



ADVISORY COMMITTEE ON ISSUES OF PUBLIC INTERNATIONAL LAW

**ADVISORY REPORT
ON HUMANITARIAN ASSISTANCE**

**ADVISORY REPORT NO. 25
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ANNEXES

Request for advice on humanitarian assistance, dated 6 June 2014
Members of the Advisory Committee on Issues of Public International Law

LIST OF ABBREVIATIONS

| | |
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| CAVV | Advisory Committee on Issues of Public International Law |
| ICRC | International Committee of the Red Cross |
| IHFFC | International Humanitarian Fact-Finding Commission |
| ILC | International Law Commission |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| OCHA | Office for the Coordination of Humanitarian Affairs |
| R2P | Responsibility to Protect |
| UN | United Nations |

PREFACE

On 6 June 2014 the Minister of Foreign Affairs asked the Advisory Committee on Issues of Public International Law to prepare an advisory report on humanitarian assistance during armed conflicts. A key question in the request concerns the nature of the international legal framework governing access and facilitation of humanitarian assistance, and how this framework can be assessed in the light of the present challenges, specifically the increasing number of instances in which access and facilitation of humanitarian aid is hampered or denied in armed conflicts.

The group formed within the CAVV to draft the report consisted of Professor L.J. van den Herik, Professor N.M.C.P. Jägers and Professor W.G. Werner.¹

The CAVV discussed the outline of the report at a plenary meeting on 23 June 2014. Given the short time frame within which the report had to be prepared (and in the summer period), the CAVV opted for a procedure that would allow its members to comment on the draft by e-mail. The outline of the report and two draft versions were sent to the members for their comments in July. The CAVV adopted the final text of the report on 26 August 2014.

¹ The CAVV benefitted greatly from the information provided by Emilie Kuijt (preparing a PhD at the Grotius Centre for International Legal Studies at Leiden University on Humanitarian Assistance and Sovereignty in International Law: Rights & Obligations in International Law regarding the Provision of Humanitarian Assistance) and Stefanie Jansen-Wilhelm (preparing a PhD at Tilburg University on the question whether states can be under an obligation to accept international assistance specifically after disasters).

INTRODUCTION AND STRUCTURE OF ADVISORY REPORT

In the course of more than three years of conflict Syria has repeatedly denied access for humanitarian assistance. Also in other conflict situations, such as Somalia and Sudan, humanitarian access has been refused, greatly hindered or delayed, for example by stringent visa requirements and other bureaucratic obstacles. Furthermore, aid convoys have been attacked or plundered. Both states and armed opposition groups have been responsible for blocking and hindering humanitarian assistance during armed conflicts. An example of the latter is the al-Shabaab group in Somalia. In areas under the effective control of armed opposition groups, the state often refuses to allow humanitarian assistance to be provided. In such circumstances the humanitarian nature of the aid operation is often disputed, as was the case with the Russian convoys sent to eastern Ukraine without the consent of the government in Kiev.

These situations beg the question of whether and, if so, in what circumstances humanitarian assistance for the civilian population may be refused. More generally, this problem suggests there is a need to reassess the international legal framework governing access and facilitation of humanitarian aid during armed conflict.

On 6 June 2014 the Minister of Foreign Affairs asked the Advisory Committee on Issues of Public International Law to prepare, as a matter of priority, an advisory report on humanitarian assistance during armed conflict. The following questions were submitted to the Committee as a guide in drafting the report:

- 1) What is the international legal framework for access and facilitation of humanitarian aid in situations of armed conflict (both international and non-international)?
- 2) What role is played by the sovereignty of the country where humanitarian assistance is required? Are there limits to the freedom of states/parties to refuse humanitarian assistance and, if so, what are the consequences under international law if these limits are not respected?
- 3) Does international law allow for exceptions to the requirement that the territorial state must grant consent for cross-border humanitarian assistance if a state systematically and arbitrarily denies access to urgently needed relief supplies?

- 4) Is the existing legal framework sufficiently clear and tailored to the current challenges facing humanitarian assistance, or should it be supplemented and/or clarified?

These questions are addressed below. In view of the relatively short time available, the Committee decided to produce a concise report focusing mainly on situations involving non-international armed conflicts, the most prevalent type of conflict today. Moreover, the rules of international humanitarian law are less comprehensive for conflicts of this kind, and there is therefore a greater need for further study of whether the existing legal framework is sufficiently clear or needs to be supplemented.

The report is organised as follows. Section 1 addresses the concept of humanitarian assistance. Section 2 examines the role of sovereignty in matters concerning humanitarian assistance. Primary responsibility for ensuring the safety and welfare of the civilian population rests with the state. However, the advisory report focuses on situations in which the state is no longer willing or able to discharge this responsibility. In this connection section 3 discusses the international legal framework governing access and facilitation of humanitarian aid delivery during *international armed conflicts* between states, dealing first with situations of *occupation*. Section 4 examines questions concerning humanitarian access during *non-international armed conflicts* by analysing the rules of international law applicable to such conflicts. A distinction is made between three types of non-international armed conflicts, namely (i) conflicts between the state and a rebel group, where the latter has control over part of the state's territory and where customary international law and Additional Protocol II to the Geneva Conventions² are applicable in so far as the territorial state has ratified the Protocol; (ii) conflicts between the state and a rebel group where the latter does not have territory under its control and where customary international law and common article 3 of the Geneva Conventions³ are applicable; and (iii) conflicts among rebel groups in failed states. For each of these three types of non-

² Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the protection of victims of non-international armed conflicts (Protocol II), Berne, 8 June 1977, Dutch Treaty Series 1978, 42.

³ Geneva Convention relative to the protection of civilian persons in time of war, Geneva, 12 August 1949, Dutch Treaty Series 1951, 75; Geneva Convention relative to the treatment of prisoners of war, Geneva, 12 August 1949, Dutch Treaty Series 1951, 74; Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, Geneva, 12 August 1949, Dutch Treaty Series 1951, 72; Geneva Convention for the amelioration of wounded, sick and shipwrecked members of armed forces, Geneva, 12 August 1949, Dutch Treaty Series 1951, 73.

international armed conflict, the Committee will examine the legal framework governing humanitarian assistance and in particular the application of the principle of consent. Section 5 considers what happens when humanitarian assistance is provided without consent. Finally, section 6 indicates areas in which the existing international legal framework needs further clarification or amendment.

In view of the context of armed conflict, this advisory report takes international humanitarian law as its starting point. The interpretation of rules in this area of law can be inspired and supplemented by rules from other areas of law, including human rights, as well as by general concepts of public international law.⁴ Where relevant and appropriate, the work of the International Law Commission (ILC) on access to humanitarian assistance in the case of natural disasters is referred to, by analogy. The report also refers to other instruments of non-binding legal status as these instruments may be indicative of how the law on humanitarian assistance may evolve in the future.

⁴ Where international humanitarian law does not provide clear rules, the Committee has referred more directly to rules from other areas of law. In this way, the CAVV endorses the position taken by the government in its reaction to the CAVV advisory report on armed drones, House of Representatives, 2013-2014 session, Parliamentary Papers 33 750 X, no. 4, p. 3.

1. THE CONCEPT OF HUMANITARIAN ASSISTANCE⁵

Assistance qualifies as 'humanitarian' when its objective is to alleviate the suffering of the civilian population. The provision of assistance in times of armed conflict, including occupation, involves the delivery of essential relief supplies to meet basic human needs such as food and clean drinking water, as well as clothing, medicines, bedding and shelter. Assistance also includes medical care. Humanitarian assistance thus comprises both essential supplies and aid workers.

Humanitarian assistance must be provided in accordance with the principles of humanity and impartiality. Non-binding guidelines on humanitarian assistance often add a third principle, that of neutrality.⁶ The principle of humanity requires that the assistance should be exclusively humanitarian in nature and may not serve any other purpose. It should be offered without promoting political opinions or religious beliefs and without pursuit of profit. Humanitarian assistance may not be used to gather sensitive information of a political, economic or military nature that is irrelevant to disaster relief.⁷ The principle of impartiality is based partly on the criteria of non-discrimination and proportionality,⁸ under which relief may be provided on the basis of need alone and priority may not be given to certain groups of people on improper grounds. These principles do not preclude special measures to assist particularly vulnerable groups such as children and people with disabilities. Moreover, security considerations often dictate where and to whom assistance is provided, particularly in areas where hostilities are taking place. The principles of neutrality

⁵ The subject of this advisory report is humanitarian assistance or relief. These terms are used interchangeably. The broader term 'humanitarian activities', which is used in the four Geneva Conventions (in common article 3 and common article 9 (article 10 in the Fourth Geneva Convention)) and in article 81 of Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Berne, 8 June 1977, Dutch Treaty Series 1978, 41), includes not only humanitarian assistance but also protective measures, i.e. measures intended to ensure respect for international humanitarian law. See ICRC Protection Policy, 90, International Review of the Red Cross, 871, September 2008, pp. 751-775.

⁶ The requirement of neutrality is not explicitly mentioned in the provisions of international humanitarian law on humanitarian assistance, including article 70 of Additional Protocol I and article 18 of Additional Protocol II. Consent may not therefore be withheld on the grounds that the assistance provided does not fulfil this requirement. However, the requirement of neutrality is mentioned elsewhere, for example in the UN's Guiding Principles, Annex to General Assembly Resolution 46/182, *Strengthening of the coordination of humanitarian emergency assistance of the United Nations*, 19 December 1991, paragraph 2.

⁷ The principle of humanity is defined in this way in paragraph 4.2 of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, International Federation of Red Cross and Red Crescent Societies, 2007.

⁸ See, for example, the International Court of Justice, *Nicaragua v. United States of America* (1986), paragraph 243.

and impartiality require that humanitarian assistance be provided without taking sides in hostilities or engaging in controversies of a political, religious or ideological nature.⁹ Providing assistance to civilians who are affiliated with one party to a conflict does not necessarily violate the principles of neutrality and impartiality. Equally, if a party to the conflict facilitates the provision of humanitarian assistance, this does not immediately constitute a violation of these principles. The fact that a humanitarian operation is protected by armed escorts does not necessarily detract from its neutral and impartial nature either, provided that the authorities who control the territory have given their approval and that the aim of the escorts is to protect the operation from attacks by bandits and common criminals.¹⁰

However, it is crucial to draw a clear distinction between impartial humanitarian assistance on the one hand and concepts such as humanitarian intervention and the responsibility to protect (R2P) on the other. This distinction is important in order to avoid politicisation of humanitarian assistance and ensure that the political considerations inherent in discussions of humanitarian intervention do not contaminate the principle of humanitarian assistance. R2P concerns the responsibility of states to protect their populations from international crimes such as genocide, crimes against humanity, war crimes and from ethnic cleansing. This responsibility may also exist outside the context of an armed conflict. R2P does not therefore have exactly the same scope and content as the legal framework for access and facilitation of humanitarian aid delivery during armed conflicts, not least because the latter is not directly linked to international crimes. Although R2P is a broad concept, it is often in practice associated with humanitarian intervention. For an analysis of the international law on these concepts, the CAVV would refer to previous advisory reports.¹¹ This advisory report is confined solely to issues concerning humanitarian assistance.

⁹ Resolution IX of the 20th International Conference of the Red Cross, Vienna 1965.

¹⁰ Resolution 5, Council of Delegates, 1993, *International Review of the Red Cross* 297, November-December 1993, pp. 477-478. The resolution also emphasises that armed protection (military escorts) should be used only in exceptional circumstances and as a last resort, and that there should be careful consideration of the advantages and disadvantages. Perceptions of partiality and intervention may have particularly negative and far-reaching consequences for the relief operation.

¹¹ Advisory report no. 13 of the Advisory Council on International Affairs (AIV) and the Advisory Committee on Issues of Public International Law (CAVV), *Humanitarian Intervention*, April 2000 and AIV/CAVV advisory report no. 70, *The Netherlands and the Responsibility to Protect: the responsibility to protect people from mass atrocities*, June 2010.

The concept of 'cross-border humanitarian assistance' is not a term of art. Nor is it a term used in international humanitarian law. It is a form of assistance which can offer a solution in practice, but is governed by the same rules as any other form of humanitarian assistance.¹²

¹² Cf. ICRC Q&A and Lexicon on Humanitarian Access (<http://www.icrc.org/eng/assets/files/2014/icrc-q-and-a-lexicon-on-humanitarian-access-06-2014.pdf>), June 2014, p. 3.

2. THE ROLE OF SOVEREIGNTY IN ISSUES OF HUMANITARIAN ASSISTANCE

Issues of sovereignty may arise at four different stages of relief operations: (i) sovereignty is naturally reflected in the basic principle that the territorial state has primary responsibility for providing humanitarian assistance. However, it also plays a role in three other contexts: (ii) where humanitarian assistance is provided by impartial humanitarian organisations; (iii) where issues of consent are involved; and (iv) in the duties of states to facilitate humanitarian assistance while retaining their right of control.¹³

2.1 Primary responsibility of the state

Primary responsibility for ensuring the welfare and safety of the civilian population rests with the state in whose territory that population is present, even in the case of an armed conflict. The only instance in which a duty to ensure essential foodstuffs and medical supplies is expressly formulated in international humanitarian law is in relation to occupation, namely in article 55 of the Fourth Geneva Convention. In other situations of armed conflict, this primary responsibility arises directly from human rights law. Relevant human rights in this context are the right to life and the prohibition of torture. Other rights of particular relevance to the subject of this advisory report are the right to housing, water and food¹⁴ and the right to medical care.¹⁵

This 'primary responsibility' may include a state's duty to request assistance if it is itself unable to fulfil its obligation. No such duty is explicitly formulated in the Geneva Conventions or the Additional Protocols to them. However, article 2 (1) of the International Covenant on Economic Social and Cultural Rights (ICESCR) expressly provides that states can fulfil their obligations under the Covenant through international assistance and cooperation. Under article 2 (1) ICESCR, states have an obligation to achieve

¹³ Cf. ICRC Q&A and lexicon on humanitarian access.

¹⁴ It follows from article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, 16 December 1966, Dutch Treaty Series 1969, 100) that states must take appropriate steps to ensure realisation of the right of everyone to an adequate standard of living, 'recognizing to this effect the essential importance of international co-operation based on free consent'. However, the explicit reference to 'free consent' in relation to food limits this obligation. On the specific subject of the right to food, the Committee on Economic, Social and Cultural Rights (CESCR) has stated that 'prevention of access to humanitarian food aid in internal conflicts or other emergency situations is a violation of the right to food', CESCR, General Comment No.12 (Twentieth session, 1999), The right to adequate food (Art.11), UN Doc. No. E/C.12/1999/5, paragraph 19.

¹⁵ Article 12 ICESCR as elaborated in CESCR, General Comment No. 14 (2000), *The right to the highest attainable standard of health*, UN Doc. No. E/C.12/2000/4.

progressively the full realisation of economic, social and cultural rights (ESC rights). The Supervisory Committee has made clear, however, that the obligation to realise the core content of these rights is of an immediate nature.¹⁶ As regards the right to health, the Committee has explained that access to health facilities, goods and services on a non-discriminatory basis belongs to the core content of this right.¹⁷ The Committee also states in General Comment No. 14 on the right to health that 'States parties have a joint and individual responsibility ... to cooperate in providing ... humanitarian assistance.'¹⁸ This responsibility to cooperate could be interpreted as implying a duty to request assistance, where necessary. Similarly, the Committee has stated, in respect of the right to food, that if a state argues 'that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access', it must demonstrate 'that every effort has been made to use all resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations', including 'that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.'¹⁹

2.2 Offer of humanitarian assistance

Where states do not fulfil their primary responsibility and do not themselves request assistance, humanitarian organisations may offer humanitarian assistance on their own initiative.²⁰ Offering strictly humanitarian assistance cannot be regarded as unlawful intervention or interference in the internal affairs of the territorial state or as otherwise in breach of international law.²¹

2.3 Consent

The provision of impartial humanitarian assistance is conditional upon the consent of the parties to the conflict and, in the case of a non-international armed conflict, the consent of

¹⁶ CESCR, General Comment No. 3, *The nature of States parties' obligations* (Art.2 (1))(Annex III), UN Doc. E/1991/23 (1990), paragraph 1.

¹⁷ CESCR, General Comment No. 14 (2000), *The right to the highest attainable standard of health*, paragraph 43(a). For the essence of the right to food, see CESCR, General Comment No.12 (Twentieth session, 1999), *The right to adequate food* (Art.11), paragraph 8.

¹⁸ *Ibid.*, para. 40.

¹⁹ CESCR, General Comment No.12 (Twentieth session, 1999), *The right to adequate food* (article 11), paragraph 17.

²⁰ The right of humanitarian initiative is laid down in common article 3 and common article 9 (article 10 in the Fourth Geneva Convention) and in article 81 of Additional Protocol I.

²¹ As also confirmed by the International Court of Justice in the case of *Nicaragua v. the United States* (1986), paragraph 242.

the territorial state concerned (see also below). In fact, a state has a duty to consent if (i) the operations are indeed of a humanitarian and impartial nature, and (ii) it is unwilling or unable to fulfil its primary responsibility and its civilian population therefore lacks goods essential to its survival and/or fundamental human rights are being violated.

2.4 Facilitation of humanitarian assistance

Where general consent has been given for humanitarian relief operations, both the parties to the conflict and third states should facilitate those operations. Authorisation of specific relief activities may be withheld temporarily and in certain areas for reasons of military necessity and security. However, this has no bearing on general consent and is instead an operational matter subject to specific rules and principles.

3. RULES OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE DURING AN INTERNATIONAL ARMED CONFLICT, INCLUDING OCCUPATION

The provision of humanitarian assistance during occupation and international armed conflict is largely regulated in the Fourth Geneva Convention and Additional Protocol I to the Geneva Conventions.

3.1 Occupation

Under article 55 of the Fourth Geneva Convention an occupying power has the duty of ensuring, to the fullest extent of the means available to it and in cooperation with the authorities of the occupied territory, food and medical supplies for the population. Additional requirements specified in article 69 of Additional Protocol I are clothing, bedding, shelter and other supplies essential to the survival of the civilian population. If the occupying power is unable to fulfil its obligations, it is obliged under article 59 of the Fourth Geneva Convention to agree to relief schemes on behalf of the civilian population and to facilitate them by all means at its disposal. Both these obligations are unconditional. The humanitarian aid may be provided by neutral third states or by impartial humanitarian organisations such as the International Committee of the Red Cross (ICRC).

All states party to the Fourth Geneva Convention have a duty to permit the free passage of humanitarian consignments and to guarantee their protection if supplies in the area are inadequate. Powers that grant free passage to relief consignments do have the right to search them and regulate their passage. However, they may not divert such consignments from the purpose for which they are intended or delay their forwarding, except in cases of urgent necessity in the interests of the population of the occupied territory. No tax may be levied on humanitarian assistance.

3.2 International armed conflict

In an international armed conflict, relief actions require the consent of the parties to the conflict. This is a consequence of article 70 of Additional Protocol I ('subject to the agreement of the Parties concerned in such relief actions'). During the negotiations on this provision, it was argued that states could not withhold consent on arbitrary grounds.²² This requirement of reasonableness has no explicit basis in the Convention. However, it is

²² ICRC Commentary to the Additional Protocols, paragraph 2805.

apparent from the absolute wording of article 70 (relief actions 'shall be undertaken'), that in certain situations territorial states may not refuse assistance. It has also been argued that the requirement of consent is modified by article 54 of Additional Protocol I, which prohibits the starvation of civilians as a method of warfare.²³ According to this interpretation, states may not refuse humanitarian assistance if this were to result in the starvation of the population.²⁴

Under article 70 of Additional Protocol I, the parties to the conflict and each party to the Convention have the same obligation to provide free passage as in situations of occupation. They are required to permit the rapid and unimpeded passage of relief consignments, equipment and personnel if the civilian population is not adequately provided with supplies, and to facilitate such passage even where the assistance is destined for the civilian population of the adversary. Parties to the conflict have the right to search the relief consignments and regulate their passage but may not divert them from the purpose for which they are intended or delay their forwarding, except in cases of urgent necessity in the interest of the population. Parties also have the right to make consent conditional on the distribution of the assistance being carried out under the local supervision of an impartial protecting power, which today is usually the International Committee of the Red Cross (ICRC).

3.3 Personnel participating in relief actions

The participation of personnel in relief actions, in particular in the transportation and distribution of relief consignments, is subject to the approval of the party in whose territory they will carry out their duties (see article 71 of Additional Protocol I). Such personnel must be respected and protected. Their activities may be limited and their movements temporarily restricted only in cases of imperative military necessity. Relief personnel may not exceed the terms of their mission, and they must take account of the security requirements of the state in which they are operating. If they breach these conditions, their mission may be terminated. However, even if they exceed the terms of their mission, they do not necessarily lose the protection of international humanitarian law.

²³ As regards the definition of starvation, see footnotes 27 and 49 below.

²⁴ For a more detailed consideration of the other grounds of refusal, see the analysis below concerning non-international armed conflicts, as also applicable to international conflicts.

4. RULES OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE DURING A NON-INTERNATIONAL ARMED CONFLICT

As noted in the introduction, this advisory report distinguishes between three types of non-international armed conflict:

- (a) conflicts between the state and a rebel group, where the latter has control over part of the state's territory (conflict type 1);
- (b) conflicts between the state and a rebel group where the latter has no territorial control (conflict type 2);
- (c) conflicts among rebel groups in failed states (conflict type 3).

4.1 Conflict type 1 (Additional Protocol II conflicts)

Article 18 of Additional Protocol II to the Geneva Conventions regulates the provision of humanitarian assistance in non-international armed conflicts in which dissident armed forces, under responsible command, exercise such control over part of a state's territory as to enable them to carry out sustained and concerted military operations and to implement the provisions of the Protocol. Article 18 (1) formulates a right for impartial relief organisations such as the ICRC to offer their services. The provision of such services does not constitute intervention in the internal affairs of a state.

Article 18 (2) provides in more absolute terms that relief actions must be undertaken if the civilian population is suffering undue hardship owing to a lack of supplies essential to their survival, such as foodstuffs and medical supplies. Although this provision does not specify who may take such action, it is apparent from common article 3 of the Geneva Conventions, as supplemented by article 18, that it is referring to impartial relief organisations. However, it is clear that humanitarian actions should be of a complementary nature. They should be undertaken only if the responsible authorities are no longer able to fulfil their primary responsibility.

Assistance may be provided in this context only 'subject to the consent of the High Contracting Party concerned'. The provision of humanitarian assistance is therefore directly conditional upon the consent of the territorial state. Article 18 of Additional Protocol II is in this respect formulated in more absolute terms than article 70 of Additional Protocol

I.²⁵ Nonetheless, here too consent may not be withheld on arbitrary or unjustified grounds²⁶ and states may not refuse consent if this were to result in the starvation of the civilian population contrary to article 14 of Additional Protocol II.²⁷ Refusal which results in violation of the right to life, the prohibition of torture or the above-mentioned core content of relevant ESC rights may be deemed to be arbitrary or unjustified.²⁸ This interpretation cannot be based directly on the text of article 18 of Additional Protocol II, since this provision expressly and unconditionally requires the consent of the territorial state. However, it has been accepted by the ICRC both in its customary international law study²⁹ and in practice.³⁰ A state may also not refuse consent if this were to lead to discrimination of a particular group or part of the population.³¹ Nor may a state withhold consent to the provision of medical assistance on the grounds that this would be used for wounded personnel of the adverse party. It is a fundamental rule of international humanitarian law

²⁵ A comparable differentiation between international and non-international armed conflicts can be found in the Rome Statute of the International Criminal Court (Rome, 17 July 1998, Dutch Treaty Series 2000, 120). Under the Statute's provisions, wilfully impeding relief supplies and thus causing the starvation of civilians is treated as a war crime only if committed in the course of an international armed conflict. This will be discussed in more detail below.

²⁶ GA A/67/L.39, 2012, article 11.2 HA in Natural Disasters, 25(2) *Guiding Principles on Displacement*.

²⁷ Although article 14 of Additional Protocol II uses the word 'starvation', the proposed interpretation of article 18 applies to all situations in which the civilian population are deprived of supplies essential to their survival. This is therefore not limited to lack of foodstuffs. See also footnote 49.

²⁸ Institut de Droit International, *Humanitarian Assistance*, Bruges 2003, Article VIII(1). See also the Institute of International Humanitarian Law, *Guiding Principles on the Right to Humanitarian Assistance, Principle 1*. The CESCR has explicitly stated that 'prevention of access to humanitarian food aid in international conflicts can constitute a violation of the right to food', General Comment No.12 (Twentieth session, 1999), The right to adequate food (Art.11), paragraph 19.

²⁹ Rules 31 and 32 of the customary international law study have been criticised for failing to explicitly mention the requirement of consent. However, this is mentioned in the explanatory notes on this study, see ICRC Customary Law Study, p. 197. The more recent ICRC Q&A and Lexicon on Humanitarian Access (see p. 11) also make explicit mention of this element.

³⁰ See, for example, UN Security Council Resolution 2165 (2014), 14 July 2014, fifteenth paragraph of the preamble, UN Security Council Resolution 2139 (2014), tenth paragraph of the preamble, Report of the Secretary-General on the Implementation of Security Council Resolution 2139 (2014), UN Doc. S/2014/365, 20 May 2014, paragraph 49 and ICRC Lexicon of Expressions & Terms, p. 11.

³¹ This fundamental rule of international humanitarian law applies in the case of both international and non-international armed conflict; common article 3 of the Geneva Conventions, article 16 of the Third Geneva Convention, article 13 of the Fourth Geneva Convention, article 75 (1) of Additional Protocol I, article 4 (2) of Additional Protocol II, articles 2 (1) and 26 of the International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966, Dutch Treaty Series 1969, 99) and article 2 (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

that a distinction may be made only on medical grounds.³² Refusal of consent must in any event always be reasoned and explained.

A more complicated situation arises when humanitarian assistance is to be provided in areas under the control of an armed opposition group. Strictly speaking, article 18 of Additional Protocol II does not require the consent of armed opposition groups, but in practice it will be almost impossible to provide humanitarian assistance without their consent in areas they control. Yet, the CAVV observes that concrete contact between relief organisations and an armed opposition group with a view to facilitating humanitarian assistance may become complicated if the latter has been listed as a terrorist organisation for the purpose of UN sanction regimes. In any event, armed opposition groups have an obligation to allow and facilitate humanitarian relief, as reflected in Rule 55 of the ICRC Customary International Law Study.³³

The main outstanding question in conflicts that fall within the scope of Additional Protocol II is whether the consent of the territorial state is required for humanitarian assistance in areas it no longer controls. Strong indications that this is the case can be found in the treaty text and in practice. Nonetheless, it has also been argued that a state that does not have control of its territory can no longer be treated as the 'High Contracting Party concerned',³⁴ and that no consent is therefore required under article 18 of Additional Protocol II. According to this reasoning, cross-border operations could take place without the consent of the state concerned (or the authorisation of the UN Security Council) through border posts the state no longer controls. This interpretation has not yet gained general acceptance. The ICRC takes the view that state consent is still required for assistance provided in areas the state no longer controls. Recent discussions within the UN also show that sovereignty considerations cannot simply be disregarded in such situations. Moreover, there are practical disadvantages to this kind of progressive interpretation of article 18. If the requirement of the state's consent were eliminated, this would also make it impossible for the state to check and regulate the relief operations. It is

³² This fundamental rule of international humanitarian law applies in both international and non-international armed conflicts; see article 10 of Additional Protocol I and article 7 of Additional Protocol II.

³³ This is also apparent from UN Security Council resolutions calling on all parties to fulfil their obligations under international law, such as UN Security Council Resolutions 2139 (2014), 2134 (2014) and 2093 (2013).

³⁴ *Access for Relief Operations in Syria*, Legal Expert Opinion by Professor Michael Bothe, November 2013, pp. 22-24.

debatable whether this would be advisable at a time when humanitarian assistance has already become strongly politicised.

4.2 Conflict types 2 and 3 (common article 3 conflicts)

In non-international armed conflicts between a state and an armed opposition group that does not have territorial control (conflict type 2) and among armed opposition groups (conflict type 3), impartial relief organisations such as the ICRC may offer their services to parties to the conflict on the basis of common article 3 of the Geneva Conventions. Although the Conventions do not formulate an explicit right for the civilian population to receive humanitarian assistance, this is generally recognised in practice.³⁵ Rule 55 of the ICRC Customary International Law Study also refers to the obligation of parties to a conflict to allow and facilitate humanitarian relief as a rule of customary international law applicable in international and non-international conflicts. It notes that the requirement of consent of the territorial state continues to apply,³⁶ though – as explained above – this consent may not be withheld on arbitrary grounds.

In cases where it is not possible to determine which are the relevant authorities for the purposes of giving consent, as in the case of failed states, the commentary on the Geneva Conventions state that consent may be presumed.³⁷ Such a far-reaching exception to the requirement of consent will apply only in situations where it is abundantly clear that there are no longer any functioning authorities.

In all types of conflict the parties have an obligation to facilitate humanitarian relief. At operational level, a state may invoke military necessity as a reason for temporarily refusing humanitarian assistance in a given geographical area. However, this is subject to the principle of proportionality, i.e. humanitarian relief may be refused on those grounds only if the civilian population would not suffer disproportionately as a result.

³⁵ Guiding Principles of the UN, Annex to General Assembly Resolution 46/182, *Strengthening of the coordination of humanitarian emergency assistance of the United Nations*, 19 December 1991.

³⁶ ICRC Lexicon of Expressions & Terms, pp. 9/10.

³⁷ ICRC Commentary on the Additional Protocols, paragraph 4884.

5. HUMANITARIAN ASSISTANCE WITHOUT CONSENT

This section examines situations in which humanitarian assistance is provided without consent or is otherwise obstructed. It must be noted that international humanitarian law does not specify the consequences of violations of the above rules by the warring parties or by the entity providing humanitarian assistance. Nor is there any provision specifying the consequences of a state's wrongfully withholding consent.

Below, the CAVV examines three specific issues: (i) whether providing humanitarian assistance without consent can be justified; (ii) what role the Security Council can play in such situations; and (iii) what the consequences of deliberately withholding consent or obstructing humanitarian assistance are under international criminal law.

Such an analysis should distinguish between the different types of entity that provide humanitarian relief – particularly when considering whether providing humanitarian assistance without consent is justified if consent has been withheld on unlawful grounds. In such situations assistance can be provided by two types of actors. The first are the recognised subjects of international law: third states and international organisations such as the UN. The second type are NGOs which, in principle, are not bound by international law, but whose actions are mainly regulated by the national law of the state in whose territory they operate. The ICRC has an exceptional position here, given that it has been expressly granted the international right of humanitarian initiative. Yet, also the ICRC is not recognised as a full subject of international law. As NGOs are therefore not bound by the rules of international law, they cannot violate them and there are no specific consequences for them under international law. It should be noted, however, that individuals working for NGOs violating the national rules of a state do not necessarily lose the protection afforded to them by international law.

5.1 Humanitarian assistance as necessity

Humanitarian assistance which is provided without the consent of the territorial state and therefore violates its sovereignty and territorial integrity can nonetheless be treated as not wrongful if necessity can be invoked. In highly exceptional circumstances this defence

may be invoked if the requirements of article 25 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts have been met. This article reads as follows:³⁸

‘1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity.’

Necessity may therefore be invoked only (i) to safeguard an essential interest (ii) against a grave and imminent peril, (iii) if this interest cannot be safeguarded in any other way and (iv) if through the action no essential interest of the state or states towards which the obligation exists, or of the international community as a whole, is harmed. As regards the fourth and final condition, it can be argued that territorial integrity is an essential interest and, if this reasoning is applied, necessity cannot be invoked. It is also worth emphasising that necessity cannot be invoked in situations where the prohibition on the threat or use of force, laid down in article 2 (4) of the UN Charter,³⁹ is violated.⁴⁰

As the safety and welfare of the civilian population can certainly also be described as an essential interest, necessity could perhaps be successfully invoked if the civilian population faces a serious and imminent threat, for example starvation or a devastating epidemic. As explained above, both states and international organisations may invoke

³⁸ Article 25 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts is virtually identical.

³⁹ Charter of the United Nations, San Francisco, 26 June 1946, Dutch Treaty Series 1979, 37.

⁴⁰ See Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *UN Doc. A/56/10*, 2001, paragraph 21.

necessity, but NGOs may not. Whether necessity can be invoked therefore depends on how the term 'essential interest' is defined. Finally, it is important to emphasise that providing humanitarian relief without consent is extremely risky and may entail many practical disadvantages for aid workers and, ultimately, the civilian population itself.

5.2 Action by the UN Security Council

On various occasions the UN Security Council has condemned or voiced concern about impediments to the provision of humanitarian assistance and attacks on aid convoys and personnel. Such concern or condemnation has been expressed in presidential declarations, resolutions adopted under chapters VI and VII of the UN Charter. The Security Council stated generally in Resolution 1296 (2000)⁴¹ that the deliberate denial of access for humanitarian assistance may constitute a threat to international peace and security, and has on various occasions expressed its willingness to take action against it.⁴² In specific situations this may involve calling on the parties to provide immediate, safe and unimpeded access for humanitarian relief operations.⁴³ A more far-reaching measure is to authorise UN humanitarian agencies directly to provide humanitarian relief. Although the territorial state is given notification in such cases, the requirement of consent is nullified by the binding effect of the Security Council resolution.⁴⁴ The Security Council may also condemn a refusal to grant access and back up this measure by imposing or threatening to impose sanctions.⁴⁵ In the case of Somalia, sanctions were imposed on entities that had obstructed the delivery and distribution of and access to humanitarian assistance.⁴⁶ As a last resort the Security Council may authorise the use of military action to compel humanitarian access to be granted.⁴⁷

⁴¹ UN Security Council Resolution 1296 (2000), 19 April 2000.

⁴² UN Security Council Resolution 1296 (2000), 19 April 2000, paragraph 8. As reaffirmed in UN Security Council Resolution 1894 (2009), 11 November 2009, paragraph 4.

⁴³ See, for example, UN Security Council Resolution 2139 (2014), 22 February 2014, paragraphs 4-6, 8 and 12.

⁴⁴ UN Security Council Resolution 2165 (2014), 14 July 2014, paragraph 2.

⁴⁵ UN Security Council Resolution 1844 (2008), 20 November 2008, paragraph 8(c) concerning Somalia, UN Security Council Resolution 1857 (2008), 22 December 2008, paragraph 4(f) concerning the Democratic Republic of Congo and UN Security Council Resolution 2134 (2014), 28 January 2014, paragraph 37(e) concerning the Central African Republic.

⁴⁶ The al-Shabaab organisation was placed on the sanctions list partly on the basis of this provision. No individuals are currently on the Somalia sanctions list for having impeded the provision of humanitarian assistance.

⁴⁷ See, for example, UN Security Council Resolutions 668 (1991), 5 April 1991, paragraphs 3 and 6 concerning Northern Iraq, 781 (1992), 9 October 1992, paragraph 1 concerning Bosnia and Herzegovina, and 794 (1992), 3 December 1992, paragraph 10 concerning Somalia. As regards

5.3 International criminal law

International criminal law plays a relatively minor role in matters of humanitarian assistance. For example, violation of article 59 of the Fourth Geneva Convention, which contains the clearest duty to facilitate humanitarian assistance, does not constitute a grave breach for the purposes of the Geneva Conventions.⁴⁸ However, the Rome Statute of the International Criminal Court does contain a number of relevant provisions dealing specifically with the protection of humanitarian relief operations. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance mission is defined as a war crime under article 8 (2)(b)(iii) and (e)(iii) of the Statute. In addition, wilfully impeding relief supplies may be a war crime if it is done for the purpose of starving civilians.⁴⁹ However, this is defined as a war crime in article 8 (2)(b)(xxv) only with regard to international armed conflicts and— in the context of the Statute — not non-international armed conflicts. Nonetheless, refusing or impeding relief operations in a non-international armed conflict may, in certain circumstances, be treated as another international crime, such as an inhumane act, or be prosecuted as a crime against humanity.

humanitarian interventions based on a mandate of the UN Security Council, see in general the AIV/CAVV advisory report as cited above in note 10.

⁴⁸ Article 59 is not mentioned as such in article 147 of the Fourth Geneva Convention, nor is article 54 of Additional Protocol I containing the prohibition on starvation mentioned in article 85 of Additional Protocol I.

⁴⁹ Starvation and dehydration should be interpreted broadly to include every act by which the civilian population are deprived of supplies essential to their survival. In this sense, see also the Elements of Crimes relating to article 8 (2)(b)(xxv) of the Statute of Rome.

6. RECOMMENDATIONS CONCERNING EXISTING GAPS AND FURTHER DEVELOPMENT OF THE LAW

6.1 Need for new rules and/or clarification of the requirement of consent

There is a need for more clarification of the rules governing access for humanitarian relief operations during armed conflicts. The requirement of consent is unclear or gives rise to debate in relation to all types of conflict, whether international or non-international. In the case of failed states, where armed groups fight one another, the question is whether consent may indeed be presumed. Nor is it clear when exactly there can be said to be no functioning government. For all other conflicts the question is whether the requirement of consent should always apply in full or whether in certain cases refusal may be described as arbitrary or unjustified. The consequences of arbitrarily refusing consent are also unclear.

A separate question concerns conflicts that come within the scope of Additional Protocol II to the Geneva Conventions and situations in which humanitarian assistance is offered in areas that are no longer under the control of the state but of armed opposition groups. There has recently been renewed discussion of whether in such cases a territorial state may still be treated as the 'High Contracting Party concerned', whose consent is required under article 18 of Additional Protocol II. As explained above, abolishing the requirement of consent in such situations is not without legal and practical objections. It is important to note in this context that aid organisations have more than once expressed their concern about the politicisation of humanitarian relief. If the consent of the state is no longer required, this raises the question of whether the consent of the armed opposition group controlling the territory is, or should be, legally required.

Ideally, such questions and, more generally, the issue of the requirement of consent should be addressed explicitly in a new additional protocol to the Geneva Conventions. The new protocol could also provide for assessment of this requirement by an external body and monitoring of the humanitarian nature of the assistance, as explained in more detail below.

As no such protocol is likely to be introduced in the near future, the Netherlands could, as an alternative, make an interpretative declaration relating to both article 70 of Additional Protocol I and article 18 of Additional Protocol II, as well as to the requirement of consent

in type 2 and type 3 conflicts (governed by common article 3 of the Geneva Conventions). In such a declaration the Netherlands could state that the territorial state may not withhold consent on arbitrary grounds and define what grounds it considers to be arbitrary. Provision could also be made for assessment and monitoring. An interpretative declaration of this kind would be consistent with and help to strengthen the guidelines currently being drafted by the UN Office for the Coordination of Humanitarian Affairs (OCHA).⁵⁰

6.2 Assessing the requirement of consent

A significant gap in the present system is the lack of an independent entity capable of deciding whether or not withholding consent is justified in a given situation. In practice, Special Representatives of the UN Secretary-General report on the situation concerned, and the UN Security Council may subsequently give a political ruling. Given the ad hoc nature of such reports and the highly political nature of the Security Council's resolutions, it may be preferable for a more independent body to be given a specific mandate to assess such matters and gradually develop precedent, thus enabling the concept of 'arbitrary or unjustified refusal' to be defined and refined.

A suitable organisation to perform this task would be the International Humanitarian Fact-Finding Commission (IHFFC), established pursuant to article 90 of Additional Protocol I. It must be observed though that the IHFFC operates on the basis of the principle of confidentiality. At present, the IHFFC is completely hamstrung in its operations by the fact that it can act only if a state has accepted its competence. Moreover, the IHFFC is hampered by a defective institutional structure and lack of support. Any consideration of a role for the IHFFC in connection with humanitarian assistance should therefore take account of the need for additional consent requirements and the broader institutional issues. Further thinking about its role and humanitarian assistance should preferably form part of more comprehensive initiatives for strengthening compliance with international humanitarian law.⁵¹

⁵⁰ *Guide to the Law Regulating Humanitarian Relief Operations in Situations of Armed Conflict*, Oxford Institute for Ethics, Law and Armed Conflict (ELAC), and the Oxford Martin Programme on Human Rights for Future Generations (HRFG), in collaboration with the UN Office for the Coordination of Humanitarian Affairs (OCHA), 10-11 July 2014.

⁵¹ Such initiatives would involve promoting compliance with and application of international humanitarian law by strengthening existing mechanisms and identifying new and more effective international mechanisms. An example is the joint initiative of the ICRC and the Swiss government

6.3 Monitoring the humanitarian character of assistance

In those cases where the requirement of consent is disregarded, a state nonetheless theoretically retains the right of monitoring. However, it may be unable to exercise this right in practice, especially in conflicts that come within the scope of Additional Protocol II. It is therefore necessary to consider whether there is a need for alternative monitoring systems to ensure the humanitarian nature of the operation. When authorising the provision of humanitarian assistance (as in 2014's Resolution 2165), the UN Security Council may also decide to set up an ad hoc monitoring mechanism immediately.⁵² It would be worth studying more closely how such a mechanism should function, given the need to minimise bureaucratic and administrative impediments.

6.4 Amendment of the Rome Statute of the International Criminal Court

As already explained, hindering relief supplies in order to starve out the civilian population constitutes a war crime under international law, as laid down in the Statute of Rome, only if this takes place in the context of an international armed conflict. It would be advisable for article 8 of the Statute to be amended in due course to cover the same acts when committed during a non-international armed conflict. Since such an amendment is unlikely to be made in the near future, the CAVV recommends that the Dutch government immediately extend the operation of the corresponding section 6 of the International Crimes Act⁵³ in the same way. This would have the effect of criminalising this conduct in non-international armed conflict and would create jurisdiction for the Dutch courts to try individuals for this crime. At international level, a national extension of this kind would serve as an indicator and could in due course prove to be a forerunner of a comparable amendment to the Statute of Rome. It would also help to shape customary international law in this respect, particularly if other states follow this example.

(see <http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm>).

⁵² UN Security Council Resolution 2165 (2014), 14 July 2014, paragraph 4.

⁵³ Act of 19 June 2003 containing rules on serious violations of international humanitarian law (International Crimes Act), Bulletin of Acts and Decrees 2003, 270.

Annexe I

Request for advice on humanitarian assistance dated 6 June 2014

Professor W.G. Werner
Chair of the Advisory Committee on Issues of Public International Law
Postbus 20061
2500 EB The Hague

Date: 6 June 2014

Re: Request for advice on humanitarian assistance

Dear Professor Werner,

The purpose of humanitarian assistance is to save lives, alleviate human suffering and preserve human dignity. Such assistance is provided in accordance with the humanitarian principles of humanity, neutrality, impartiality and independence. Parties to a conflict are obliged to allow unimpeded passage of humanitarian relief, although they retain the right to monitor consignments to ensure that they do indeed consist of humanitarian relief. Until a few decades ago, this principle was generally respected.

Recently, however, access for humanitarian relief operations (including aid workers and humanitarian aid for the target group) has been increasingly impeded and hampered. This has occurred, for example, in Somalia, South Sudan, Sudan and, most notably, Syria. In Syria both cross-line humanitarian assistance (i.e. assistance provided across the front lines) and cross-border assistance (assistance provided across the borders with neighbouring countries) have been seriously hampered by all parties to the conflict.

Often the problems seem attributable to non-compliance with the rules. At the same time, however, it is worth asking whether the legal framework is sufficiently clear and geared to the current reality.

Given the topicality of this issue, I would kindly request your Committee to give priority to advising me on this matter, using the following questions as a guide:

- 1) What is the international legal framework for access and facilitation of humanitarian aid delivery in situations of armed conflict (both international and non-international)?
- 2) What role is played by the sovereignty of the country where humanitarian assistance is required? Are there limits to the freedom of states/parties to refuse humanitarian assistance and, if so, what are the consequences under international law if these limits are not respected?
- 3) Does international law allow for exceptions to the requirement that the territorial state must grant consent for cross-border humanitarian assistance if a state systematically and arbitrarily denies access to urgently needed relief supplies?
- 4) Is the existing legal framework sufficiently clear and tailored to the current challenges facing humanitarian assistance, or should it be supplemented and/or clarified?

I should be grateful to receive your advisory report before 1 August 2014.

Yours sincerely,

Frans Timmermans
Minister of Foreign Affairs

Annexe II

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The Advisory Committee on Issues of Public International Law advises the government and parliament on international law issues.