gone through a similar expansion (Roberts and Sivakumaran, 2012). The term 'armed groups' is not defined in treaty law. In order to be classified as a non-international armed conflict, the parties involved must demonstrate a certain level of organisation. Organised armed groups are extremely diverse, however, ranging from those that are highly centralised (with a strong hierarchy and effective chain of command) to those that are decentralised (with semi-autonomous or splinter factions) (Mack, 2008). Groups may also differ in their level of territorial control; and their capacity to train members and to carry out disciplinary or punitive measures for IHL violations (Rondeau, 2011). The terms 'organised armed group', 'non-state armed group' and 'armed group' will be used interchangeably in this section.

Under what basis is IHL considered binding on non-state armed groups?

IHL binds all parties to non-international armed conflicts, whether state actors or organised armed groups. Various explanations are given to justify the binding force of IHL on armed groups. These include binding force via the following:

The state – the doctrine of legislative jurisdiction

This explanation, considered by some as **the majority view, holds that IHL applies to armed groups because the 'parent' state has accepted the IHL rule(s)**. It is based on the capacity and right of a state to legislate for all its nationals and to impose upon them obligations that originate from international law. Organised armed groups may reject such an explanation, however, on the grounds that this is the same state against which they are fighting (Kleffner, 2011).

Individuals

The fact that individuals can be held accountable for war crimes demonstrates that they are subject to duties that stem directly from IHL. Kleffner (2011) argues, however, that individual responsibility is not sufficient to justify the binding force of IHL on organised armed groups.

The exercise of de facto government forces

Should an organised armed group carry out government functions and exercise effective sovereignty (or *de facto* authority), it may be argued that it is thus bound by IHL (Kleffner, 2011). Similar arguments have been made to justify the application of human rights obligations to non-state actors (Bellal et al., 2011). This degree of effectiveness is rarely met by armed groups, however (Kleffner, 2011). In addition, there is no clear legal indication of what level of ‘authority’ is required to trigger human rights obligations (Bellal et al., 2011).

International customary law – legal personality

Armed groups that have reached a certain level of organisation, stability and effective control of territory can be considered to possess international legal personality. This renders them bound by customary international law (Kleffner, 2011). A similar argument is made regarding human rights law and the application of ‘general principles of law recognised by civilised nations’. The International Law Association argues that armed groups are bound by core human rights norms that are part of *jus cogens* norms (Bellal et al., 2011).

These explanations can be beneficial as armed groups here are bound by the international community of states, rather than by the state against whom they fight. Nonetheless, as long as armed groups are excluded from these processes of law formation, their sense of ownership over the rules may still be weak (Kleffner, 2011; ICRC, 2005b).

Consent – special agreement or unilateral declaration

IHL can be binding on such groups due to their own consent, rather than being imposed. Common Article 3(2) of the Geneva Conventions encourages parties to a non-international armed conflict to conclude ‘special agreements’ through which all or parts of the other provisions of the Conventions (applicable to international armed conflict) are brought into force. There are various situations in which **armed groups have entered into agreements with international organisations and states in which they accept certain IHL obligations** (see box below: Operation Lifeline Sudan). Such agreements are considered to improve compliance by non-state groups. States are often unwilling, however, to enter into such agreements due to concerns about granting legitimacy to armed groups party to the conflict (Roberts and Sivakumaran, 2012; Pfanner, 2009). There are also concerns that it could lead to the argument that armed groups must consent to all rules in order to be considered bound by them (Kleffner, 2011).

Armed groups have also engaged in unilateral declarations of their acceptance of IHL rules. For example, various non-state actors have become party to the ‘Deeds of Commitment’, an instrument launched by Geneva Call to ban anti-personnel mines and to further protect children from the effects of armed conflict.

Operation Lifeline Sudan – an example of negotiated access

Operation Lifeline Sudan (OLS) materialized in April 1989 during the Second Sudanese Civil War between the Khartoum-based government in the North and the Sudan People's Liberation Army (SPLA) in the South. Displacement and starvation occurred on a large scale. OLS involved a 'negotiated access' model, whereby a trilateral agreement was reached in 1989 by the United Nations, the Sudanese government and the SPLA in order to access affected areas in the South (and to a lesser extent the North). While originally based solely on 'mutual understandings', the OLS later adopted signed written agreements with the rebel movements on 'ground rules'. These rules involved acknowledgement of the need for protection of civilians for aid delivery; the right of civilians to live in safety and dignity; and the principle that humanitarian assistance must be provided in accordance to considerations of need alone, independent of political factors. OLS set an important precedent that it is possible to negotiate access to areas of conflict; and to obtain acknowledgement from both warring sides of the need to provide civilians with humanitarian relief and to facilitate safe delivery. It contributed to the distribution of large amounts of food and other relief supplies to southern Sudan, which helped significantly in relieving famine and suffering. Despite an established system of 'ground rules', however, there were problems with accountability and the neutrality of humanitarian aid. Glaser (2005) argues that in practice, the rules were used more as a tool to provide safe access than as a means of holding rebel authorities accountable. There were various accusations that the SPLA was diverting aid meant for civilians and using it to feed their own soldiers (Philpot, 2011; Rigalo and Morrison, 2007; Glaser, 2005).

Should armed groups be involved in law creation?

It is commonly argued that **non-state armed groups are unlikely to feel bound by rules that they had no part in developing**, thus undermining compliance. There are various cases in which armed groups have given notice that they do not consider themselves bound by particular rules since they did not participate in their creation. In response, some scholars have advocated for the **participation of non-state armed groups in law creation**, in order to boost their sense of ownership, recognition of and compliance with IHL rules. The UN Secretary General has indicated that although engagement with such groups may be considered 'unpalatable' by some states, it is essential in order to promote respect for IHL and to protect civilians (Rondeau, 2011, p. 137). This suggestion faces much resistance, however, as states are reluctant to relinquish their exclusive law-making powers (Roberts and Sivakumaran, 2012).

Concerns with this potential expansion in the sources of law are centred on views **that it would affect the legal status of armed groups and increase their perceived legitimacy**. Roberts and Sivakumaran (2012) argue that granting armed groups some role in lawmaking does not have to lead to any change in their legal status. There is no precedent to indicate that this would be a necessary outcome. Concerns over imparting legitimacy to armed groups are even more pronounced. The Government of Myanmar, for example, prevented UN entities from engaging with Burmese armed groups on child soldier issues due to their concerns over legitimising the groups. Another key concern, from the perspective of the international community, is that the involvement of armed groups in law creation could result in the

downgrading of humanitarian law protections. This is related to the view that by granting such groups a role in lawmaking, they may declare that they are not bound by existing legal obligations to which they played no role in developing. It is thus important to ensure that the participation of armed groups is not equated to giving them a role equal to that of states or the license to dictate the content of the law (Roberts and Sivakumaran, 2012).

How to engage with armed groups?

Roberts and Sivakumaran (2012) highlight several ways in which armed groups could be incorporated into law creation:

- Encouraging them to engage in **unilateral declarations** and '**special agreements**' that bind them to IHL rules.
- Integrating them into **multilateral treaties**, either by giving armed groups some role in treaty negotiation and/or recognising a right for armed groups to ratify or accede to the treaty.
- Allowing them to play a role in the creation of customary IHL ('**quasi-custom**'), for example, through the publishing of their codes of conduct, internal orders, drafted constitutions and penal codes, many of which may contain IHL provisions (e.g. the Ejército Zapatista de Liberación Nacional (EZLN) of Mexico enacted a Revolutionary Women's Law and the LTTE in Sri Lanka enacted a Child Protection Act). The legal status of these materials remains contentious, however. While the ICRC has stated that their legal significance is 'unclear', the ICTY has taken into account some of the practice of non-state armed groups in determining that various customary rules apply to non-international armed conflicts.

Bangerter (2009) provides some practical guidance on how to engage in dialogue with non-state armed groups and to persuade them to follow IHL rules. Merely explaining IHL and telling decision-makers and commanders about specific legal standards, while essential, is rarely sufficient to convince armed groups to comply. The following three principles are important to adopt in order to improve the chances of successful persuasion:

- Taking time to discuss: this process entails building a case over time and involves both parties exchanging ideas and asking questions, rather than simply stating a position.
- Sowing doubt rather than trying to convince: by creating a sense of doubt, it may become possible to find pragmatic solutions. For example, reminding a commander that child soldiers represent a command and control problem in military terms may render him or her more open to discussions to end child recruitment and to demobilize existing child soldiers.
- Appealing to the other person's self-image: most members of armed groups view themselves as part of a decent group, fighting for a noble cause, rather than as war criminals. Appealing to these positive convictions could result in their acceptance of certain protections.

The Responsibility to Protect

The **principle of non-intervention** is a **key aspect of international law**. The UN Charter of 1945 states clearly that: 'Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state' (Article 2(7)). This provision applies specifically to UN organs. An exception to the principle of non-intervention is articulated in the Convention on the Prevention and Punishment of the Crime of Genocide, which asserts in Article 1 that 'genocide, whether committed in time of peace or in time of war, is a crime under international law which [contracting states] undertake to prevent and to punish'. Most countries are party to this treaty. In addition, Chapter VII of the UN Charter allows for the Security Council to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' and to take military or non-military action to 'restore international peace and security'.

Despite these latter provisions, the response of the international community to genocide and threats to peace has often been erratic and incomplete (Evans, 2006-7). Barber (2009) argues, however, that although there have been significant failures, such as in Somalia in 1993, Rwanda in 1994 and Srebrenica, Bosnia and Herzegovina, in 1995, there has been a gradual expansion in the Security Council's interpretation of what constitutes a 'threat to the peace, breach of the peace, or act of aggression' over the past decades.

What led to the development of the 'responsibility to protect'?

The experience of **Kosovo (1998-1999)** was a turning point that resulted in **extensive debate about international intervention**. After the brutal conflict in Bosnia and Herzegovina, the international community was quick to condemn the violence in Kosovo. Security Council resolutions 1160 and 1199 of 1998 identified the Federal Republic of Yugoslavia (FRY) as the primary culprit and called on the FRY to achieve a political solution. The resolutions stopped short though of a decision to take 'all necessary measures' or to authorise member states to do so. In March 1999, following lack of adherence of the Yugoslav side and continued violence, NATO commenced air strikes against Serb forces. After 11 weeks, the defeated Serb troops retreated from Kosovo. NATO justified the military intervention on humanitarian grounds. Although the intervention was viewed as decisive for ending the military conflict in Kosovo and for stopping mass killings and other human rights violations there, NATO's actions were controversial and considered by some to be a violation of the prohibition of the use of force (Hilpold, 2009).

In the aftermath of Kosovo, many attempts were made to find a legal justification for the intervention. Efforts were also made to determine whether developments in Kosovo amounted to acceptance of 'humanitarian intervention' (military action to prevent or end human rights violations, without the consent of the state within whose territory the force is applied) as a legal form of action. Hehir (2009) finds that Kosovo has not resulted in any change in international customary law. **Since Kosovo, there has not been any evidence of consistent state practice regarding unilateral humanitarian action**. In addition, there is **no general acceptance (*opinio juris*) of such action**, evident in the fact that various countries, including China, Russia, India, Japan, Indonesia and South Korea were unsupportive of NATO's intervention. In the aftermath, 133 states comprising the G-77 declared that they reject the so-called 'right' of humanitarian intervention.

In response to the legal deficiencies exposed by Kosovo and NATO's justification of humanitarian intervention, then UN Secretary general Kofi Annan called for fresh thinking on the issue. In response, the International Commission on Intervention and State Sovereignty (ICISS) published in 2001 its seminal

report entitled *The Responsibility to Protect*. It aims to find some new common ground on issues of humanitarian intervention. The report states that while the responsibility to protect resides first and foremost with the state whose people are directly affected, a **'residual responsibility' lies with the broader community of states**, and that this residual responsibility is 'activated when a particular state is clearly either unwilling or unable to fulfil its responsibility to protect or is itself the actual perpetrator of crimes or atrocities (p. 17).'

How does the 'responsibility to protect' differ from 'humanitarian intervention'?

'Humanitarian intervention' and the 'responsibility to protect' (R2P) share the conviction that sovereignty is not absolute. However, **the R2P doctrine shifts away from state-centred motivations to the interests of victims** by focusing not on the right of states to intervene but on a responsibility to protect populations at risk. In addition, it introduces a new way of looking at the essence of sovereignty, moving away from issues of 'control' and emphasising 'responsibility' to one's own citizens and the wider international community (Arbour, 2008; Evans, 2006-7).

Another contribution of R2P is to extend the intervention **beyond a purely military intervention** and to encompass a whole continuum of obligations:

- **The responsibility to prevent:** Addressing root causes of internal conflict. The ICISS considered this to be the most important obligation.
- **The responsibility to react:** Responding to situations of compelling human need with appropriate measures that could include sanctions, prosecutions or military intervention.
- **The responsibility to rebuild:** Providing full assistance with recovery, reconstruction and reconciliation.

How has the concept of R2P been treated?

R2P is referred to in the ICISS report as an **'emerging guiding principle'**, which has yet to achieve the status of a new principle of customary international law (p. 15). The UN High-Level Panel on Threats Challenges and Change endorsed R2P as an 'emerging norm' in its report *A More Secure World: Our Shared Responsibility* (2004, p. 106). R2P as an 'emerging norm' was confirmed by the UN Secretary-General's 2005 report, *In Larger Freedom: Towards Development, Security and Human Rights for All*, which centred on the idea that threats facing humanity can only be solved through collective action. At the same time, the report acknowledged the sensitivities involved in R2P (p. 35). Also in 2005, the concept of R2P was incorporated into the outcome document of the high-level UN World Summit meeting. Participating member states recognised the **responsibility of each individual state to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity**, as well as a corresponding **responsibility of the international community to help states to exercise this responsibility** through peaceful means or through collective action should peaceful means prove inadequate. This document was adopted by the General Assembly in its Resolution 60/1 2005 World Summit Outcome (paras 138-139).

The R2P framework has been criticized for not being gender-responsive in that it largely neglects the differing needs and capacities of men and women; and fails to acknowledge that women are disproportionately represented among the poor and marginalized in weak unstable states. Decision-

making structures that emphasise the equal participation of women should be incorporated in the framework (Bond and Sherret, 2005).

What is the legal force of R2P and what are challenges to its implementation?

Unlike treaties, General Assembly resolutions are not binding under international law but are solely recommendatory. Nonetheless, Gierycz (2010) argues that the World Summit Outcome document has particularly high political and moral significance since its commitments were undertaken by the world leaders. In addition, it addresses fundamental issues involving the obligation to provide protection from genocide, war crimes, ethnic cleansing and crimes against humanity. These obligations reflect well established rules and principles of IHL and IHRL treaties and customary international law. Arbour (2008) also emphasises that the R2P doctrine rests on an established obligation under international law: the prevention and punishment of genocide as stipulated in the Genocide Convention.

Alongside **uncertainty over the legal force of R2P**, there are various other challenges involved with its implementation. Bellamy (2006) highlights that the inclusion of R2P in the Outcome Document derived in part from a concession whereby the notion of legitimate intervention without Security Council approval, which was integral to the original ICISS proposal, was dropped in favour of Security Council authorisation (cited in Hehir, 2009). As such, the original notion of R2P has lost a core aspect in its General Assembly adoption.

In addition, the concept of complementarity, whereby the primary responsibility to protect lies with the state and the subsidiary responsibility with the international community, can result in an additional threshold for collective security action. Domestic authorities may invoke their primary responsibility to argue against any exercise of protection by international actors, which may be accepted by the international community. Such was the case in Darfur, where Security Council members claimed that it was premature to impose sanctions against Sudan since the crisis had not reached the stage where the domestic government had demonstrated a clear failure to exercise its responsibility to protect (Stahn, 2007). Further, none of the key documents that endorse R2P provide meaningful guidance on how to deal with violations of the responsibility to protect by states and the international community.

The context of disasters

The devastating effects of cyclone Nargis in Burma and the refusal by the government to allow access to affected populations resulted in arguments to extend the concept of R2P to disaster situations. Some members of the ICISS argued that R2P was not meant to protect people from the impact of natural disasters; whereas others argued that R2P could be invoked if a government's failure to respond, in the face of immense need and the threat of large-scale loss of life, amounted to a crime against humanity. Collective action was ultimately not adopted in the case of Burma, nor did the UN General Assembly endorse such an expansion in coverage of R2P. Nonetheless, Barber (2009) argues that the concept of R2P could still be important in developing a legal framework for assessing the appropriate role of the international community in the aftermath of natural disaster.

Intervention in Libya – strengthening or weakening R2P?

In response to the rapidly disintegrating situation in Libya in 2011, the UN Security Council adopted Resolution 1970 in March, which deplored the gross and systemic human rights violations in the country, called for an end to hostilities and for the observance of human rights, and set in place a number of coercive measures. Resolution 1973 reiterated the responsibility of the Libyan government to protect the Libyan population and authorised coercive military intervention, without the consent of the Libyan government. Two days after this resolution, a military coalition under the umbrella of NATO began bombing Libyan government positions, with the aim of protecting the civilian population against gross human rights abuses. With ensuing concerns of a stalemate between the government and rebels, the goal of the intervention shifted to one of regime change. The subsequent military victory of the NATO coalition was seen as sufficient to conclude that the R2P operation was a success. The intervention was also seen by some to have advanced the cause of R2P: opposing Security Council countries had restrained from using a veto, and swift action had been taken. The intervention has been severely criticised, however, particularly by Security Council members who had abstained from the vote on Resolution 1973, for ‘mission creep’. Had regime change been specified as a goal from the outset, it is unlikely that Security Council endorsement would have materialised. Residual concerns over ‘mission creep’ have been used to explain to some extent why the UN Security Council has failed to act in the case of Syria, despite reports of violations of a scale similar to those in Libya (Zifcak, 2012).

Compliance with and Enforcement of International Humanitarian Law

There are various methods and mechanisms that have been adopted to promote compliance with and enforcement of international humanitarian law. For example, these can take the form of penal and disciplinary measures, legal advisors in the military and military sanctions, fact finding missions, human rights bodies, and the enforcement of international criminal law through courts and tribunals.

Provisions under the Geneva Conventions and Additional Protocols

Protecting Powers

The Geneva Conventions introduced the system of appointing Protecting Powers in order to ensure that protected persons are treated in accordance with the Conventions (common Art 8). This system has not been effective, however, and has rarely been implemented. The Geneva Conventions also provide for the ICRC to take the place of the Protecting Powers, if none are appointed, and make provision for the ICRC to visit prisoners of war and detained civilians (common Art 10) (Pfanner, 2009). The ICRC today declines to act as protecting power instead of acting on its own behalf.

Fact-Finding Commission

Additional Protocol I introduced the International Humanitarian Fact-Finding Commission, with the role of inquiring into any allegations of serious violations of the Geneva Conventions or API (Art 90). The Commission has rarely been relied upon, however, probably in large part due to the requirement that inquiries can only be initiated by state parties into other state parties, rather than allowing for initiation by individuals claiming breaches of IHL (Pfanner, 2009). (UN fact-finding missions will be discussed later in this section.)

Penal measures

Another method of enforcement envisaged by the Geneva Conventions and AP I is the obligation by state parties to investigate persons accused of carrying out or ordering the most serious war crimes, known as grave breaches (wilful killing, torture or inhuman treatment, biological experiments, wilfully causing great suffering, causing serious injury to body or health, unlawful and wanton extensive destruction and appropriation of property not justified by military necessity). Grave breaches are liable to punishment and prosecution (GCI, Art 49, GCII, Art 50, GC III, Art 129, GCIV, Art 146). While many states have incorporated clauses in their national penal systems, providing for sanctions for grave violations of IHL, it is up to them to decide how and by whom such measures should be taken (Philippe, 2008).

Reparations

Should parties to a conflict be held responsible for breaches in IHL in international armed conflict, there is an obligation to pay compensation (AP1, Art 91). It remains disputed, however, whether an individual right to reparations is recognised under IHL (Pfanner, 2009).

Military counsel and sanctions

Uniformed military lawyers comprise the compliance unit within the military. They work to ensure that commanders and troops obey the rules of engagement, which operationalise IHL. A study of military lawyers in the US Army Judge Advocates General's Corps (JAG) found that they help to devise the rules of engagement and train troops in these rules, prior to deployment and on the battlefield. In order to promote salience and compliance, these rules are framed in a way that demonstrates their contribution to military effectiveness (Dickinson, 2010).

Soldiers who use excessive force are also subject to disciplinary action, often resulting in criminal or administrative penalties. Disciplinary sanctions can be used to repress not only grave breaches but also other violations of IHL. Depending on the scope of military disciplinary law provided for in a state, the impact on compliance with IHL can be significant. Sanctions have a dual aim: education, which involves encouraging soldiers to discharge their responsibilities better and to respect the rules; and dissuasion, which serves as a warning to all personnel under the authority imposing the sanction. In order for national military disciplinary sanctions to promote compliance with IHL, they must be based on rules that are themselves inspired by IHL (Renault, 2008).

Fact-finding

Fact-finding can be defined as a method of determining facts through the ‘evaluation and compilation of various information sources’ (Boutruche, 2011, p. 2). While fact-finding missions, such as those conducted or supported by the UN Office of the High Commissioner for Human Rights and the UN Human Rights Council (UNHRC) have focused on human rights violations in peacetime and during armed conflict, they have more recently expanded to include coverage of IHL – for example, the UNHRC sponsored fact-finding on the Gaza conflict (2008-9) and on the ‘Israeli attacks on the flotilla of ships carrying humanitarian assistance’ (2010). Other examples of fact-finding by the UN on IHL issues including the Kalshoven Commission in Yugoslavia (1992) and the International Inquiry on Darfur (1995), both of which were authorised by the UN Security Council. Fact-finding has also extended to cover non-state actors, such as the Darfur rebels and the Palestinian authorities (Yihdego, 2012). There have also been fact-finding visits of the UN special rapporteur on violence against women to various conflict areas, such as Darfur, the DRC and Palestine.

By ascertaining facts and interpreting and applying general IHL rules, **fact-finding can play an integral role in the implementation of IHL**. Fact-finding can also **facilitate determinations of individual criminal liability**. Some UN fact-finding reports (e.g. Yugoslavia and Darfur) have led to criminal indictments (Boutruche, 2011).

There are various challenges to fact-finding on international human rights and humanitarian law violations. These include:

- Separating fact-finding and legal evaluation.
- Lack of information, making it difficult to reach definite conclusions and to satisfy robust standards of proof.
- Establishing facts dependent on complex aspects of armed conflict, such as command structures, legitimate military targets, and principles of proportionality.
- Securing cooperation from the parties to the conflict in order to access relevant areas to obtain and verify information. There are currently no legal consequences to non-compliance with UNHCR and UN General Assembly fact-finding. In contrast, the UN Security Council can refer fact-finding to the ICC or to a special criminal tribunal (such as in the case of Yugoslavia) (Boutruche, 2011).
- Lack of witness protection mechanisms to protect those who come forward to give information.
- Addressing the dilemma faced by humanitarian actors, whose participation in fact-finding and other accountability mechanisms may undermine their access to populations in need (see also the section below on ICL).
- The interplay of human rights and IHL in inquiries; facts in question can vary depending on whether they are assessed under IHL or under human rights. Legal conclusions will also vary according to the body of law applied. Boutruche (2011) notes that Commissions of inquiry tend to affirm the complementary nature of human rights and IHL, highlighting in addition the principle of *lex specialis* (see *Overview of IHL*).
- Communicating the importance of fact-finding to local communities that have been affected by violent conflict and the links to accountability and protection.

Human rights bodies

International humanitarian law focuses on ‘the parties to the conflict’. In contrast, international human rights law is formulated as individual entitlements and provides for a right to remedy, through lodging **individual complaints** against alleged violations. Such a right does not exist in IHL. As such, human rights bodies – human rights treaty monitoring bodies and the Human Rights Council – have increasingly been called upon to **scrutinise the application of human rights law in situations of armed conflict**. While their competence is generally confined to determination of violations under human rights law, this does not preclude them from taking into consideration provisions of IHL in order to interpret such norms. The involvement of human rights bodies in situations of armed conflict can be beneficial in terms of using human rights law to supplement and assist in interpreting state obligations under IHL (Byron, 2006-7).

Some scholars have argued, however, that the consideration of IHL by human rights bodies can be problematic. Human rights bodies often lack expertise in IHL and may reach conclusions contrary to humanitarian law experts (Meron, cited in Byron, 2006-7). Should human rights bodies continue to deal with cases involving armed conflict, it is important that an effort is made to employ more members with IHL expertise. Another criticism is that human rights law is not enforceable against non-state groups. As such, the findings of a human rights body addressing a case involving a non-international armed conflict may appear one-sided since it cannot hear applications against or demand reports from non-state entities (Byron, 2006-7).

Courts, tribunals and international criminal law

The International Court of Justice

The International Court of Justice, the main judicial organ of the United Nations, applies all bodies of international law. It contributes to the implementation of humanitarian law through its jurisprudence and its advisory opinions. It can be called upon to settle a dispute between states on the application of IHL so long as both states have consented to the Court’s jurisdiction. The ICJ’s interpretations of IHL, **judgments and opinions are influential** and widely respected. (See, for example: the case of Nicaragua vs. the US, concerning the *provision of aid to the Contras in Nicaragua* in this guide’s section on Humanitarian Principles and Humanitarian Assistance; and the *Legality of Nuclear Weapons* and *Construction of a Wall in the Occupied Palestinian Territories* opinions in *Overlapping Areas of Law*.) However, judgments **may not necessarily be implemented**. The US has yet to pay war reparations to Nicaragua, as ordered by the Court; and the opinions are inherently non-binding (Pfanner, 2009).

International criminal law

International criminal law prohibits certain categories of conduct viewed as serious atrocities (primarily war crimes, crimes against humanity and genocide) and seeks to hold accountable individual perpetrators of such conduct (individual criminal responsibility). **Grave breaches of IHL** rules, as specified in the Geneva Conventions (see *Provisions under the Geneva Conventions and Additional Protocols* above), **constitute war crimes for which individuals can be held directly accountable**. It is the **primary responsibility of states to prosecute** these crimes. If a state is unable or unwilling, then the crimes can be tried by **international criminal tribunals** established by treaty or by a binding decision of the UN Security Council (Posse, 2006).

International *ad hoc* tribunals (e.g. ICTY and ICTR), mixed tribunals (e.g. the Special Court for Sierra Leone), and the permanent International Criminal Court have been set up to enforce individual criminal responsibility for violations of IHL, crimes against humanity and genocide. Responsibility is incurred not only by acting, but also by **failing to act** where there is an obligation to act. This includes military leaders and their superiors who fail to take necessary and reasonable measures to prevent or suppress the commission of unlawful acts by subordinates, over whom they have effective control (Posse, 2006). This form of liability, termed ‘command responsibility’ has been established by the ICTY and ICTR.

Court decisions are not simply declaratory of the law, but courts themselves are important actors in their development. **The ICTY and ICTR interpreted their mandate as extending to non-international armed conflict**, whereas the Geneva Conventions and Additional Protocols only specified the application of individual criminal responsibility in international armed conflict situations. **This extended jurisdiction was subsequently incorporated into the Rome Statute of the International Criminal Court.** The ICC also specifies two categories of crimes over which they have jurisdiction. The first concerns grave breaches of the Geneva Conventions in international armed conflict and serious violations of Article 3 in the case of non-international armed conflict. The second concerns other serious violations of the laws and customs applicable in international and non-international armed conflicts. This includes ‘intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance [mission]’ as long as they are entitled to civilian protection under IHL (Rome Statute, Articles 2(b)(iii) and 2(e)(iii)). In addition to war crimes, the ICC and the other international (and mixed) tribunals have jurisdiction over crimes against humanity, genocide and the crime of aggression.

Humanitarian organisations operating in conflict areas are often witness to violations that can be used as evidence in international criminal proceedings. However, their **participation in such proceedings could undermine their access to populations in need.** If parties to the conflict that are facilitating the delivery of assistance are at risk of criminal investigation and prosecution, they may deny humanitarian actors access to affected areas and withdraw from humanitarian dialogue. Humanitarian organisations need to develop a strategy to address this dilemma; and international criminal tribunals need to be aware of these risks. Both sides should work together to minimise potential adverse impacts on the provision of humanitarian assistance (La Rosa, 2006).

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<http://www.ifrc.org/en/what-we-do/idrl/idrl-guidelines/>

- Protection of Persons in the Event of Disasters (ILC Programme)

http://untreaty.un.org/ilc/guide/6_3.htm

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