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UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
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**Humanitarian assistance during armed conflict and the
COVID-19 pandemic.**

A Mini dissertation by

Thelma Munashe Chinyamurindi
BA Law, LL.B (UP)
15302262

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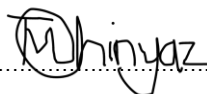
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ABSTRACT

Title: **Humanitarian assistance during armed conflict and the COVID-19 pandemic.**

By **Thelma Chinyamurindi***

The current study looked at the International Humanitarian Law Frameworks on humanitarian assistance and access in the context of the COVID-19 pandemic. The researchers wanted to determine whether or not these rules adequately protect civilians in conflict-affected territories when a health pandemic doubles the negative impacts suffered by victims of armed conflict.

The COVID-19 pandemic had enormous and terrible impacts on the whole population of the world, but these effects were felt to an even greater degree by populations living in areas of active conflict. Humanitarian aid in these countries is critical in saving lives during the major crisis created by the convergence of COVID-19 pandemic and the various armed conflicts. It was therefore important that the rules that guarantee these populations' protection in such a case be assessed.

Using academic, desk-based research methods, this study looked at the rules regulating humanitarian aid as found in the *lex specialis* of the law of armed conflict which is International Humanitarian Law. It found that under International Humanitarian Law the parties to a conflict have the primary responsibility to provide humanitarian assistance to the civilian population under their control. In the case of COVID-19, this includes the need to provide Personal Protective Equipment, medication, and other resources required to combat the epidemic. It was also established that if and when a party is unable to provide these provisions, IHL gives the right to impartial humanitarian organisations to come in and offer assistance subject to the consent of parties to a conflict in International Armed Conflicts and Non-International Armed Conflicts, which consent cannot be denied arbitrarily. The requirement for consent is not applicable in military occupations where the Occupying Power must accept relief from impartial humanitarian organisations when it is unwilling or unable to meet the needs of the population under its control.

The research concluded, after an analysis of the applicable rules, that IHL frameworks on humanitarian assistance have a significant gap, which can be filled by adopting a human rights-based approach to humanitarian assistance. These entails applying IHL and IHRL principles together.

Key words : COVID-19, Humanitarian assistance, humanitarian access, humanitarian law, human rights law, relief operations.

*Thelma Chinyamurindi is an BA Law and LL.B graduate at the University of Pretoria. This dissertation was written to complete her LL.M in Humanitarian Law and Human Rights in Military Operations in the Department of Public Law, Public Law, University of Pretoria.

TABLE OF CONTENTS

Chapter 1: Introduction.....	5
1.2 BACKGROUND.....	7
1.3 Research problem.....	10
1.4 Scope and delimitations.....	14
1.5 METHODOLOGY.....	15
1.6 Structure.....	15
Chapter 2: COVID-19 humanitarian relief in situations of Military Occupation.....	17
2.1 military occupation: a brief synopsis.....	17
2.2 Humanitarian needs of occupied territories specific to the COVID-19 pandemic.....	19
2.3 Basic rules on humanitarian assistance in Occupied Territories.....	20
2.4 MENTAL HEALTH AND COVID-19 IN OCCUPIED TERRITORIES.....	36
2.5 Conclusion.....	37
Chapter 3: Humanitarian assistance in International Armed Conflicts Other than Occupation.....	38
3.1 International armed conflict other than occupation <i>vis-à-vis</i> military occupation.....	38
3.3 Humanitarian assistance FOR REFUGEES, stateless persons and IDPs during COVID.....	45
3.4 The issue of consent FOR COVID-19 RELATED humanitarian operations in international armed conflicts.....	48
3.5 Conclusion.....	52
Chapter 4: Humanitarian assistance in non-international armed conflict.....	53
4.1 an overview of non-international armed conflicts.....	53
4.2 Applicable rules for humanitarian assistance in non-international armed conflicts.....	54
the right to and the corresponding responsibility to provide humanitarian assistance during the COVID-19 pandemic in non-international armed conflicts.....	55
4.3 The issue of consent by NSAGs in NIACs.....	60
4.4 CONCLUSION.....	62
CHAPTER 5: International Human Rights Law as supplementary IHL regime on humanitarian assistance during the COVID-19 pandemic.....	63
5.1 The relationship between IHL and IHRL.....	63
5.2 IHRL provisions on humanitarian assistance and access in times of conflict during the COVID-19 pandemic.....	64
5.3 Specific IHRL rights relevant to humanitarian assistance in a pandemic during armed conflict.....	66
5.4 A human rights-based approach to humanitarian assistance in conflict: Lessons from COVID-19.....	68
5.5 Conclusion.....	71
CHAPTER 6: Conclusion.....	73

CHAPTER 1: INTRODUCTION

This mini-dissertation aims to evaluate aspects of International Humanitarian Law's rules on humanitarian assistance, particularly pertinent in the setting of the global COVID-19 pandemic. This research will attempt to assess whether these rules sufficiently protect the civilian population in the event of a pandemic occurring during a time of armed conflict.

International humanitarian law (IHL) or the law of armed conflict is a set of rules which seek, to limit the effects of armed conflict.¹ IHL is designed to mitigate the human suffering caused by war.² More particularly, IHL specifically protects civilians and civilian objects with Rule 10 of the ICRC's study on customary international law,³ stating that civilian objects are protected against attack, unless and for such a time as they are military objectives. This is further supported by Rule 11 of the ICRC study,⁴ which prohibits indiscriminate attacks as outlined in Article 51(4) of Additional Protocol 1.⁵ The purpose of IHL is therefore more plainly to preserve a semblance of humanity in battle until armed conflict subsides or ends.⁶ In order to facilitate this, IHL contains provisions that give parties to the conflict, third States and international humanitarian organisations important ground rules on humanitarian access and the provision of humanitarian activities.⁷ These rules remain applicable, and arguably even more so when a pandemic coincides with an armed conflict,⁸ and equally to all parties to a conflict irrespective of the justice of their causes.⁹ Further, the rights to humanitarian assistance

¹ International Committee of the Red Cross, (ICRC) (Advisory Service on International Humanitarian) Law, 'What is International Humanitarian Law?' (July 2004) 1.

² Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, (1st edn, Cambridge University Press 2010) 22.

In footnote 98 he refers to Kalshoven F, Zegveld L, and International Committee of the Red Cross, *Constraints in the Waging of War: An Introduction to International Humanitarian Law* (ICRC, 2001).

³ Jean Marie Henckaerts and Louise Doswald-Beck, 'Customary International Humanitarian Law, Volume 1: Rules', (ICRC, 2005), Rule 10.

⁴ Ibid Rule 11.

⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of victims of International Armed Conflicts (AP I), Art 51(4).

IHL however acknowledges that war has the potential to inflict suffering not only on active combatants but also on innocent civilians, with wars constantly linked to massive civilian casualties, not to mention the civilians who suffer the psychological and often invisible scars of war. This can be attributed to collateral damage, in that civilians could be innocent victims of an otherwise discriminate attack, or more seriously a war crime in which armed forces attack indiscriminately.

⁶ Solis (n 2) 23.

⁷ International Committee of the Red Cross (ICRC) 'IHL Rules on Humanitarian Access and COVID-19' (8 April 2020) <https://www.icrc.org/en/download/file/117870/ihl_humanitarian_access_and_covid-19.pdf> accessed 21 September 2022.

⁸ Ibid.

⁹ Adam Roberts, 'The equal application of the laws of war: a principle under pressure', (2008) 90/872 IRRC, 931, 93'2.

enshrined in IHL provisions, apply to every person affected by armed conflict as they are entitled to their fundamental rights and guarantees without discrimination.¹⁰

IHL does not have a specific definition of ‘humanitarian activities.’¹¹ However, there are rules of IHL that regulate these kinds of activities, which rules have a ‘protection’ and ‘relief’ dimension and have the objective of safeguarding the life and dignity of the victims of armed conflicts.¹² Protection is defined as encompassing ‘all activities aimed at ensuring full respect for the rights of the individuals by the letter and spirit of the relevant bodies of law’.¹³ The relief dimension in the context of this research refers to activities aimed at the ‘removal or lightening of something painful or distressing’,¹⁴ being the double effects of a pandemic and an armed conflict.

To this day, no hard law definition of ‘humanitarian assistance’ exists in international law.¹⁵ The Geneva Conventions and their Additional Protocols do not define ‘humanitarian assistance’.¹⁶ Instead, they offer rudimentary explanations of the rights and duties of parties to the conflict and the potential role of humanitarian agencies.¹⁷ The definition of ‘humanitarian assistance’ can be deduced from some international instruments and international practice.¹⁸ From these rights and responsibilities, we can deduce that humanitarian assistance in the context of armed conflict is any aid designed to save lives, alleviate suffering, and maintain human dignity,¹⁹ during and in the immediate aftermath of conflict. Humanitarian assistance is today understood as the most prominent activity within the broader concept of humanitarian action, which encompasses a wide range of activities, ranging from short-term relief to rehabilitation and reconstruction activities and development cooperation, often even encompassing

¹⁰ Huma Haider, ‘International Legal Frameworks for Humanitarian Action: Topic Guide’ 2013 GSDRC, University of Birmingham, 18.

With reference to AP I, Article 75.

Referring also to the view by the ICRC that the principle of non-discrimination forms part of customary international law in NIACs and IACs (ICRC, Customary International Humanitarian Law 2005, vol 1 :Rules).

¹¹ International Committee of the Red Cross, ‘ICRC Q and A and lexicon on humanitarian access’, 2015 96/893 IRRC 359, 367.

¹² Ibid 367.

¹³ Katarina Månsson, ‘Implementing the Concept of Protection of Civilians in the Light of International Humanitarian Law and Human Rights Law: The case of MONUC’ in Roberta Arnold and Noëlle N. R. Quéniwet (eds), *International humanitarian law and human rights law: towards a new merger in international law* (Martinus Nijhoff Publishers 2008), 555.

¹⁴ ‘relief, (Merriam-Webster.com Dictionary) <<https://www.merriam-webster.com/dictionary/relief>> accessed 29 October 2022.

¹⁵ Flavia Lattanzi, ‘Humanitarian Assistance’ in Andrew Clapham, Paola Gaeta, and Marco Sassoli (eds) *The 1949 Geneva Conventions A Commentary*, (Oxford University Press 2015), 232.

¹⁶ Haider (n10)26.

¹⁷ Haider (n10)17.

¹⁸ Lattanzi (n15) 232.

¹⁹ Humanitarian Coalition ‘From Humanitarian to Development Aid’ <<https://www.humanitariancoalition.ca/from-humanitarian-to-development-aid>> accessed 21 September 2022.

measures of disaster readiness, prevention and reduction of risk.²⁰ IHL acknowledges the necessity for humanitarian assistance in situations of conflict and establishes the prerequisites for the provision of humanitarian aid in the form of medication, medical supplies, and other essential supplies *inter alia* to civilians in need.²¹ In the context of COVID-19, humanitarian aid necessary for saving lives and alleviating suffering in conflict areas came in the form of COVID-19 prevention, mitigating and treatment supplies. As a cautionary note, humanitarian assistance must be distinguished from humanitarian intervention which is a coercive action of a state carried out in the territory of another state or in the territory controlled by a rebel group in the affected state-in order to protect and relieve a population whose survival is at risk.²²

Humanitarian access concerns humanitarian actors' capability to reach populaces affected by a crisis, as well as the affected populace's ability to access humanitarian assistance and services.²³ Humanitarian access is therefore interconnected with the concept of humanitarian assistance and is authorised by the United Nations in GA resolution 46/182,²⁴ due to *inter alia* deep concerns about the suffering of victims, the loss of human lives, the flow of refugees, and the material destruction.²⁵ The resolution was furthermore stimulated by the need to reinforce and make more effective, the collective of the international community in providing humanitarian assistance.²⁶ In other words, humanitarian access is concerned with the delivery and receipt of humanitarian assistance by humanitarian actors and affected populations respectively.

In light of the foregoing, this study will explore the rules of IHL governing and regulating humanitarian assistance, paying specific attention to their applicability in the context of COVID-19 coexisting with armed conflicts.

1.2 BACKGROUND

²⁰ Heike Spieker, 'The Right to Give and Receive Humanitarian Assistance' in Hans-Joachim Heintze and Andrej Zwitter (eds) *International Law and Humanitarian Assistance*, (Springer 2011), 7.

²¹ International Committee of the Red Cross, 'IHL and Humanitarian Assistance' in ICRC Online Casebook 'How Does the Law Protect in War' < <https://casebook.icrc.org/law/conduct-hostilities#Chapter5> > accessed 21 September 2022.

²² Lattanzi (n 15) 232.

²³ United Nations Office for the Coordination of Humanitarian Assistance (OCHA), 'OCHA on Message: Humanitarian Assistance' < https://www.unocha.org/sites/unocha/files/dms/Documents/OOM_HumAccess_English.pdf > accessed 21 September 2022.

²⁴ UNGA Resolution 46/182 (19 December 1991) UN Doc A/RES/46/182.

²⁵ *Ibid.*

²⁶ *Ibid.*

In December 2019, an outbreak of pneumonia of unknown origin was reported in Wuhan, Hubei Province of China.²⁷ The ‘pneumonia’ would later be identified as the seventh human coronavirus, known as Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-Co-V-2)²⁸ or COVID-19 which rapidly spread all over the world and was declared a pandemic by the World Health Organisation on 11 March 2020.²⁹ SARS-Co-V-2 transmission occurs with high efficacy and infectivity mainly through the respiratory route, with droplet transmission being the main recognised route.³⁰ Among the prevention tips for the virus were physical distancing of at least one metre; mask-wearing; congregating in well-ventilated open spaces; cleaning your hands; and staying at home.³¹

While global pandemics like COVID-19 do not discriminate,³² it is true that some populations are often affected with greater ferocity than others.³³ Like all epidemics, COVID-19 has a spatial dimension that needs to be managed as the impact of the pandemic differs markedly not only across countries but also across regions.³⁴ This is especially true when one looks at the pandemic in the context of armed conflict.³⁵ The populations of conflict-affected areas are likely to be especially vulnerable to disease outbreaks.³⁶ In 2020, the year COVID-19 was declared a pandemic, there were estimated to be at least thirty-four (34)³⁷ active armed conflicts around the world. COVID-19, being a

²⁷ Massimo Cicozzi and others, “The COVID-19 Pandemic” (2020) 57 *Critical Reviews in Clinical Laboratory Sciences* 365.

²⁸ *Ibid.*

²⁹ Anshu Singh and Izharul Haq, “Novel Coronavirus Disease (Covid-19): Origin, Transmission Through the Environment, Health Effects, and Mitigation Strategies—A Review” (2021) 4 *Environmental Sustainability* 515.

³⁰ *Ibid.*

³¹ *Ibid.* 519.

³² Lena Gross, “Viruses Do Not Discriminate?” (2020) 25 *lambda nordica* 128, 133

Editorial, 'Stop the coronavirus stigma now' [2020] 580(7802) *Nature* <https://doi.org/10.1038/d41586-020-01009-0> accessed 24 October 2022

UNICEF, 'COVID-19 does not discriminate; nor should our response Statement by the United Nations Network on Migration' (UNICEF, 20 March 2020) <<https://www.unicef.org/press-releases/covid-19-does-not-discriminate-nor-should-our-response>> accessed 24 October 2022.

³³ “The Territorial Impact of Covid-19: Managing the Crisis and Recovery across Levels of Government” [2021] OECD Policy Responses to Coronavirus (COVID-19), 5.

³⁴ *Ibid.* 14.

David McCoy, 'What exactly is the government's coronavirus strategy?' (Queen Mary University of London, 3 April 2020) <<https://www.qmul.ac.uk/media/news/2020/pr/what-exactly-is-the-governments-coronavirus-strategy.html>> accessed 24 October 2022.

³⁵ International Committee of the Red Cross (ICRC), “As if the War was not enough, stories of hardship and resilience in times of COVID-19” A report on the pandemic's impact on the protection of people caught up in conflict' (2021) ICRC, 7.

³⁶ International Crisis Group, “COVID-19 and Conflict: Seven trends to watch”, (24 March 2020) Crisis Group Special Briefing No 4, 2.

³⁷ See generally Rule of Law on Armed Conflict (RULAC), Geneva academy, 'About RULAC' (Rule of Law in Armed Conflict, 5 July 2022) <<https://www.rulac.org/>> accessed 24 October 2022.

See also Escola de Cultura de Pau. Alert 2021! Report on conflicts, human rights and peacebuilding. Barcelona: Icaria, 2021, 8.

borderless non-discriminatory disease³⁸ did not spare any of these affected areas. In fact, areas of active conflict including North-Western Syria, around the besieged enclave of Idlib, and Yemen were predicted to be at the highest immediate risk of COVID-19.³⁹ Similarly, UNICEF,⁴⁰ reported that amongst other countries, South Sudan was facing multiple humanitarian crises with many parts of the country still affected by *inter alia* armed conflict and the pandemic. Other conflict-affected countries like Nigeria, Colombia and Afghanistan were hit particularly hard by COVID-19 which caused far-reaching implications for *inter alia* the conflict dynamics of these countries.⁴¹ The examples are endless, but what is clear is that this intersection highlights the increased need for humanitarian access by populations affected by conflict. There was furthermore evidence of the pandemic's impact on several other factors, such as how pandemic-related lockdowns increased humanitarian needs in conflict-affected settings while at the same time restricting humanitarian access and relief delivery.⁴² With both COVID-19 and armed conflict continuing to trigger turmoil globally, the IHL principles of humanitarian assistance and access became more urgent than ever.⁴³ This heightened need can be attributed to the fact that often particularly when compounded by bad governance, corruption or foreign sanctions, conflicts have rendered national health systems extremely ill-prepared for a pandemic like COVID-19.⁴⁴ Additionally, the economic consequences of lockdowns and stay-at-home restrictions tied to COVID-19 have left populations in desperate need of humanitarian aid.

Armed conflicts give rise to significant needs for humanitarian assistance,⁴⁵ particularly when compounded by a global health emergency. Different populations, depending on the prevailing

³⁸ Sila Bal, 'Covid-19: An Ageless, Borderless Battle', (Millennial Eye, March 2020) < <https://millenniaeye.com/articles/mar-apr-20/covid-19-an-ageless-borderless-battle-2/>> accessed 21 September 2022. Gavin Crowden, 'The borderless disease, why COVID-19 is a reminder that we are all in this together' (Concern Worldwide, 30 March 2020) < <https://www.concern.org.uk/news/borderless-disease-why-covid-19-reminder-we-are-all-together> > accessed 21 September 2022.

³⁹ International Crisis Group (n36) 3.

⁴⁰ United Nations Children's Fund (UNICEF) 'COVID-19 and conflict: A deadly combination' (30 December 2020) < <https://www.unicef.org/coronavirus/covid-19-and-conflict-deadly-combination#:~:text=Chronic%20poverty%20and%20weak%20essential,from%20acute%20malnutrition%20in%202021> > accessed 21 September 2022.

⁴¹ Mercy Corps 'A Clash of Contagions, The Impact of COVID-19 on Conflict in Nigeria, Colombia and Afghanistan' (June 2021), Mercy Corps, Washington DC ,6 (generally) and, 31, 72, 108 noting key finding and implications on how the pandemic shaped conflict in Nigeria, Colombia and Afghanistan respectively.

⁴² Ibid 8.

⁴³ Oona Hathaway, Mark Stevens and Preston Lim, 'COVID-19 and International Law Series: International Humanitarian Law- Humanitarian Access' Just Security, (November 12, 2020) <https://www.justsecurity.org/73336/covid-19-and-international-law-series-international-humanitarian-law-humanitarian-access/> accessed 21 September 2022.

⁴⁴ International Crisis Group (n 36) 2.

⁴⁵ Omar B Warsame, 'What does IHL provide for in terms of humanitarian access and assistance' International Committee of the Red Cross (14 August 2017) < <https://blogs.icrc.org/ilot/2017/08/14/what-does-ihl-provide-for-in-terms-of-humanitarian-access-and-assistance/>> accessed 21 September 2022.

circumstances will require different relief support to alleviate their suffering. These will be the population's humanitarian needs, which are based on an initial rapid assessment of needs and designed to contribute effectively to their recovery.⁴⁶ Humanitarian needs are usually grouped into the following categories: food; shelter; non-food items; and water, sanitation, and hygiene (WASH) services.⁴⁷ The category of non-food items can include all basic and culturally appropriate goods and supplies to maintain a population's health, privacy, and dignity, meet their personal hygiene needs, prepare and eat food and achieve necessary levels of thermal comfort.⁴⁸

Indeed, the needs of conflict-affected populations are intensified when an armed conflict collides with a global pandemic,⁴⁹ as was the case with COVID-19. Fortunately, IHL contains rules on humanitarian access which rules will be assessed by this dissertation in terms of their ability to adequately provide for COVID-19-related relief to conflict-affected areas.

1.3 RESEARCH PROBLEM

This section aims to elaborate on the problem of the research by enumerating the research objectives, the significance of the research as well as the research questions to be answered to achieve the objective.

During medical and other calamities like the COVID-19 pandemic, humanitarian aid is crucial in areas where violent conflicts are present. Each party to an armed conflict is primarily responsible for providing for the basic needs of the population under its control, according to IHL.⁵⁰ Furthermore, impartial humanitarian organisations such as the International Committee of the Red Cross (ICRC) may volunteer their services and be permitted to conduct relief operations in aid of victims of armed situations.⁵¹ These organisations' complementary role is frequently critical for persons affected by armed conflicts.⁵² It is the role of States and the parties to the armed conflict to permit and facilitate the swift and unimpeded passage of humanitarian relief subject to their right of control.⁵³ This is seen

⁴⁶ Humanitarian Coalition 'Humanitarian Needs' <<https://www.humanitariancoalition.ca/humanitarian-needs>> accessed 21 September 2022.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ ICRC, 'As if the War wasn't enough (n35) 7.

⁵⁰ Felix Schwendimann, 'The legal framework of humanitarian access in armed conflict' [2011] 93(884) International Review of the Red Cross 993, 996.

⁵¹ ICRC 'Q and A and lexicon on humanitarian access', 2015 96(893) IRR 339, 359.

⁵² Ibid.

⁵³ ICRC, 'COVID-19: How IHL provides crucial safeguards during pandemics' (International Committee of the Red Cross, 31 March 2020) <<https://www.icrc.org/en/document/covid-19-how-ihl-provides-crucial-safeguards-during-pandemics>> accessed 21 October 2022.

first in customary IHL as seen in Rule 55 of the 161 rules of customary international law identified in the ICRC study on customary IHL⁵⁴ which requires that the parties to the conflict ‘must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.’ This is supplemented by Rule 56 of the same study which requires that humanitarian relief personnel be ensured freedom of movement in the exercise of their functions, which freedom is to be limited in cases of imperative military necessity.⁵⁵ There is also treaty law that governs humanitarian access.⁵⁶ The applicable treaty law is dependent on the type of armed conflict in question,⁵⁷ as despite the practical similarities of armed conflict there is a decisive difference between IACs and NIACs which makes it indispensable to maintain the distinction between them.⁵⁸ These rules of IHL must be respected by all parties to an armed conflict.⁵⁹

Under international law, there are generally considered to be two types of armed conflict, to which a given number of identical and a certain number of differentiated norms apply,⁶⁰ that of the international character, in other words, a war between States⁶¹ and that not of an international character.⁶² According to Common Article 2 to the Geneva Conventions,⁶³ international armed conflicts (IACs) are those which oppose ‘High Contracting Parties’ meaning States.⁶⁴ Apart from regular, inter-state armed conflicts, Additional Protocol I extends the definition of IAC to include armed conflicts in which

⁵⁴ ICRC, ‘Customary International Humanitarian Law, 2005, Volume I: Rules’ (n3) Rule 55.

⁵⁵ Ibid Rule 56.

⁵⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (*Fourth Geneva Convention*), (adopted 12 August 1949, entered into force 21 October 1950), 75 UNTS 287 (GC IV), Arts 23,55 and 59;

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (adopted 8 June 1977 and entered into force on 7 December 1978), Arts 69-71 deal with the relief actions in IACs;

Article 3 Common to the four Geneva Conventions of 1949 (Common Article 3);

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (adopted 8 June 1977 and entered into force on 7 December 1978), Arts 9 and 18 *inter alia* deal with humanitarian activities in NIACs.

⁵⁷ See generally Schwendimann (n 50).

⁵⁸ Nils Melzer, *International Humanitarian Law: A comprehensive Introduction* (International Committee of the Red Cross: Geneva, 2016) ,53.

⁵⁹ ICRC Q and A and lexicon on humanitarian access’, (n55), 359.

⁶⁰ Robert Kolb *Advanced Introduction to International Humanitarian Law* (Edward Elgar, 2014), 22.

⁶¹ Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing, 2008),65.

⁶² International Justice Resource Centre, ‘International Humanitarian Law’ < <https://ijrcenter.org/international-humanitarian-law/>> accessed 22 September 2022.

⁶³ Article 2 common to the four Geneva conventions of 1949 (Common Article 2).

⁶⁴ ICRC, ‘Opinion paper “How is the term ‘Armed Conflict’ defined in International Humanitarian Law?”’(March 2008), 1.

peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination (wars of national liberation).⁶⁵

The second type of armed conflict, NIACs, concerns armed conflicts between governmental forces and insurgents or between armed groups.⁶⁶ NIACs are normally categorised within the meaning of Common Article 3⁶⁷ and NIACs within the meaning of Additional Protocol II.⁶⁸ The International Criminal Tribunal for the Former Yugoslavia, in the Tadic judgment,⁶⁹ indicated that two factual criteria must be satisfied for a conflict to be classified as a NIAC and not a case of internal disturbances and tensions, such that CA3 and AP II are applicable. The first criterion is that the violence must reach a certain level of intensity,⁷⁰ which is determined by *inter alia* the collective nature of the fighting and resort to armed force by the state, duration of the conflict, nature of weapons, frequency of attacks and number of victims.⁷¹ The second factual criterion is that the parties involved must demonstrate a certain level of organisation.⁷² Article 1 of AP II affirmed these criteria but set a higher threshold to fulfil the criteria of parties involved, adding the requirement of ‘control of part of a territory’ as well as restricting application to conflicts between a state and a non-state armed group.⁷³

Populations in these different types of conflict areas require different humanitarian assistance. This is to say the needs of an occupied territory might differ from the needs of a population within a NIAC. While the rules on humanitarian access vary slightly depending on the nature of the conflict,⁷⁴ it is important to note here that the IHL framework regulating humanitarian access mainly revolves around four main stages which are; the obligation of each party to a conflict to meet the needs of the population under its control;⁷⁵ the right of impartial humanitarian organisations to offer humanitarian services when the needs of the population affected by armed conflict are not fulfilled;⁷⁶ the consent of parties to the conflict to impartial humanitarian activities; and finally the facilitation of rapid and unimpeded passage of humanitarian relief schemes.⁷⁷

⁶⁵ Ibid 2.

⁶⁶ Kolb (n 60) 22.

⁶⁷ Common Article 2.

⁶⁸ ICRC Opinion paper (2008) (n 68) 4.

⁶⁹ Prosecutor v Duško Tadić, IT-94-1-A International Criminal Tribunal for the Former Yugoslavia (ICTY), 15 July 1999

⁷⁰ Ibid para 70.

⁷¹ Haider (n10) 17.

⁷² Tadić,(n69), para 70.

⁷³ Haider (n10) 17.

⁷⁴ ICRC Q and A lexicon on humanitarian access’, 2015 96/893 International Review of the Red Cross (IRRC) 363.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Rebecca Barber, ‘Facilitating humanitarian assistance in international humanitarian and human rights law’ 2009 International Review of the Red Cross 91(874) 371, 391.

Customarily and to a non-negligible extent, the relevant rules of the laws of armed conflict are not the same.⁷⁸ In order to determine which rules apply, the distinction remains important.⁷⁹ For the purposes of this research, we will see that treaty law regulating humanitarian assistance in situations of NIACs is not as developed as that governing IACs.⁸⁰ There are a few treaty rules that address conditions of access and delivery of humanitarian assistance in NIACs.⁸¹ Provisions for humanitarian assistance are the least developed in the context of non-international armed conflicts.⁸² This is despite the fact that most armed conflicts today are NIACs,⁸³ and entail more suffering than international armed conflicts,⁸⁴ and would therefore inevitably benefit from a more substantive regime regulating humanitarian assistance. The lack of development of IHL of NIAC's rules on humanitarian assistance does not allude to the fact that humanitarian needs are less pressing in NIACs than in international ones, in fact the opposite is true with the savageness of internal conflicts tending to be greater than in IACs.⁸⁵ The reason for a more substantive IAC regime on humanitarian assistance, can in fact be attributed to the simple fact that the IHL of IACs is older and more detailed.⁸⁶ However, as is seen in the ICRC study on customary IHL and elaborated later in this research, many rules initially designed to apply only in international conflicts also apply as customary rules in conflicts, not of an international character.⁸⁷ This inevitably includes the rules on humanitarian assistance.

In each of these rules, governing the different types of conflicts there exist rules governing humanitarian access and humanitarian needs of conflict-affected populations. These general principles of humanitarian access in IACs and NIACs apply with urgency to conflicts in the present moment when the pandemic has amplified the needs of conflict-affected communities around the world.

Considering the above, this research has the objective of assessing and evaluating the IHL rules on humanitarian assistance and their relevance and applicability in the context of an intersection between an armed conflict and another humanitarian crisis like the Global COVID-19 pandemic. Owing to the distinction between conflicts, the rules will be examined depending on the type of conflict they apply to, and any significant differences highlighted. This is done to showcase the value and determine the

⁷⁸ Kolb (n 60) 71.

⁷⁹ Ibid.

⁸⁰ Melzer (n 58) 259.

⁸¹ Haider (n10) 29.

⁸² Ibid 27.

⁸³ Marco Sassoli *International Humanitarian Law: Rules, Solutions to Problems Arising in Warfare and Controversies* (Edward Elgar 2019) 583.

⁸⁴ Ibid.

⁸⁵ Kolb and Hyde (n 61) 66.

⁸⁶ Sassoli (n 83) 204.

⁸⁷ Ibid.

adequacy of IHL rules in protecting civilian populations in the event of a pandemic occurring during an armed conflict. To achieve this objective the research will attempt to answer the following questions:

- 1) What are the humanitarian needs brought about by the intersection of COVID-19 and: i) Military occupation; ii) International armed conflicts and; iii) Non-International Armed Conflicts?
- 2) What are the applicable IHL provisions regulating humanitarian assistance in situations where there is a collision between a global health emergency like the COVID-19 pandemic and: i) Military occupation, ii) International armed conflict and; iii) non-international armed conflicts?
- 3) How adequate are these rules in protecting the civilian population in areas of: i) Military occupation; ii) International armed conflict and; iii) non-international armed conflicts.
- 4) Are there other international law provisions that are applicable to supplement the IHL rules regulating humanitarian assistance in conflict during the COVID-19 pandemic?

1.4 SCOPE AND DELIMITATIONS

Humanitarian assistance is not only limited to situations of conflict. Humanitarian aid is simply material or logistical assistance provided for humanitarian purposes, typically in response to a humanitarian crisis.⁸⁸ A humanitarian crisis is an event or events that threaten the health, safety, or wellbeing of a large group of people.⁸⁹ The crises can be caused by war, natural disasters, famine and/or disease outbreak.⁹⁰ In other words, the COVID-19 pandemic on its own can be considered a humanitarian crisis.⁹¹ This research is not concerned with the provision of humanitarian assistance in all situations of humanitarian crises. Instead, this research is focused on humanitarian assistance in the event that an armed conflict coincides with another crisis like the COVID-19 pandemic.

Because the *lex specialis* regulating armed conflict is IHL,⁹² this research will be conducted through the lenses of the specific IHL provisions dealing with humanitarian assistance. This therefore also

⁸⁸ Katherine Rouleau, Lynda Redwood-Campbell, 'International development and humanitarian aid: in times of economic crisis, should Canada maintain its spending?' (2009) 55/6 Canadian Family Physician 575, 575.

⁸⁹ Save the Children 'Humanitarian Crises to know about in 2022' < <https://www.savethechildren.org/us/charity-stories/humanitarian-crises-you-need-to-know-about>> accessed 22 September 2022.

⁹⁰ Ibid.

⁹¹ Julitta Onabanjo 'Conflict, Climate and COVID: Tackling humanitarian crises on multiple fronts' (13 August 2021) United Nations Population Fund (UNFPA) < <https://esaro.unfpa.org/en/news/conflict-climate-and-covid-tackling-humanitarian-crises-multiple-fronts>> accessed 22 September 2022.

⁹² 'Lex specialis' in ICRC Online Casebook: How does the law protect in war? (n 21).

disqualifies other situations of violence that are not considered as armed conflicts under IHL,⁹³ even when they intersect with the COVID-19 pandemic, to be assessed under this study as the research is one of IHL and therefore only armed conflicts as understood under IHL will be assessed.

Furthermore, the nexus requirement under international law whereby IHL applies only to conduct linked to an armed conflict,⁹⁴ will delimit this research further. This is to say, even on the territory controlled by a party during an armed conflict, IHL only governs conduct that has a sufficient nexus to the armed conflict.⁹⁵ Indeed, this research will look at situations where COVID-19 related humanitarian needs can be sufficiently linked to the ongoing conflict. In this regard, using the test determined in *Prosecutor v Kunarac*,⁹⁶ the armed conflict must have a significant role in the persistence of specific COVID-19 related humanitarian needs, requiring humanitarian assistance. Where no such link can be ascertained, this research will not find application.

1.5 METHODOLOGY

This research will utilise academic, desk-based research. The provisions of IHL as found in the primary sources of IHL, notably the Geneva Conventions and their Additional Protocols dealing with humanitarian assistance will be used as the point of departure for the research's analysis. Use will also be made of rules of customary international humanitarian law as well as authoritative commentaries on IHL, and case law of courts and tribunals as guidelines in analysing selected provisions. These provisions will be analysed and interpreted according to the Vienna Convention on the Law of Treaties' rules on the interpretation of treaties.⁹⁷

1.6 STRUCTURE

As concerns structure, this dissertation will be divided into six Chapters. This Chapter, Chapter 1, introduced key concepts and the general background and focus of the research. Chapters 2 to 4 will discuss humanitarian assistance in different armed conflicts, beginning with Chapter 2 on military

⁹³ For example, IHL distinguishes between a NIAC and other lesser forms of collective violence such as civil unrest, riots, isolated acts of terrorism or other sporadic acts of violence.

For more see ICRC, '10-12-2012 Interview: Internal conflicts or other situations of violence-what is the difference for victims?' < <https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm>> The law of armed conflict will not be applicable in these situations.

⁹⁴ Sassoli (n 83) 201.

⁹⁵ Ibid 202.

⁹⁶ *Prosecutor v Kunarac and others*. (Appeals Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002) (Kunarac), International Criminal Tribunal for the former Yugoslavia, 58.

⁹⁷ Vienna Convention on the Law of Treaties, May 23, 1969 1155 United Nations Treaty Series 331; 8 I.L.M. 679 (1969).

occupation, Chapter 3 on IACs other than occupation and Chapter 4 on NIACs respectively. In these Chapters, humanitarian issues relating to the COVID-19 pandemic that are particularly relevant to conflict will be addressed in the respective sections. Chapter 5 will then discuss, considering the findings of Chapters 2-4, the regulation of humanitarian assistance in conflict areas, under IHRL as supplementary to the IHL rules on humanitarian assistance, before concluding with Chapter 6 which will consolidate the previous Chapters.

CHAPTER 2: COVID-19 humanitarian relief in situations of Military Occupation

This Chapter will explore the rules of the law of military occupation governing humanitarian assistance and access in occupied territories during pandemics like COVID-19. First the Chapter will briefly describe the type of conflict that is a military occupation according to how it is understood in IHL. This is done to promote a better understanding of the applicable legal framework that will be analysed in this Chapter. Following this rundown on the concept of military occupation the research will unpack the basic and more specific rules of IHL on humanitarian assistance in situations of military occupation relevant during health pandemics, before concluding the Chapter.

2.1 MILITARY OCCUPATION: A BRIEF SYNOPSIS

Other than situations of declared war and actual armed conflict Common Article 2 extends the Geneva Conventions to all situations of belligerent occupation,⁹⁸ also called military occupation. Military occupation entails a situation where territory is occupied by a foreign army, regardless of if the occupation is resisted.⁹⁹ It is recognised in the Hague regulations,¹⁰⁰ that a key element of the definition of military occupation is that it is a form of government,¹⁰¹ although it is expressed in the context of concern about the territorial extent of military occupation rather than directly in terms of the nature of military occupation.¹⁰² The occupation encompasses only the territory where such authority has been established and can be exercised.¹⁰³ A State's territory may therefore be partly occupied, in which case the laws and obligations of occupation apply only in the territory or parts that are actually occupied.¹⁰⁴

⁹⁸ Emily Crawford and Alison Pert, *International Humanitarian Law*, (2nd edn, Cambridge University Press 2020), 54.

⁹⁹ *Ibid.*

¹⁰⁰ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.

¹⁰¹ Peter M.R. Stirk, *A History of Military Occupation from 1792 to 1914*, (1st edn, Edinburgh University Press 2016), 8. Hague Regulations, (n99), Article 42.

‘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.’

¹⁰² Stirk (n101) 8.

¹⁰³ ‘Occupation’ in ICRC Online Casebook: How does the law protect in war? (n 21).

¹⁰⁴ *Ibid.*

Military occupation presupposes forceful presence of the troops, as when a State consents to the presence of foreign troops there is no occupation.¹⁰⁵

Determining whether a certain territory is occupied within the meaning of IHL is thus a question of fact and,¹⁰⁶ is contingent on whether the occupying power has established effective control over the territory in question.¹⁰⁷ This effective control does not necessarily have to be exercised directly through the armed forces of the occupying power.¹⁰⁸ It can also exist when a foreign State applies total control over local authorities who, in turn, exert their direct governmental control as de facto State agents on behalf of the occupying power.¹⁰⁹ A belligerent occupation begins when a hostile army invades into territory under the rule of another State, or at least not under the rule of its own State, and begins to exert effective and exclusive control over it.¹¹⁰ This is in accordance with Article 42 of the Hague Regulations.¹¹¹ Consequentially, a belligerent occupation concludes when the hostile armed forces cease to control the occupied territory.¹¹²

To exemplify, perhaps the most well-known instance of military occupation is the one of Palestine by Israel, commonly referred to as the Occupied Palestine Territories (oPt). In this occupation, Israel has been occupying the territory of Palestine since the end of the Six-Day War in 1967.¹¹³ Israel is as such worldwide recognised as the occupying power in the West Bank, including East Jerusalem, and the Gaza Strip.¹¹⁴ Other examples of military occupation include the military occupation of Western Sahara by Morocco where Morocco, Syria by Turkey, Syria by Israel and Georgia by Russia inter alia.¹¹⁵

While occupation presupposes an international armed conflict,¹¹⁶ in that there are normally two States involved, there are different rules regulating an international armed conflict other than occupation and

¹⁰⁵ Ibid.

¹⁰⁶ Melzer (n 58) 59.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid referring to ICRC, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*, report prepared and edited by Tristan Ferraro, ICRC, Geneva, March 2012, 23.

¹¹⁰ Kolb and Hyde (n61), 230.

¹¹¹ Hague Regulations (n100), Art 42.

¹¹² Kolb and Hyde (n61) 230.

¹¹³ Ibid.

¹¹⁴ Rule of Law in Armed Conflicts (RULAC), Military Occupation of Palestine by Israel < <https://www.rulac.org/browse/conflicts/military-occupation-of-palestine-by-israel#collapse1accord> > accessed 01 October 2022.

¹¹⁵ Rule of Law in Armed Conflicts (RULAC), Military Occupation < <https://www.rulac.org/browse> > accessed 01 October 2022.

¹¹⁶ Sassoli (n 83) 303.

those regulating military occupation. Military occupation is governed by a specific branch of IHL called the law of occupation which regulates the relationship between the occupying power (OP) on the one hand, or the wholly or partially occupied State or territory (OT) and its inhabitants, including refugees and stateless persons, on the other.¹¹⁷

The law of military occupation which is applicable in the case of the Occupied Palestinian Territories (oPt) and other occupied territories is set forth in the Hague Conventions, the Fourth Geneva Convention, and Additional Protocol I to the Geneva Conventions of 1949. Customary international humanitarian law as seen in the ICRC's study¹¹⁸ is also applicable in the Occupied territories. The Hague Regulations are mainly concerned with the administrative rights and responsibilities of the OP, whereas the Geneva Conventions have supreme interest for the rights accorded for the protection of the civilian population.¹¹⁹ Moreover, the Hague Regulations fall short in providing a wide-ranging elucidation of the norms applying to occupied territories, while the Geneva Convention attempts to provide a clearer and more comprehensive framework setting out the rights and duties pertinent in occupied territory, thus completing the work begun in the Hague Regulations.¹²⁰

These rules as found in the Hague Regulations and the Geneva Conventions explicate the rights and obligations of the occupying forces which are bound to take the required steps to restore inter alia public life and maintain them as well as possible.¹²¹ In this regard, the provisions in these sources dealing with humanitarian assistance will be reviewed and the aptness of these provisions to COVID-19 humanitarian needs assessed.

2.2 HUMANITARIAN NEEDS OF OCCUPIED TERRITORIES SPECIFIC TO THE COVID-19 PANDEMIC

Indeed, 'war is an infectious disease's best friend'.¹²² This statement can be seen to be true in the context of an intersection of military occupation and a contagious disease pandemic, with various humanitarian issues arising from this connexion. 2020 witnessed a significant increase in the severity

¹¹⁷ ICRC, *Lesson 9: The law of armed conflict, belligerent occupation* (2002), <https://www.icrc.org/en/doc/assets/files/other/law9_final.pdf> accessed 01 October 2022

¹¹⁸ ICRC, *Customary International Humanitarian Law*, (n 3).

¹¹⁹ Kolb and Hyde (n 61) 229.

¹²⁰ Ibid 230.

¹²¹ ICRC Online Casebook: How does law protect in war? (n 20), Glossary: 'Occupation'.

¹²² Michael Osterholm, *Medicine and the Machine* podcast in May 2021, <<https://open.spotify.com/episode/7ePgyhv9YLke1Y1ZRe5EBR>> accessed 01 October 2022.

of humanitarian needs across occupied territories like the oPt.¹²³ Areas of civilian wellbeing affected by the co-existence of COVID-19, and military occupation include physical health¹²⁴ complicated by symptoms of the virus as well as mental health.¹²⁵ In the oPt for example, 2 years into the pandemic, by February 2 2022, there had been 556 550 confirmed cases of COVID-19.¹²⁶ Of these there had been about 5513 COVID-19 related deaths and a positivity rate of 31.1% by the end of the same month.¹²⁷ Despite this only 49.3% of the population were fully vaccinated.¹²⁸ Similarly in Syria, occupied by different powers including Turkey and Israel¹²⁹, the numbers of COVID-19 cases and deaths continue(d) to rise.¹³⁰ To compound the situation, the Syrian healthcare system has been tremendously damaged and lacks the capability to contain such a crisis.¹³¹ The estimated number of intensive care unit beds with ventilators is only 325, and the theoretical maximum number of cases that can be adequately treated is barely 6,500.¹³² It was thus important that the civilians in occupied territories have access to COVID-19 prevention supplies including water; sanitation and hygiene (WASH) facilities,¹³³ Personal Protective Equipment (PPE) as well as treatment supplies like medicines and other mitigation materials.¹³⁴

2.3 BASIC RULES ON HUMANITARIAN ASSISTANCE IN OCCUPIED TERRITORIES

According to international humanitarian law, the main sources of the law of belligerent occupation are Section III of the Hague Regulations in Articles 42-56, and Sections I, III, and IV of the Fourth Geneva

¹²³ United Nations Office for the Coordination of Humanitarian Affairs (OCHA) ‘Humanitarian needs overview oPt, working document’ Humanitarian program cycle 2021.

¹²⁴ Marco Longobardo, ‘The Duties of Occupying Powers in Relation to the Prevention and Control of Contagious Diseases through the Interplay between International Humanitarian Law and the Right to Health’, (2022) 55(3) *Vanderbilt Journal of Transnational Law* 757, 758.

¹²⁵ Rula Ghandour and others, *Double Burden of COVID-19 Pandemic and Military Occupation: Mental Health Among a Palestinian University Community in the West Bank* 2.

¹²⁶ World Health Organisation, *Health Conditions in the occupied Palestinian territory, including east Jerusalem and in the occupied Syrian Golan*, Report by the Director-General at the 75th World Health Assembly 7.

¹²⁷ World Health Organisation, *COVID-19 Monthly Situation Report, Occupied Palestinian territory*, 1.

¹²⁸ *Ibid* 2.

¹²⁹ The Rule of Law in Armed Conflict (RULAC), *Military Occupation of Syria by Turkey* <<https://www.rulac.org/browse/conflicts/military-occupation-of-syria>> accessed 31 October 2022. The Rule of Law in Armed Conflict (RULAC), *Military Occupation of Syria by Israel*, <<https://www.rulac.org/browse/conflicts/military-occupaton-of-syria-by-israel>> .

¹³⁰ Batoul Bakkar and others, *A cross-sectional survey of COVID-19: attitude and prevention practice among Syrians*, 2. ¹³¹ *Ibid*.

¹³² M. Gharibah, Z. Mehchy, *COVID-19 Pandemic: Syria’s Response and Healthcare Capacity*, 2020 updated 04/10/2021. Available from: <http://eprints.lse.ac.uk/id/eprint/1038412020>.

¹³³ WASH Cluster, *State of Palestine ‘WASH COVID-19 Response guidance’* (May 2020), 20 <www.washcluster.net/covid-19/palestine-wash-covid-19-response-guidance-may-2020> accessed 02 October 2022.

¹³⁴ Osaid Asler, ‘Healthcare workers preparedness for COVID-19 pandemic in the occupied Palestinian territory: a cross-sectional survey’ (2021) 21 (766) *BMC Health Services Research* 1, 3.

Convention (GC IV).¹³⁵ Article 42 of the Hague Regulations, defines the powers exercised by an occupying power as *de facto* authority as opposed to legal authority exercised by a State on its own territory.¹³⁶ This is further formulated and confirmed by the State practice of the United Kingdom which states in its manual on the law of Armed Conflict that IHL does not confer power on an occupant, but instead regulates the occupant's use of power which power arises from the actual control of the area.¹³⁷ This *de facto* authority is shaped and limited by international law and is subject to a number of duties,¹³⁸ including an obligation upon the OP, both negative and positive, not to interfere as well as to do due diligence to ensure public order and civil life.¹³⁹ Article 43 of the Hague Regulations¹⁴⁰ articulates in a very general way the duties of the OP.¹⁴¹ In this regard the Article's English translation reads in part, '[the Occupying Power] must take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'¹⁴²

This provision was confirmed to correspond with customary law by the International Military Tribunal at Nuremberg¹⁴³. The precise meaning of this provision is however quite unclear,¹⁴⁴ which makes it imperative to attempt to interpret and define, which will be done in following sections. For this section, it suffices to state that there are arguably two major elements of the law of belligerent occupation that describe the regime of rights and duties arising from the treaty law regulating military occupations.¹⁴⁵ These two features are preservation to the fullest possible extent of the status quo in the occupied territory,¹⁴⁶ as well as respect for individual rights of the civilian population.¹⁴⁷ IHL of belligerent occupation is therefore designed to allow protected civilians to continue their lives as normally as

¹³⁵ Sassoli (n83) 303.

¹³⁶ Michael Bothe 'Legal expert opinion on the right to provide and receive humanitarian assistance in occupied territories' (July 15, 2015) < https://www.nrc.no/globalassets/pdf/legal-opinions/bothe_expert-opinion-on-humanitarian-assistance.pdf >, accessed 02 October 2022, 6.

¹³⁷ Ibid referring to the UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 2004, para 11.9.

¹³⁸ Ibid 7.

¹³⁹ Sassoli (n83) 303.

¹⁴⁰ Hague Regulations (n100), Art 43.

¹⁴¹ Bothe (n 136), 7.

¹⁴² Marco Sassoli 'Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century' (Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, June 25-27 2004) (Program on Humanitarian Policy and Conflict Research at Harvard University) IHLRI 2.

See also Bothe M, *Legal expert opinion*, (n 151), 6.

¹⁴³ Sassoli (n83) referring in n3 to the Trial of the Major War Criminals, International Military Tribunal in Nuremberg, published in (1947) 41 AJIL 172, in particular at 248-249.

¹⁴⁴ Ibid.

¹⁴⁵ Kolb and Hyde (n 66) 229.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid 230.

possible.¹⁴⁸ It is the aim of this research to assess what this means for populations in occupied territories in the context of COVID-19, where mask wearing and constant washing of hands and sanitizing *inter alia* became ‘the new normal’.

RESPONSIBILITIES OF OCCUPYING POWERS DURING THE COVID-19 PANDEMIC.

It is arguable that when a territory is subject to military occupation, as with the oPt, the legal position as regards humanitarian assistance to the local civilian population is the clearest.¹⁴⁹ It is accepted in IHL that an OP has the responsibility to provide for the well-being of the population of the OP, an obligation enshrined in the customary law of belligerent occupation¹⁵⁰. Indeed, in IHL, in situations of occupation, the OP is considered the *de facto* authority.¹⁵¹

Article 43 of the Hague Regulations bestows on an OP, the duty to restore and ensure as far as possible, public order and safety of the occupied territory.¹⁵² A very important element in this discussion pertains to what the obligation to ensure public order and public life as in Article 43 entails. The general rule of treaty interpretation as found in Article 31 of the VCLT,¹⁵³ states that the ordinary meaning¹⁵⁴ of the terms of a treaty are to be defined first when attempting to interpret a treaty. In this regard it is important that the terms ‘ensure’, and ‘public order’ be defined. According to Merriam-Webster¹⁵⁵ the word ‘ensure’ entails to make sure or certain. In this regard the obligation regarding public order and public life is a fixed commitment. Public order in the context of humanitarian law describes the general conditions that must exist so that individuals can enjoy their rights and freedoms¹⁵⁶. This entails that it is the OP’s duty to make certain that the environment that prevails in an OT, is one that allows the population to enjoy their rights and freedoms. Article 32 of the Vienna Convention also authorises the use of supplementary means of interpretation.¹⁵⁷ This Article authorises *inter alia*, the use of the ‘preparatory work’ of the treaty in order to confirm the meaning derived from Article 31.¹⁵⁸ In this

¹⁴⁸ Sassoli (n 83) 323.

¹⁴⁹ Yoram Dinstein, ‘The Right to Humanitarian Assistance’ (2000) 53(4) *Naval War College Review* 77, 79.

¹⁵⁰ Bothe (n136) 7.

¹⁵¹ *Ibid.*

¹⁵² Hague Regulations (n100) Art 43.

¹⁵³ VCLT (n97), Art 31.

¹⁵⁴ *Ibid* Article 31(1)

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

¹⁵⁵ “Ensure.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/ensure>. Accessed 3 Oct. 2022.

¹⁵⁶ Françoise Bouchet-Saulnier, ‘*The Practical Guide to Humanitarian Law*’ (Rowman and Littlefield, 2002) 544.

¹⁵⁷ VCLT (n97), Art 32.

¹⁵⁸ *Ibid.*

regard, the legislative history of the Hague Regulations provides good reasons to confirm but also broaden this definition to include social functions and ordinary transactions which comprise daily life.¹⁵⁹ The immediate predecessors of the provisions in Article 43 of the Hague Regulations can be said to be Articles 2 and 3 of the Brussels Declaration.¹⁶⁰ Article 2 of the Declaration of Brussels provides, similar to Article 43 that the occupying power must re-establish and ensure public order and civil life.¹⁶¹ In this regard, the Belgian representative at the Brussels negotiation interpreted ‘order’ to presumably entail safety and general security while civil life was interpreted to refer to social needs and ordinary transactions which constitute daily life. This interpretation was then confirmed by the Commission.¹⁶² Since the Hague Regulations were informed by the Brussels Declaration,¹⁶³, it can be interpreted that the scope of Article 43 is more extensive than simply the area of public order and safety.¹⁶⁴ This has been accepted by the Israeli Supreme Court,¹⁶⁵ and argued to be in line with the basic premise of IHL, confirmed in the introductory sentence of Article 43, that, if necessary, the OP must assume all functions of the government to guarantee normal life for the civilian population.¹⁶⁶

It is important that we note that Article 43 states that the occupying power ‘*shall*’, not ‘*may*’ take all measures in his power to restore public order and safety. Going back to the general rule of treaty interpretation as per Article 31 of the VCLT, it is established here that the occupying powers have a substantial obligation in international law to reconstruct the occupied territory¹⁶⁷. The word ‘*shall*’ is defined by Merriam Webster as ‘used in laws, regulations, or directives to express what is mandatory’.¹⁶⁸ It is therefore not permissible for an OP to allow an OT to fester in a state of economic,

¹⁵⁹ Sassoli (n142) 3 referring to an explanation proposed by Baron Lambermont, the Belgian representative at the negotiations for the Brussels Convention of 1874, which never entered into force, but is known as the “Brussels Declaration”, in n8.

¹⁶⁰ Conor McCarthy, ‘The Paradox of the International Law of Military Occupation’ (2005) 10(1) Journal of Conflict & Security Law 43, 61 .

¹⁶¹ Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874, adopted by the Conference of Brussels < [Treaties, States parties, and Commentaries - Brussels Declaration, 1874 \(icrc.org\)](#)> accessed 03 October 2022 .

¹⁶² McCarthy C, (n 160), 61.

¹⁶³ Declaration of Brussels (n161).

It is stated in the introduction that ‘*Both the Brussels Declaration and the Oxford Manual formed the basis of the two Hague Conventions on land warfare and the Regulations annexed to them, adopted in 1899 and 1907. Many of the provisions of the two Hague Conventions can easily be traced back to the Brussels Declaration and the Oxford Manual*’.

¹⁶⁴ McCarthy (n 160) 61.

¹⁶⁵ Sassoli M, Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century, n158, 4, referring to the Israeli Supreme Court decision in Supreme Court of Israel, Christian Society for Holy Places v. Minister of Defense (1971), summarized in [1972] Israel Yearbook of Human Rights at 354.

¹⁶⁶ Ibid.

¹⁶⁷ McCarthy (n160) 62.

¹⁶⁸ “Shall.” *Merriam-Webster.com Dictionary*, Merriam-Webster, www.merriam-webster.com/dictionary/shall accessed 18 Sep. 2022.

social, political and infrastructural impedance generated by the conflict from which the occupation has resulted.¹⁶⁹

The duty under Article 43 has also been interpreted to entail a general obligation to ensure the wellbeing of the population, as far as possible.¹⁷⁰ In this regard one must read Article 43 of the Hague Regulations, in tandem with specific articles of the 4th Geneva Convention that add specific duties concerning specific aspects of the wellbeing of the population. In the context of this research Articles 55¹⁷¹ and 56¹⁷² regarding health services and provision of food and medical supplies (basic needs) are very relevant and must be assessed in the context of COVID-19 and cases of military occupation.

THE RIGHTS OF THE CIVILIAN POPULATION TO FOOD AND MEDICAL SUPPLIES AND THE CORRESPONDING OBLIGATION BY THE OP TO PROVIDE SUCH DURING THE COVID-19 PANDEMIC.

As mentioned above, one of the aspects of the law of military occupation that typify the regime of rights and duties from the treaty law of military occupation is the respect for individual rights of civilian population.¹⁷³ In this regard the Geneva Convention IV contains a series of provisions granting the civilian population rights against the occupier.¹⁷⁴ In light of the COVID-19 pandemic, there are specific provisions under the 4th Geneva Convention and Additional Protocol 1 which obligates the occupying power to promote public health particularly in the time of the global pandemic.¹⁷⁵

First it must be noted that civilians in military occupation like the oPt are entitled to be humanely treated and protected.¹⁷⁶ This is articulated in the 4th Geneva Convention in Article 27.¹⁷⁷ The principle of humane treatment in IHL requires that those who fall into the hands of the enemy be treated with respect for their dignity as human beings.¹⁷⁸ This undoubtedly entails the provision of at least a minimum level of the fundamental determinants of health such as WASH facilities, medicines and health care.¹⁷⁹

¹⁶⁹McCarthy (n160), 62.

¹⁷⁰ Bothe (n 136) 7.

¹⁷¹ GC IV, Art 55 .

¹⁷² Ibid.

¹⁷³ Kolb and Hyde, (n61) 233.

¹⁷⁴ Ibid.

¹⁷⁵ Mohamad Kamal Sodiqin Absull Manaf and Nisar Mohammad Ahmad, 'The Roles of International Humanitarian Law During the COVID-19 pandemic: A Case Study of the Occupied Palestinian territory' (International Seminar on Islam and Science 2020), 15 October 2020.

¹⁷⁶ Ibid, 1203.

¹⁷⁷ GC IV, Art 27.

¹⁷⁸ 'Humane treatment' ICRC Online Casebook: How does law protect in war? (n 21).

¹⁷⁹ Manaf and Ahmad (n 203) 1204.

Article 55(1)¹⁸⁰ imposes on the OP, the duty, to the fullest extent of the means available to it, to ensure the food and medical supplies of the civilian population. In using the ordinary meaning as dictated by the VCLT in Article 31, the nature of this conduct is obligatory in accordance to Merriam Webster’s definition of duty.¹⁸¹ The provision is caveated by the phrase ‘to the fullest extent of’ which limits the obligatoriness of the provision of food and medical supplies to ‘as much as allowed by’,¹⁸² the means available to the OP. The ICRC commentary on this Convention notes that this duty is ‘*a definite obligation to maintain at a reasonable level, the material conditions under which the population of the occupied territory lives.*’¹⁸³ This entails an absolute obligation, that an occupying power must abide by and an inalienable right that civilians of an OT are entitled to. To confirm this interpretation of the provision, as in Article 32 of the VCLT, using the drafting history of the Convention as supplementary material it can be seen as identified by the commentaries, that this obligation is indicative of the traditional idea of the law of war according to which belligerents sought to destroy the power of the enemy state and not the individuals.¹⁸⁴

Whether, WASH facilities and other PPE necessary for the prevention of COVID-19 are included in this provision is important to ascertain. The commentary clarifies this by asserting that ‘supplies for the population are not limited to food but include medical supplies and any article necessary to support life’.¹⁸⁵ As was mentioned above, masks were part of the comprehensive strategy of measures to suppress the transmission of COVID-19.¹⁸⁶ Despite the importance of these face coverings for the prevention of COVID-19, it was noted that ‘not all face masks were considered to be medical devices’.¹⁸⁷ The word face mask was used as the umbrella term for all types of face coverings, from custom-made cotton scarves to disposable surgical masks and medical grade N95 respirators.¹⁸⁸ This ambiguity on what a mask is could lead an OP (Israel in the case of the opt or Syria for example) to get out of the responsibility to provide masks for the prevention of COVID-19 in that they were

¹⁸⁰ GC IV Art 55 (1).

¹⁸¹ “Duty.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/duty>. Accessed 18 Sep. 2022.

¹⁸² “To the fullest extent of.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/to%20the%20fullest%20extent%20of>. Accessed 18 Sep. 2022.

¹⁸³ Dinstein (n149) 79.

¹⁸⁴ Commentary of 1987 to Art 55 of GC IV.

¹⁸⁵ Ibid.

¹⁸⁶ World Health Organisation ‘Coronavirus disease (COVID-19) advice for the public, when and how to use masks?’ <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks>> accessed 31 October 2022.

¹⁸⁷ Karl Mutter, ‘Face masks as medical devices, to be or not to be’ <https://cms.law/en/col/publication/face-masks-as-medical-devices-to-be-or-not-to-be> accessed 22 October 2022.

¹⁸⁸ Lucia Martinelli and others, (2021) Face Masks During ‘ the COVID-19 Pandemic: A Simple Protection Tool with Many Meanings. *Front. Public Health* 8:606635. doi: 10.3389/fpubh.2020.606635, 3.

technically not considered ‘medical supplies’.¹⁸⁹ The framers of IHL were cognisant of this or a similar possibility arising and thus experts clarified in the commentaries that this provision includes any article ‘necessary to support life’.¹⁹⁰ Seeing as how important all these face coverings, medical or not, and other PPE are in preserving lives by preventing the transmission of COVID-19, it can certainly be argued that they would be included in this provision. This assertion is also supported by Article 69(1) of Additional Protocol I which stipulates that the OP must ensure without adverse distinction the provision of, inter alia, ‘other supplies essential to the survival of the civilian population...’.¹⁹¹ The phrase ‘supplies essential to the civilian population’ is key here. Something that is essential considered something that is of utmost importance.¹⁹² This provision can therefore be re-read in accordance with Article 31 of the VCLT,¹⁹³ as other supplies that can be considered of utmost importance to the civilian population. Further the word ‘other’ clearly shows that this list was not intended to be exhaustive.¹⁹⁴ The ICRC Commentaries to this provision note in this regard that it depends on the local conditions whether certain supplies are essential or not.¹⁹⁵ In this regard, the prevailing circumstances in many occupied territories, other than the military occupation itself, was the Covid-19 pandemic,¹⁹⁶ with it being a global outbreak. Furthermore, the preamble to Additional Protocol, which is important to view as a supplementary interpretation tool in accordance with Article 31(2)(a) of the VCLT¹⁹⁷ denotes that the drafters drafted the Protocol with the belief that ‘it necessary to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application’. In this regard Article 69 of AP 1 reaffirms Article 55 of GC IV,¹⁹⁸ specifically mentioning it in its introductory sentence.¹⁹⁹ It further develops, Article 55, setting out from the idea that it is too restrictive to limit the obligation to supply the population of the occupied territory only with food and

¹⁸⁹ Ibid 9.

¹⁹⁰ Commentary of 1987 to Art 55 of the 4th Geneva Conventions of 12 August 1949.

¹⁹¹ Article 69(1) of AP I.

¹⁹² “Essential.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/essential>. Accessed 18 Sep. 2022.

¹⁹³ VCLT (n97) Art 31.

¹⁹⁴ Commentary to Article 69 of Additional Protocol 1, para 2780.

¹⁹⁵ Ibid.

¹⁹⁶ See among others: Mohammed Alsabri and others, ‘Conflict and COVID-19 in Yemen: beyond the humanitarian crisis notes that’ (2021) 17(83) *Globalization and Health* who note that ‘*Yemen has been left in shambles and almost destroyed by its devastating civil war, and is now having to deal with the spread of coronavirus. The Yemeni people have been left to fend for themselves and faced many problems such as hunger, the ongoing war, infections, diseases and lack of equipment even before the COVID-19 pandemic.*’;

International Commission of Jurists, ‘Under Occupation: Unprotected and Unvaccinated Israel’s Denial of Equitable Access to COVID-19 Vaccines in the Occupied Palestinian Territory: A Briefing Paper’ (October 2021).

¹⁹⁷ VCLT (n97) Art 31(2)(a).

¹⁹⁸ Commentary of 1987 to Additional Protocol 1, Article 69, para 2779.

¹⁹⁹ Additional Protocol 1, Art 69 ‘In addition to the duties specified in Article 55 of the Fourth Geneva Convention...’.

medical supplies.²⁰⁰ As such, having taken 6.53 million lives,²⁰¹ at the time of writing this dissertation,²⁰² with the numbers being probably much higher as these are only the officially reported figures,²⁰³ COVID-19 is deadly and its prevention is consequently essential to the survival of the population. Therefore, OPs, like Israel, in the context of COVID-19 must provide prevention supplies including masks, WASH facilities and other PPEs in accordance with Article 55 of the 4th Geneva Convention and Article 69 of Additional Protocol 1 as interpreted herein. The provisions of Article 69 of AP I and 55 of the GC IV have been confirmed as customary law and can be found to be confirmed in Rule 55 of the ICRC Study on Customary International Humanitarian Law which contains similar provisions stating, *‘The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.’*²⁰⁴

The provision of these supplies must be ‘without any adverse distinction’.²⁰⁵ This obligation is also found in customary international law with Rule 55 of the ICRC Study also containing a ‘without adverse distinction’ caveat²⁰⁶ and is seen in various State practices including in the military manuals of Djibouti²⁰⁷ as an example. The notion of ‘adverse’ distinction has been elaborated by the ICRC to be the IHL equivalent to human rights law’s principle of non-discrimination.²⁰⁸ The notion of adverse distinction implies that while the unfavourable distinction is prohibited, a distinction may be made to give priority to those in most urgent need of care.²⁰⁹ Distinctions are unlawful when based on criteria other than medical or humanitarian.²¹⁰ Rights and obligations of different actors are to be distinguished. This obligation applies equally to aid provided for by the OP, and to relief

²⁰⁰ Commentary of 1987 to Additional Protocol 1, Article 69, para 2779.

²⁰¹ World Health Organisation, WHO Coronavirus (COVID-19) Dashboard < <https://covid19.who.int/>> accessed 27 August 2022.

²⁰² This information was obtained from the World Health Organisation’s Coronavirus Dashboard (n225) above. It was correct as of 18/09/2022 when this section was drafted.

²⁰³ Statement by the International Committee of the Red Cross (ICRC) at the United Nations Security Council, New York 11 April 2022. Delivered by Dr. Esperanza Martinez, Senior Advisor to the Office of the Director General.

²⁰⁴ ICRC, Customary International Humanitarian Law, (n 3), Rule 55.

²⁰⁵ Article 69 of the Additional Protocol 1.

²⁰⁶ ICRC, Customary International Humanitarian Law, (n 3), Rule 55.

²⁰⁷ Djibouti, *Manuel sur le droit international humanitaire et les droits de l’homme applicables au travail du policier*, Ministère de l’Intérieur, Direction Générale de la Police, 2004, states [I]f the civilian population is deprived of objects essential for their survival (such as foodstuffs or medical supplies), relief action “of an exclusively humanitarian and impartial character and which are conducted without any adverse distinction” .

²⁰⁸ ‘adverse distinction in’ ICRC Online Casebook: How does law protect in war? (n 21).

²⁰⁹ Ibid.

²¹⁰ Heike Speiker, ‘The Right to Give and Receive Humanitarian Assistance’, in Hans-Joachim Heintze and Andrej Zwitter (eds), *International Law and Humanitarian Assistance: A Crosscut Through Legal Issues Pertaining to Humanitarianism* (Springer Verlag Berlin Heidelberg 2011), 9.

operations.²¹¹The OP must therefore prohibit discrimination, except only when a distinction is based on medical condition, age, sex or other medical or humanitarian conditions.²¹² In addition, while the rights of victims to humanitarian assistance must be as extensive as possible to achieve maximum protection, every effort must be made to ensure that the aid provided does not favour one of the parties of the conflict.²¹³In the oPt for example, while Israel conducted a prompt COVID-19 immunisation drive of its own population, it failed to assure access to the same for the population of the oPt²¹⁴ contrary to their obligations under IHL. In this regard, Israeli officials proposed that Israel may supply vaccines for Palestinians at a later stage if it has surplus.²¹⁵ This is incompatible with Israel's obligations under international law and a clear contradiction of IHL of belligerent occupation. Israel as an OP should therefore not illogically obstruct the delivery of hygiene kits, ventilators, and other supplies essential for COVID-19 prevention for the oPt.²¹⁶ in line with the principle of 'adverse distinction' and the prohibition of it.

THE PROVISION OF VACCINATIONS AGAINST COVID-19 BY OPs in OCCUPIED TERRITORIES

A vital factor in the fight to combating COVID-19 is the use of vaccines as they are regarded one of the most effective ways to prevent SARS-CoV-2²¹⁷ in the long term. In this regard, the COVID-19 Treatment Guidelines Panel recommended that all eligible persons be vaccinated as soon as possible in accordance with the Centre for Disease Control and Prevention (CDC)'s Advisory Committee on Immunisation Practices.²¹⁸ As with the provision of supplies mandated by Articles 55 of GC IV and 69 of AP I, the OP is obligated by IHL to provide vaccines to the civilian population of the territory they occupy.²¹⁹ GC IV having been adopted in the wake of the Second World War (WW2) after millions of civilians worldwide suffered horribly²²⁰ acknowledges the importance of immunisation

²¹¹ Commentary of 1987 to Article 69 of AP I.

²¹² Ibid.

²¹³ Stoffels RA, "Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps" (2004) 86 *Revue Internationale de la Croix-Rouge/International Review of the Red Cross* 515, 539.

²¹⁴ International Commission of Jurists, *Under Occupation: Unprotected and Unvaccinated-Israel's Denial of Equitable Access to COVID-19 Vaccines in the Occupied Territory*, Briefing Paper, October 2021.

²¹⁵ Diakonia International Humanitarian Law Centre, *COVID-19 Vaccines for the Palestinian Population: Who is Responsible Under International Law*, 3 < <https://www.diakonia.se/ihl/news/covid-19-vaccines-for-the-palestinian-population/>> accessed 25 October 2022.

²¹⁶ International Commission of Jurists (n196), 1203.

²¹⁷ National Institute of Health, *COVID-19 Treatment Guidelines Panel. Coronavirus Disease 2019 (COVID-19) Treatment Guidelines*. National Institutes of Health. < <https://www.covid19treatmentguidelines.nih.gov/>> accessed 20 September 2022, 24.

²¹⁸ Ibid.

²¹⁹ GC IV, Art 56 .

²²⁰ Jelena Pejic 'The Other Side of Civilian Protection: The 1949 Fourth Geneva Convention', March 7 2022 <

against diseases as an important step to limit civilian suffering.²²¹ The health conditions under which the inhabitants of the occupied territory lived during WW2 were often deplorable²²² and favoured the spread of epidemics. Accordingly, the ICRC based on the experience gained during WW2 recommended that at the end of hostilities, specific measures be taken to prevent any repetition of this state of affairs.²²³ Over twenty years after the adoption of Article 43 of the Hague Regulations, during the 1919-1920 US occupation of parts of Germany,²²⁴ preventive and prophylactic measures in occupied territory were commonplace, both on the basis of existing law and new regulations enacted by the occupying power.²²⁵ In particular, relating to vaccinations Article 56 of GC IV is important, stating in part:

To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the co-operation of national and local authorities, the medical and hospital establishments and services, public health, and hygiene in the occupied territory, with reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics.²²⁶

The obligation created by Article 56 is crucial in the face of the COVID-19 outbreak and it may include a duty to share available information on prevention measures²²⁷ and vaccinate the population. Using the methods of treaty interpretation as regulated by the VCLT,²²⁸ one can see that this provision therefore specifically confers on an OP, the duty of ensuring the adoption and application of preventative measures essential to fully fight the spread of infectious diseases and pandemics. This explanation is derived from the ordinary or dictionary meaning of the word prophylactic which is '*done or used to prevent a disease*'.²²⁹ The wording demonstrates that the OP has a specific duty to ensure and maintain inter alia the public health of the OP.²³⁰ This entails that even the Personal Protective Equipment mentioned before in relation to Article 55 could be covered by this provision, seeing as

²²¹ Article 56 of the 4th Geneva Convention <https://lieber.westpoint.edu/other-side-civilian-protection-fourth-geneva-convention/> accessed 21 October 2022.

²²² Commentary of 1987 to Art 56 .

²²³ Ibid.

²²⁴ After the armistice ended the fighting on the Western Front in World War I, the US Third Army marched into the American occupation zone around the city of Koblenz, Germany, in December 1918. American forces remained there as part of an "inter-Allied" coalition until early 1923. For more information read among others, Dean A. Nowowiejski, *The American Army in Germany, 1918-1923*.

Irwin I Hunt, *American military government of occupied Germany, 1918-1920: report of the officer in charge of civil affairs, third army and American forces in Germany* 123–53 (1943).

²²⁵ Longobardo M (n124), 775.

²²⁶ Art 56 of the GC IV.

²²⁷ Diakonia International Humanitarian Law Centre (n215) 2.

²²⁸ VCLT (n111), Arts 31 and 32 on general and supplementary rules of interpretation.

²²⁹ Oxford Advanced Learner's Dictionary, International Student's Edition , p 1195 prophylactic.

²³⁰ Longobardo M, (n 139), 780.

they were utilised to prevent the COVID-19 virus. The question to be dealt with in this section, however, is whether an OP is obliged to provide vaccinations to the population of an occupied territory as part of their duties under Article 56.²³¹ At the time of the adoption of Article 56, it was seen as advancing the protection offered by the Hague Regulations, in that it specifies a duty that could have been linked to Article 43 of the Hague Regulations,²³² whilst explicitly embodying positive obligations for the OP.²³³ The very text of Article 56(1) highlights the provision's role in regulating contagious diseases like the COVID-19 pandemic.²³⁴ In this regard the provision refers specifically to prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics,²³⁵ both categories being applicable to COVID-19. Under this provision, the nature of the contagious disease at hand is entirely irrelevant,²³⁶ with the ICRC noting that epidemics in armed conflict could arise for a variety of reasons, including a lack of hygiene and medicines.²³⁷ The plain language of Article 56(1) combined with the humanitarian object and purpose of the GC IV,²³⁸ make it easy to conclude that the responsibility of the OP covers infectious diseases both related and unrelated to the occupation.²³⁹ Vaccinations are generally very important in the prevention of diseases including COVID-19, especially reducing the rates of COVID-19 infections, severity, hospitalisation and mortality among different populations.²⁴⁰ Two UN Special Rapporteurs Michael Lynk²⁴¹ and Tlaleng Mofokeng,²⁴² recently avowed the duties in Article 56 with regards to the provision of vaccines to the oPt, emphasising that the ultimate responsibility for health services remained with the

²³¹ Article 56 of the GC IV.

²³² Hague Regulations (n100), Art 43.

²³³ Longobardo M (n124), 780.

²³⁴ Ibid.

²³⁵ GC IV, art. 56(1).

²³⁶ Longobardo M (n124), 781.

²³⁷ International Committee of the Red Cross, *Preliminaire Fournie par le Comité International de la Croix-Rouge, Commission d'experts gouvernementaux pour l'étude des conventions protégeant les victimes de la Guerre*, Geneva, Du 14 Au 26 Avril 1947, 25 (1947).

²³⁸ The Convention adopted in 1949 takes account of the experiences of World War II. It contains a rather short part concerning the general protection of populations. The Convention does not invalidate the provisions of the Hague Regulations of 1907 on the same subject but is supplementary to them. Read more < <https://ihl-databases.icrc.org/ihl/INTRO/380#:~:text=The%20Convention%20adopted%20in%201949,of%20the%20use%20of%20weapons.>> accessed 22 October 2022,

See also Article 154 of GC IV, regarding its relationship with the Hague Conventions.

²³⁹ Longobardo M, (n124), 781.

²⁴⁰ Ibrahim Mohammed and others, 'The efficacy and effectiveness of the COVID-19 vaccines in reducing infection, severity, hospitalization, and mortality: a systemic review', 2022 18(1) *Human Vaccines and Immunotherapeutic*, doi: [10.1080/14760584.2022.2067531](https://doi.org/10.1080/14760584.2022.2067531).

²⁴¹ Prof S, Michael Lynk is the Special Rapporteur on the situation of human rights in the Palestinian territories (at the time of writing).

²⁴² Ms Tlaleng Mofokeng is the Special Rapporteur on the right to health (at the time of writing).

OP until the occupation has fully and finally ended.²⁴³ The commentary to Article 56 further notes that prophylactic measures include *inter alia* the distribution of medicines.²⁴⁴ A vaccine undoubtedly falls into the category of medicines as a safe, effective, and universal COVID-19 vaccine is a public health necessity, an economic priority to ensure recovery, and a moral imperative for all people everywhere.²⁴⁵ In accordance with this provision, all logistical arrangements in the distribution of vaccines are measures which need to be taken by the OP.²⁴⁶ It has been argued that leaving the local population of occupied territory exposed to health risks,²⁴⁷ including by not providing vaccinations, violated the ‘laws of humanity’, and, ultimately, constituted genocide,²⁴⁸ which prohibition is now recognised as customary international law and has been recognised by the ICJ as a peremptory norm of international law, meaning that it is binding on States.²⁴⁹

COOPERATION BETWEEN OCCUPYING POWER AND LOCAL AUTHORITIES IN DEALING WITH CONTAGIOUS DISEASES LIKE THE COVID-19 PANDEMIC.

According to Article 56, the ensuring of public health must be done ‘with the cooperation of national and local authorities.’²⁵⁰ The meaning of “cooperation” depends on the factual circumstances.²⁵¹ This phrase is indicative of a shared burden of taking measures toward public health and controlling epidemics like COVID-19 between the OP and the national authorities. Indeed, in certain situations of occupation, the national authorities are able to take measures and look after the health of the population without the interference or intervention of the occupying power.²⁵² This shows clearly that the OP alone cannot be held responsible for the provision of health services and for taking measures to control epidemics²⁵³. During the pandemic, some cooperation as mandated by Article 56 between the national

²⁴³ United Nations Office of the High Commission, ‘Israel/OPT: UN experts call on Israel to ensure equal access to COVID-19 vaccines for Palestinians’ (14 January 2021) < <https://www.ohchr.org/en/press-releases/2021/01/israelopt-un-experts-call-israel-ensure-equal-access-covid-19-vaccines?LangID=EandNewsID=26655>> accessed 27 September 2022.

²⁴⁴ Commentary to Art 56 .

²⁴⁵ Oxfam, Occupied Palestinian Territory and Israel, and Others, Joint letter RE: Free and equitable access and distribution of COVID-19 vaccine in OPT, 18 February 2021, Jerusalem/Ramallah < <https://reliefweb.int/report/occupied-palestinian-territory/joint-letter-free-and-equitable-access-and-distribution-covid>> accessed 25 October 2022.

²⁴⁶ Mohamad Kamal Sodiqin Abdull Manaf and Nisar Mohammad Ahmad, ‘COVID-19 IN Palestine: What International Laws Can Offer? 2022 *Ulum Islamiyyah* 33(3),27.

²⁴⁷ Longobardo M (n124), 778.

²⁴⁸ Longobardo M (n124), 781.

²⁴⁹ United Nations Office on Genocide Prevention and the Responsibility to Protect, legal framework, accessed < <https://www.un.org/en/genocideprevention/genocide-convention.shtml>> accessed on 20/09/2022

²⁵⁰ Diakonia International Humanitarian Law Centre, (n215).

²⁵¹ Ibid.

²⁵² Dina Klingsbo, The Right to Health: Israel’s Obligations in the Occupied Palestine During the COVID-19 Pandemic, 12.

²⁵³ Commentaries OF 1987 to Art 56, para 313.

authorities and the OP was seen in the oPt, with the PA placing the country under internal lockdown and the OP (Israel) placing the oPt under external lockdown²⁵⁴ in an attempt to prevent the spread of the virus. Likewise, it was reported that, at an early stage, the healthcare authorities of Western Sahara addressed COVID-19 in the areas not under occupation by Morocco,²⁵⁵ whereas Morocco took care of the situation in other portions of occupied territory in Western Sahara.²⁵⁶ Accordingly, the OP must directly intervene only if the health infrastructure of the OT, like Palestine, is unable to provide adequate health care, otherwise only being subject to a negative duty not to interfere and to a positive duty to cooperate to strengthen the local authorities' capacity to tackle the disease.²⁵⁷ The task is above all one for the competent services of the occupied country itself.²⁵⁸ In these situations, the OP's only duty is to avoid hampering the work of the organisations responsible for the tasks.²⁵⁹

There are occasionally tools that help in understanding the modalities of cooperation between the OP and the authorities of the OT. In the case of the oPt, for example, the Oslo Accords²⁶⁰ are relevant to understand the modalities of cooperation between Israel and the oPt.²⁶¹ The Oslo Accords were signed between Israel and the Palestine Liberation Organisation granting the Palestinians elements of self-government for an interim period leading to negotiations on the final status of the West Bank and Gaza.²⁶² In this agreement, both parties agreed for Israel to discharge some of its responsibilities as an OP, including as they relate to public health, through Palestinian authorities.²⁶³ In this regard, Israel's role as the OP in the oPt includes the support of Palestinian authorities in their deployment and vaccination campaign, by all appropriate means.²⁶⁴ The Oslo records should however be read as prioritising the intervention of the Palestinian authorities to prevent and control COVID-19 in those areas where Palestinians enjoy the administration of health care.²⁶⁵

²⁵⁴ Ibid.

²⁵⁵ Rule of Law in Armed Conflict (RULAC), Military Occupation of Western Sahara by Morocco <<https://www.rulac.org/browse/conflicts/military-occupation-of-western-sahara-by-morocco>> accessed 19 October 2022.

²⁵⁶ Longobardo M (n124), 781.

²⁵⁷ Longobardo M (n124), 783.

²⁵⁸ 1987 Commentaries to Article 56, para 313.

²⁵⁹ Commentary of 1987 to Article 56.

²⁶⁰ Robbie Sabel, "The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements. By Geoffrey R. Watson. Oxford, New York: Oxford University Press, 2000. Pp. Xii, 429. Index. \$72." (2001) 95 American Journal of International Law 248.

²⁶¹ Diakonia International Humanitarian Law Centre, (n215) 5.

²⁶² Sabel (n260) 269.

²⁶³ Diakonia International Humanitarian Law Centre, (n215)5.

²⁶⁴ Ibid.

²⁶⁵ Longobardo M (n124), 786.

In most cases, however, the invading forces will be occupying a country suffering severely from the effects of war; hospitals and medical services will be disorganized, without the necessary supplies and quite unable to meet the needs of the population.²⁶⁶ This has proven to be true for the oPt where the Palestinian healthcare system was already weak after decades of Israeli occupation and its severe restrictions on freedom of movement were proven to be unprepared to handle the pandemic.²⁶⁷ The Palestinian public health system, similar to other OTs has been left seriously lacking in both funding and manpower. Where the national authorities are incapable of catering for the public health of the OT, the OP must then ensure that the hospital and medical services function properly and continue to do so.²⁶⁸ From the standpoint of international [humanitarian] law, Israel as the OP in the oPt, and Morocco as the OP in Western Sahara *inter alia*, have the responsibility to ensure that the national authorities are adequately equipped to handle the pandemic.²⁶⁹

THE OBLIGATION TO ALLOW RELIEF OPERATIONS

Intrinsically linked to the issue of cooperation discussed in the last session is the obligation to allow relief operations. It is plausible that the occupying power might not have the capabilities to provide these provisions in accordance with Articles 55 and 56 of GC IV and 69(1) of AP I which all contain the caveat of ‘to the fullest extent possible’. Indeed, the wording of these provisions leads one to conclude that the drafters of the Geneva Convention and its Additional Protocol were mindful of the complexities in which an OP would likely find itself in times of armed conflict. Various factors may impede the OP’s ability to provide the necessary supplies and services. To use the case of the oPt as an example, the OP has failed to guarantee access to the COVID-19 vaccine.²⁷⁰ In fact, Israel has breached the negative and positive obligations alluded to above about the general law of belligerent occupation. It was reported that Israel for example took measures directly contrary to their obligations under IHL by *inter alia* demolishing testing centres and homes.²⁷¹ Furthermore, in a move deemed to be part of medical apartheid²⁷² it was reported that Israel refused to provide vaccines for more than four million Palestinians living under military rule.

²⁶⁶ Ibid

²⁶⁷ Yotam Rosner and others, Covid-19 Report; A policy of neglect, The first 100 days of Covid-19 in Israel’s Healthcare system, 64.

²⁶⁸ Commentary of 1987 to Art 56.

²⁶⁹ Yotam Rosner and others (n269), 74.

²⁷⁰ International Commission of Jurists (n196).

²⁷¹ Klingsbo D (n252).

²⁷² Diana Buttu ‘COVID-19 vaccinations are proof of Israel’s medical apartheid’, Aljazeera (23 March 2021) <<https://www.aljazeera.com/opinions/2021/3/23/covid-19-vaccinations-are-proof-of-israels-medical-apartheid>> accessed 26 October 2022.

An argument that could have been brought forward is perhaps the OP simply did not have the resources to provide these supplies. In fact, financial constraints and transport problems for instance may seriously hamper the OP's capabilities to meet these obligations.²⁷³ The drafters kept this in mind, however, and this explains the existence of Article 59(1) of GC IV, which provides that whenever an OP is not able to fulfil its duty to provide the civilian population under its control with essential supplies, it must agree to relief schemes on behalf of this population. The regime established by this provision is an obligation *de contrahendo* upon the OP, with respect to relief schemes undertaken by states and impartial organisations.²⁷⁴ Such an obligation is not subject to any condition; the schemes 'shall be agreed' upon and the relief shall be facilitated...'.²⁷⁵ Article 59 of the GC IV is an obligation of result, which is implemented if the occupying power reaches the result of agreeing and facilitating the relief.²⁷⁶ The first paragraph of Article 59 embodies two separate obligations pertaining to consent to relief operations and facilitation of the relief operations.²⁷⁷ It provides for situations in which the OP is insufficiently supplied and the OP is unwilling or unable to offer medical supplies as requested by Articles 55 and 56(1) of the GC IV.²⁷⁸

Importantly with regards to occupation, the condition to allow relief operations is an unconditional provision. This means in all cases where occupied territory is inadequately supplied, the OP is bound to accept relief supplies destined for the population.²⁷⁹ In the context of COVID-19, all relief operations must be accepted into an oPt. Israel's impeding of relief operations is therefore contrary to international humanitarian law.

Article 59 in its first paragraph makes reference to the OP 'acting on behalf of the population'²⁸⁰ Acting on behalf of entails acting 'in the interests of' or 'as a representative of'²⁸¹, in accordance with the ordinary meaning of the words. In this regard, in accordance with its usage in Article 59, this provision entails that the OP must represent or act in the interest of the OT at the international level instead of

²⁷³ Schweizerische Eidgenossenschaft, Federal Department of Foreign Affairs, (FDFA), 'Humanitarian Access in situations of armed conflict: Handbook on the Normative Framework, Version 1.0' (2011),23.

²⁷⁴ Lattanzi Flavia, Chapter 12, Humanitarian Assistance, in *The 1949 Geneva Conventions A Commentary*, Clapham, Gaeta, Sassoli, 242.

²⁷⁵ *Ibid.*

²⁷⁶ Longobardo M (n124), 790.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ Commentary of 1987 to Art 59 of GC IV.

²⁸⁰ Art 59 of the GC IV.

²⁸¹ "Behalf." *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/behalf>. Accessed 21 Sep. 2022.

the local population.²⁸² While it is possible that the local population is still represented by some local authorities with international personality or by a government in exile, usually OPs do not acknowledge the legitimacy of the acts of the ousted sovereign.²⁸³ For example during the COVID-19 pandemic in parts of Georgia occupied by Russia²⁸⁴, the Russian created administrations, in the form of allegedly independent governments, have rejected offers of COVID-19 vaccinations from Georgia,²⁸⁵ whereas Russia provided vaccines for both its army²⁸⁶ and the local populations of the regions.²⁸⁷

Article 147 of which sets out the penal sanctions for grave violations, does not list a violation of Article 59 as one of the grave violations²⁸⁸ (despite Article 59 being unconditional). However, impeding relief operations can be considered a war crime in accordance with the Rome Statute²⁸⁹ of the ICC which states in Article 8(2)(b)(xxv) ‘...wilfully impeding relief supplies as provided for under the Geneva Conventions...’ shall be considered to be a war crime in which the court shall have jurisdiction in respect of war crimes.²⁹⁰ An occupying power like Israel can therefore be held accountable in the ICC for impeding relief operations.

RESPECT FOR MEDICAL PERSONNEL

Over and above catering for the public health of an OT, the law of military occupation also demands that the OP respect all medical personnel and allow them to carry out their duties. In this regard, the second paragraph of Article 56 reads in part:

Medical personnel of all categories shall be allowed to carry out their duties. If new hospitals are set up in occupied territory and if the competent organs of the occupied State are not operating there, the occupying authorities shall, if necessary, grant them the recognition provided for in Article 18.

The 1958 commentaries note with regards to this provision, that ‘all categories’ should be taken to mean all people engaged in any branch of medical work.²⁹¹ An exploration of the ordinary meaning as

²⁸² Longobardo M, (n 124)791.

²⁸³ Ibid.

²⁸⁴ Rule of Law in Armed Conflict (RULAC), Military Occupation of Georgia by Russia < <https://www.rulac.org/browse/conflicts/military-occupation-of-georgia-by-russia> > accessed 21 September 2022

²⁸⁵ Longobardo M (n324), 792.

²⁸⁶ COVID-19 Vaccination Rollout Begins at Russian Military Bases in Abkhazia, Tskhinvali, CIVIL.GE (Jan. 15, 2021), <https://civil.ge/archives/391474> [https://perma.cc/WZD9-8DYZ] (archived Feb. 17, 2022), in Longobardo, M(n324), 792

²⁸⁷ Sergei Kuznetsov, Russia’s Coronavirus Vaccine Makes Inroads in Conflict Territories, POLITICO (Feb. 26, 2021) <https://www.politico.eu/article/russiakoronavirus-vaccine-sputnik-v-inroads-conflict-territories/> [https://perma.cc/CZ2Z9ALX] (archived Feb. 17, 2022), in Longobardo M (n124),792.

²⁸⁸ Dinstein (n149) 8.

²⁸⁹ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, <https://www.refworld.org/docid/3ae6b3a84.html> accessed 26 October 2022.

²⁹⁰ Ibid Art 8(1).

²⁹¹ Commentary of 1987 to Art 56.

mandated by the rules of interpretation²⁹² indicates that the term ‘medical personnel’ is used in IHL to refer to persons assigned exclusively, whether for a permanent or temporary period, to medical purposes, namely the search for, collection, transportation, diagnosis or treatment of the wounded, sick and shipwrecked, or to the prevention of disease, or to the administration or operation of medical units or medical transports.²⁹³ This indeed broadens the scope of protection and emphasises the humanitarian imperative to act and not delay the provision of medical care,²⁹⁴ particularly relevant during a pandemic of a highly contagious disease like COVID-19. It must be noted that this provides broader protection of medical humanitarian actors than Article 20 of GC IV which solely refers to hospital staff as being entitled to wear an armlet on their left arm and to be respected and protected²⁹⁵. The recognition provided for in Article 18 as per the provision entails that the medical personnel provided for in Article 56 ‘may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict’.²⁹⁶ That such protection exists indicates IHL’s recognition of the invaluableness of outside humanitarian actors in providing for the needs of an occupied territory. This protection became particularly imperative during the COVID-19 pandemic, in situations of armed conflict where there was a heavy reliance on these ‘medical personnel’ to curb the spread of the virus. As civilians, humanitarian workers of course benefit from the rules mandating the targeting of military objectives and excluding civilians and civilian objects from their scope.²⁹⁷ However, as persons having to actively work in areas of combat, they are afforded extra protection to ensure the undisturbed carrying out of their work as indicated by Article 56.

2.4 MENTAL HEALTH AND COVID-19 IN OCCUPIED TERRITORIES

An often overlooked but very important aspect of public health and its maintenance in conflict situations including military occupation is the issue of mental health. The World Health Organisation reported in 2019, that approximately one in five people living in areas of armed conflict experience symptoms of mental disorders.²⁹⁸ This is found to be particularly true in situations of occupation. A pandemic like COVID-19 exacerbates this situation by imposing a double burden on civilians. In the

²⁹² VCLT (n97) Art 31.

²⁹³ I ‘Medical personnel’ in ICRC Online Casebook: How does law protect in war? (n 21).

²⁹⁴ World Health Organisation, ‘A guidance for medical teams responding to health emergencies in armed conflicts and other insecure environments’, 5.

²⁹⁵ Art 20 GC IV.

²⁹⁶ Art 18 GC IV.

²⁹⁷ Toni Pfanner, Editorial: Humanitarian Actors 2007 IRRC 89 (865) 118.

²⁹⁸ Fiona Charlson and others, ‘New WHO Prevalence Estimates of Mental Disorders in Conflict Settings: A Systematic Review and Meta-Analysis’ (2019) *Lancet* 394, 240.

oPt, for example, the situation in Gaza has been described as an ‘open-air prison’, which situation has been worsened by the COVID-19 pandemic.²⁹⁹ It is important to establish whether the law of military occupation in GC IV Article 56 includes the provision of mental health services in its protections. Firstly, it must be noted that Article 56 simply mentions ‘public health’, without specifying whether it is limited to physical health or mental and psychosocial support services. The World Health Organisation, the leading authority on international health affairs in its Constitution defines health as ‘a state of complete physical and mental and social wellbeing and not merely, the absence of disease’.³⁰⁰ This is in line with the ICESCR which recognises ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.³⁰¹ With this understanding of health as including mental health, it can be argued that mental health services are included in Article 56’s protection of the civilian population. This is particularly true during COVID-19, compounded by lockdowns which exacerbated the angsts of a population already suffering the effects of military occupation.

2.5 CONCLUSION

What is clear therefore is that IHL’s law of military occupation contains provisions aimed at ensuring the health and well-being of the civilian population in an OT. After a careful analysis of the relevant provisions, this Chapter concluded that occupying powers indeed have duties under IHL to provide and/or facilitate for the provision of humanitarian assistance in the territories they control. In the context of the COVID-19 pandemic this entails provision of supplies that can prevent, mitigate or treat the COVID-19 pandemic. It also involves a duty to ensure the sound mental health of the civilian population where it is otherwise adversely impacted by the convergence of two crises such as a conflict and a pandemic. Where the OP is unable to provide these supplies for the population in the occupied territory, there is a definite obligation on the OP to allow for third party humanitarian agencies to intervene in the event that the OP cannot adequately meet its obligations.

²⁹⁹ Islamic Relief Worldwide, ‘Many Young People in Gaza desperately need mental health support’ <[Many young people in Gaza desperately need mental health support - Islamic Relief Worldwide \(islamic-relief.org\)](https://www.islamic-relief.org/news/many-young-people-in-gaza-desperately-need-mental-health-support)>.

³⁰⁰ Constitution of the World Health Organisation, 1946 36(11) American Journal of Public Health, Preamble, 1315.

³⁰¹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 16 December 1966, Article 12.1.

CHAPTER 3: HUMANITARIAN ASSISTANCE IN INTERNATIONAL ARMED CONFLICTS OTHER THAN OCCUPATION

While the preceding Chapter explored concerns of COVID-19 pertaining to humanitarian access and aid during military occupation, this Chapter will do the same, *mutatis mutandis*, in relation to international armed conflicts. First, an overview of International Armed Conflicts will be presented, followed by a discussion of the rules governing humanitarian assistance, with a focus on those that became relevant during the COVID-19 pandemic.

3.1 INTERNATIONAL ARMED CONFLICT OTHER THAN OCCUPATION *VIS-À-VIS* MILITARY OCCUPATION

It has already been established that military occupation is indeed a type of IAC. In this regard, questions might arise as to why the rules discussed in the previous Chapter do not apply to IACs other than occupation. The main reason is that in IHL, while they are both IACs, the law of military occupation and that of IACs other than occupation are treated differently and governed by distinct rules. Indeed, it will be evident in this Chapter and throughout this research that, the characteristic feature of the rules of humanitarian assistance in times of armed conflict is that they are not the same for different categories of war victims.³⁰² That the drafters of IHL rules separated the frameworks dealing with an ordinary IAC and military occupation is in the opinion of this writer indicative of differences in inter alia the nature and consequentially of the results of these conflicts. The regime of humanitarian access in IACs is predictably reflective of these distinctions, providing for different rules that are applicable and relevant to IACs other than occupation as will be seen below.

A major dissimilarity between an ordinary IAC and military occupation is the issue of ‘armed resistance’, which is not a requirement for military occupation,³⁰³ whereas the very definition of an IAC being ‘resort to armed force between 2 or more States,³⁰⁴ presupposes armed resistance. Another difference particularly relevant with regard to an analysis of humanitarian action during the COVID-19 pandemic is the issue of territory. This is to say, military occupation as seen by the example of the oPt, is localised to one State, whereas the mere fact that an IAC involves two or more States, expands

³⁰² Bosko Jakovljevic, ‘The Right to humanitarian assistance: Legal aspects’ (1987) IRRC 260, 472.

³⁰³ Common Article 2(2).
Kolb (n60) 22.

the territorial application of IHL. However there are also key distinctions in the results of these conflicts which consequentially implies a differentiation in some of the humanitarian needs for the different populations during COVID-19.

In its simplest form, an international armed conflict can be defined as an armed conflict between States.³⁰⁵ In other words, an IAC occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of the confrontation. No formal declaration of war or recognition of the situation is required.³⁰⁶

During the COVID-19 pandemic, perhaps the most infamous example of an IAC was the Russia-Ukraine war in which Russian forces entered Ukraine and commenced targeting military objectives close to the major Ukrainian cities in February 2022. During the following hours, airstrikes continued and extended to other areas of Ukraine, including the capital Kyiv. At least 100,000 people were displaced, while neighbouring countries prepared to receive refugees.³⁰⁷ Other IACs during this time included the IAC between Kyrgyzstan and Tajikistan, India and China, India and Pakistan, Iraq and Syria.³⁰⁸

3.2 BASIC RULES OF HUMANITARIAN ACTION IN IACS

In times of international armed conflict, much like in military occupation, owing to a scarcity of foodstuffs, medications and other crucial provisions-civilians may face tremendous challenges in acquiring nutritious comestibles and withstanding disease.³⁰⁹ The plight of civilians is undoubtedly exacerbated by the emergence of a contagious disease pandemic in areas of IACs. The protection of the rights of these civilians through the provisions of humanitarian assistance in these circumstances thus becomes crucial. Humanitarian access in international armed conflicts other than occupation can be found mainly in Articles 70 and 71 of Additional Protocol 1 of 1977.³¹⁰ Customary international humanitarian law also applies, meaning Rule 55 on access for humanitarian relief to civilians in need

³⁰⁵ Kolb (n 60) 22.

³⁰⁶ 'International Armed Conflict' in ICRC Online Casebook, How does law Protect in war? 'International Armed Conflict' (n21).

³⁰⁷ RULAC 'International armed conflict in Ukraine' <https://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine>, accessed 26 September 2022.

³⁰⁸ More on these conflicts can be found on the Rule of law in Armed Conflicts (RULAC)'s website, under international armed conflicts <<https://www.rulac.org/browse/conflicts/international-armed-conflicts-between-kyrgyzstan-and-tajikistan>> accessed 27 September 2022.

³⁰⁹ Yoram Dinstein, *The Conduct of hostilities under the law of international armed conflict* (Cambridge University Press, 2004), 137.

³¹⁰ FDFA (n273) 17.

and Rule 56 freedom of movement of humanitarian relief personnel are applicable in regulating humanitarian assistance and access in IACs.³¹¹

THE RIGHT TO HUMANITARIAN ASSISTANCE AND ACCESS IN IACS

Article 70 deals with the issue of relief actions in armed conflicts other than occupation. The first sentence of this Article delineates the scope of the application, specifically excluding relief actions intended for occupied territories³¹². In this regard, it limits its scope to '*civilian population under the control of a Party to a conflict, other than occupied territory*'.³¹³ The subject of protection under these provisions is therefore civilians caught up in an international armed conflict. Civilians are defined under international law as 'persons who are not members of the armed forces.'³¹⁴ This definition is confirmed in Article 50(1) of Additional Protocol I,³¹⁵ which defines civilians in the negative to refer to anyone who is not a member of the armed forces, highlighting the fact that civilians and combatants are two mutually exclusive categories and that there is no undisputed middle between these two categories.³¹⁶ This is further reiterated in the *Blaškić case*³¹⁷ which holds that civilians are persons who are not, or no longer, members of the armed forces. Furthermore, the reference to 'party to a conflict, other than occupied territory', read together with Article 1(3) of the same protocol which states that AP I is supplementary to the Geneva Conventions and shall apply in situations referred to in Article 2 common to those Convention,³¹⁸ confirms the non-applicability of Article 70 to civilians in a military occupation, applying therefore only to an IAC other than occupation. This is confirmed by Article 2 Common to the four Geneva conventions, referred to in Article 1(3) of AP I which makes specific mention 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties...'.³¹⁹ The term high contracting party is employed by the Geneva Conventions to refer to the States that are party to the Conventions.³²⁰ The scope of application of Article 70 is therefore entitled to persons who are not part of or who are no longer part of the military

³¹¹ ICRC, *Customary International Humanitarian Law*, (n 3), Rule 55.

³¹² Commentary of 1987, to Art 70 of AP I.

³¹³ Art 70(1) of AP I.

³¹⁴ ICRC, *Customary International Humanitarian Law*, (n 3), Rule 55.

³¹⁵ Art 50 AP I.

³¹⁶ Emmanuel-Chiara Gillard, 'Protection of civilians in the conduct of hostilities', 159 In Rain Liivoja and Tim McCormack(eds) *Routledge Handbook of the Law of Armed Conflict*, (2016, Routledge).

³¹⁷ *Prosecutor v. Tihomir Blaskic (Trial Judgement)*, IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 March 2000, 715.

³¹⁸ Art 1(3) of AP I.

³¹⁹ Common Article 2.

³²⁰ Medecins Sans Frontieres, High contracting Parties [https://guide-humanitarian-law.org/content/article/3/high-contracting-parties/#:~:text=A%20High%20Contracting%20Party%20is,\(GCI%E2%80%93GCIV%20Common%20Arts](https://guide-humanitarian-law.org/content/article/3/high-contracting-parties/#:~:text=A%20High%20Contracting%20Party%20is,(GCI%E2%80%93GCIV%20Common%20Arts) accessed 28 September 2022.

armed forces but are caught up in an IAC other than occupation, who have a right under IHL to receive the necessary assistance.³²¹

Article 70 continues to state that ‘relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken...’.³²² It is crucial to elaborate on this clause. Firstly, the use of the word ‘shall’ in accordance with its ordinary meaning as already established in the previous Chapters denotes a mandatory obligation.³²³ In other words, ‘shall’ denotes a must or a compulsory objective.³²⁴ Thus the obligation to undertake humanitarian and impartial humanitarian action is a compulsory one. Humanitarian objectives are those intended to save lives, alleviate suffering and maintain human dignity.³²⁵ Impartiality entails that the humanitarian objectives must make no discrimination as to nationality, religious beliefs, class or political opinions.³²⁶ The principle of impartiality endeavours to relieve the suffering of individuals, being guided solely by their needs, and to give priority to the most urgent case of distress.³²⁷ In the context of COVID-19, therefore, Article 70 mandates the implementation of COVID-19 relief operations that strive to save lives, alleviate suffering, and preserve human dignity without discrimination, and that gives precedence to the most pressing instances. As was previously said, COVID-19 is a very contagious and fatal disease; consequently, prophylactic interventions against the disease would be crucial for reducing suffering and saving lives.

Article 70 further refers to the adequate provision of supplies mentioned in Article 69.³²⁸ Article 69 in turn explicitly mentions clothing, bedding, means of shelter and other supplies essential to the survival of the civilian population, in addition to food and medical supplies as provided for in Article 55 of the Fourth Geneva Convention,³²⁹ which calls for the provision of food and medical supplies of the population.³³⁰ Supplies that are essential or indispensable to the survival of the civilian population include *inter alia*, medical supplies.³³¹ Article 71 complements article 70 by *inter alia* calling for the respect and protection of personnel participating in relief actions. In the context of the pandemic, it has

³²¹ Françoise Bouchet-Saulnier (n156) 45.

³²² Art 70(1) of AP I.

³²³ Merriam Webster (n 195).

³²⁴ Germana D’Acquisto ‘The Role of Shall and Should in Two International Treaties’ (2009) 3(1) *Critical Approaches to Discourse Analysis across Disciplines* 36, 40.

³²⁵ OECD, *Towards better humanitarian donorship, 12 Lessons from DAC Peer Reviews*.

³²⁶ ICRC, *IHL and humanitarian principles, impartiality*.

³²⁷ *Ibid.*

³²⁸ Art 70(1) of AP I.

³²⁹ Art 69 of AP I.

³³⁰ Art 55 of GC IV.

³³¹ Françoise Bouchette Saulnier, (n 156),450.

already been ascertained that the provision of masks, PPE and other COVID-19 prevention and mitigation supplies was essential to curbing the spread of the highly contagious virus, essentially preserving the lives of populations across the world.³³² Given the importance of these provisions for population survival, Article 70 becomes applicable in terms of assuring the availability of these supplies to populations affected by international armed conflicts, such as those living in active armed conflict in Ukraine and Russia. Vaccinations are also viewed as being covered by Article 70, as poor vaccination rates may have numerous detrimental consequences on additional surges of cases, both in the country and in the region, as witnessed in Ukraine.³³³ In this light, immunisations can be viewed as potentially life-saving or, at the absolute least, potentially alleviating suffering in accordance with Article 70.³³⁴

RESPONSIBILITY FOR MEETING THE BASIC NEEDS OF THE POPULATIONS AS WELL AS HUMANITARIAN ASSISTANCE AND ACCESS

Generally, the responsibility for meeting the basic needs of the affected populations lies with States who have control over them.³³⁵ As stated in a UN General Assembly Resolution:

Each State has the responsibility, first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory...the affected State has the primary role in the initiation, organisation, coordination and implementation of humanitarian assistance within its territory...³³⁶

The obligation for the provisions required for COVID-19 prevention, for example, falls with the governments of Russia and Ukraine, respectively. Because, unlike military occupation, control under an IAC does not transfer to another state despite an attack on one state by another. While Russia invaded Ukraine in what has been termed the largest military mobilisation in Europe since WW2, the Ukrainian government retains control of the country's populace. As a result, each state holds the responsibility of meeting the humanitarian needs of its citizens. There may be occasions where governments are unable to deliver the essential supplies, and IHL provides for this in Article 70(1) of AP I, which states that if the state fails to meet this responsibility for whatever reason, third states or humanitarian organisations may supply humanitarian assistance. When other states and/or

³³² Farrar J and Sands P, “Unloved, But a Life-Saver- We Must Value PPE” <<https://www.theglobalfund.org/en/blog/2021-10-04-unloved-but-a-life-saver-we-must-value-ppe/>> accessed August 24, 2022 .

³³³ Alice Park, ‘ Why Ukraine’s COVID-19 Problem is everyone’s problem’, (2 March 2022, TIME) < <https://time.com/6153254/ukraine-russia-war-covid-19/>> Accessed 21 October 2022.

³³⁴ Art 70 of AP I.

³³⁵ FDFA, (n273), 17.

³³⁶ UN General Assembly Resolution, Guiding Principles on Humanitarian Assistance, UNGA RES 46/182 (1991).

humanitarian organisations assist in a crisis, this intervention must not be considered "interference" or "unfriendly acts."

Two caveats are very important regarding relief operations, the first being that these relief operations are subject to the consent of the parties concerned and the second that these relief operations must be exclusively humanitarian, impartial, and conducted without any adverse distinction. The inclusion of the requirement of consent was added to protect the sovereignty of the State accepting relief.³³⁷ However, this condition should not be construed to imply that the State has absolute and unlimited freedom to refuse their agreements to relief actions.³³⁸ In this regard, consent cannot be refused on arbitrary grounds,³³⁹ a refusal must be based on valid reasons. Arbitrary means that something is based on random choice or personal whim, rather than any reason or system.³⁴⁰ The denial of consent is justified (and therefore not arbitrary) if either the civilian population does not actually need the humanitarian assistance or if the entity offering it is unable to carry out relief actions that are exclusively humanitarian and impartial in character without any adverse distinction.³⁴¹ The arbitrariness of a State's refusal to consent is dependent on the circumstances and should be determined on a case-by-case basis.³⁴² With regard to the second condition, the starting point must be human suffering³⁴³ and must be exclusively dedicated to addressing humanitarian needs. It is important in this regard that the humanitarian needs for populations amidst IACs like the Russia/Ukraine war during the COVID-19 pandemic be established.

FREE AND UNIMPEDED PASSAGE OF RELIEF SUPPLIES

In addition to the provisions governing the access to persons expressly protected by the Geneva Conventions, humanitarian law posits that relief supplies must be granted free passage in general.³⁴⁴ With regards to international armed conflicts, this is governed by Article 23(1) of the Fourth Geneva Convention which requires States to 'allow the free passage of all consignments of medical and hospital stores...'³⁴⁵ *as well as the free passage of all consignments of essential foodstuffs, clothing*

³³⁷ FDFA, (n273), 19.

³³⁸ Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1974-1977, CDDH/II/SR.87, paras. 27-30.

³³⁹ FDFA, (n328), 19 referring to The Guiding Principles on Internal Displacement (Principle 25)

³⁴⁰ Oxford Learner's Dictionaries, 'arbitrary',

<https://www.oxfordlearnersdictionaries.com/definition/english/arbitrary#:~:text=%2F%CB%88%C9%91%CB%90rb%2F%AAtreri%2F,plan%20and%20sometimes%20seeming%20unfair> accessed 26 October 2022.

³⁴¹ Sassoli M, IHL Rules, Solutions to Problems Arising in Warfare and Controversies (n 83), 583.

³⁴² FDFA, (n273), 19.

³⁴³ Ibid.

³⁴⁴ Françoise Bouchett-Saulnier, (n 156) 355.

³⁴⁵ FDFA (2011), (n273) 20.

*and tonics intended for children under fifteen, expectant mothers and maternity cases.*³⁴⁶ Regarding relief supplies and their passage, they are limited to prescribing the technical conditions under which such transit is permitted, including searches, and making approval contingent on the supervision of a Protecting Power or its equivalent on the ground.³⁴⁷

Article 23(1) demands that only vital foodstuffs are entitled to free passage which should be understood to mean basic foodstuffs, essential to the health and normal physical and mental development of the persons for whom they are intended, viz. children under fifteen³⁴⁸ *inter alia*. The term "tonics" covers any pharmacological products which are intended to restore normal vitality to the human organism.³⁴⁹ With regards to a pandemic situation like the COVID-19 pandemic erupting during an armed conflict, tonics could therefore be interpreted to mean medication intended to treat the symptoms of COVID-19, including coughing and fever. There might also be an argument for tonics to also include vaccinations against the pandemic seeing as how important vaccines are to prevent the spread of COVID-19 in cases where other prevention measures like social distancing, regular handwashing and mask-wearing were hard or even impossible to implement, as is often the case in international armed conflicts. This was seen to be true in the Russia/Ukraine war for example where an essential factor in increasing the spread of SARS-CoV-2 was noted to be the high population density during the evacuations³⁵⁰ with people attempting to escape the active hostility sites. At the same time, most of the evacuees are children.³⁵¹ In such a case the provisions of humanitarian relief as mandated by Article 23 to vulnerable populations become particularly pertinent to try and circumvent the effects of a deadly pandemic colliding with a similarly deadly armed conflict.

Article 70(2) of Additional Protocol 1 supplements and enhances the provisions of Article 23 of the Fourth Geneva Convention, with Article 70(2) of AP1 providing that all States must '*allow and facilitate and unimpeded passage of all relief consignments, equipment and personnel, even if such assistance is destined for the civilian population of the adverse Party.*'³⁵² We must note the use of the phrase '*all States*' in this provision. This expands the responsibility of facilitation of humanitarian assistance to not only the belligerent parties but all States. Using the Russia/Ukraine war as an example,

³⁴⁶ Ibid.

³⁴⁷ Francoise Bouchette Saulnier, (n156) 333.

³⁴⁸ Commentary of 1987 to Art 23 of GC IV.

³⁴⁹ Ibid.

³⁵⁰ Dmytro Chumachenko, Tetyana Chumachenko, Editorial 'Impact of war on the dynamics of COVID-19 in Ukraine' (2022) *BMJ Global Health* 7, doi:10.1136/bmjgh-2022-009173, 1.

³⁵¹ Ibid.

³⁵² Art 70(1) of AP I.

either of the warring parties as well as any country for example Poland, who might find themselves in a situation where they must allow the passage of relief consignments, must allow for such passage to be unimpeded even if it is intended for Russia or Ukraine civilians who are at war. Article 70(2) expands the rules of the Geneva Convention in that it applies to the whole civilian population and not only to vulnerable groups as with Article 23 of GC IV. In this regard, COVID-19-related humanitarian aid during an IAC like the Russia/Ukraine war for example is intended for all civilians not only vulnerable groups like women and children. This provision is especially valuable with regards to COVID-19 vaccines where widespread vaccination is critical to ending the pandemic³⁵³ and with many people in armed conflicts living in countries where no vaccines are available, or when they are accessible, they face challenges to access health services and are at risk of being forgotten.³⁵⁴

Civilians in international armed conflicts with active hostilities are usually forced to hide from artillery and airstrikes in bomb shelters, basements and subways.³⁵⁵ These areas are characterised by a high population density, a lack of social distance, the absence of a mask regulation, and inadequate ventilation, which intensifies the spread of a contagious virus like the COVID-19. As a result, vaccination becomes an effective method of avoiding pandemic (like COVID-19) spread during an armed conflict. It is consequently vital that vaccination efforts target the whole civilian population rather than specific categories, and Article 70(1) of AP1 accomplishes this where Article 23 of GC IV is more limited. In Ukraine, for example, military operations and humanitarian concerns compelled people to dwell in unsanitary conditions, without observing COVID-19 preventative measures, which was aided by the rapid spread of the virus.³⁵⁶ The pandemic was no longer the top priority of Ukraine's healthcare system which was further burdened by casualties of war. This is frequently the reality for many conflict-affected populations, and it is frequently an important element in boosting the dynamics of the spread of other non-war-related diseases in the country, such as COVID-19 infection.³⁵⁷

3.3 HUMANITARIAN ASSISTANCE FOR REFUGEES, STATELESS PERSONS AND IDPS DURING COVID

³⁵³ United Nations, 'COVID-19 vaccine access in conflict areas remains critical', <<https://news.un.org/en/story/2022/04/1116032>> accessed 26 October 2022.

³⁵⁴ ICRC, 'COVID-19 Vaccinations: Support to people affected by armed conflict and violence and those living in hard-to-reach areas', <<https://www.icrc.org/en/document/covid-vaccination-armed-conflicts>> accessed 26 October 2022.

³⁵⁵ Chumachenko and Chumachenko T, (n350), 1.

³⁵⁶ Ibid.

³⁵⁷ Ibid.

There is an indisputable correlation between armed conflicts and displacement³⁵⁸ with armed conflict being one of the major drivers of population movement within and outside borders.³⁵⁹The laws of IHL take into consideration the fact that armed combat has this effect and may cause significant population movements.³⁶⁰ They are not nationals of the territorial State, nor can they rely on the protection of their State of origin or State of last residence.³⁶¹It is consequently crucial not to exclude these individuals from the protection of IHL, or otherwise disadvantage them, based on formalistic criteria of nationality that do not correspond to the reality of their situation.³⁶² In this regard, IHL establishes standards to guarantee that refugees are not treated as enemy aliens or on the contrary deprived of protected civilian status because of their *de jure* nationality.³⁶³ Refugees are individuals who no longer benefit from the protection of their state of origin.³⁶⁴IHL regulates and authorises concrete relief actions undertaken by the ICRC or impartial humanitarian organisations for the benefit of protected persons,³⁶⁵ including refugees. Civilians may be forced or obliged to flee or to leave their homes or places of habitual residence...but do not cross an internationally recognized State border, instead, they stay within their countries.³⁶⁶ These individuals become displaced inside their country of origin and are called internally displaced persons (IDPs)³⁶⁷ under international refugee and humanitarian law.

Displacement is a very common characteristic of IACs. This was demonstrated during the Russia/Ukraine war when nearly seven million Ukrainians fled to neighbouring countries while eight million were displaced internally within Ukraine.³⁶⁸ The ICRC noted at the onset of the global COVID-19 pandemic, that internally displaced persons and refugees *inter alia* are particularly exposed to outbreaks of COVID-19, given their frequently harsh living conditions and limited access to basic services including healthcare.³⁶⁹ As a result, these populations are among the most in need of

³⁵⁸Melanie Jacques, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge University Press 2012), 1.

³⁵⁹ Ibid.

³⁶⁰ Françoise Bouchette Saulnier, (n156), 161.

³⁶¹ Nils Melzer (n58), 231

³⁶² Ibid.

³⁶³ Sassoli (n83) 451.

³⁶⁴ Françoise Bouchette Saulnier, (n156) 310.

³⁶⁵ Ibid.

³⁶⁶ UNHCR, internally displaced people < <https://www.unhcr.org/internally-displaced-people.html>>

³⁶⁷ Françoise Bouchette Saulnier, (n156),159.

³⁶⁸ BBC 'How many Ukrainian refugees are there and where have they gone?' (4 July 2022) < <https://www.bbc.com/news/world-60555472>> accessed 31 October 2022.

³⁶⁹ ICRC, Covid-19 and International Humanitarian Law <https://www.bbc.com/news/world-60555472>> accessed 26 September 2022.

humanitarian assistance, and their access to it must be enabled at all costs in order to avoid preventable casualties.

It must then be established how IHL provides for the distribution of humanitarian aid to these populations. In the context of an international armed conflict, the responsible state, has a duty to ensure that the civilian population on their territory is adequately provided with food, medical supplies, and other basic needs.³⁷⁰In the case of internally displaced populations, in Ukraine for example, the Ukrainian government bears the main duty for the protection and assistance of internally displaced people.³⁷¹ If a party is unable or unwilling to fulfil this obligation, humanitarian access to the affected populations is essential³⁷², and the responsible State must take action to ensure that this access is granted.

While a right to humanitarian assistance has not yet been explicitly recognized by human rights instruments, international humanitarian law contains several provisions on humanitarian assistance and relief actions on behalf of civilians in armed conflict as alluded to in Chapter 2 above. These rules are applicable to internally displaced persons caught up in war mainly by virtue of their civilian status.³⁷³ After fleeing their homes, they are frequently gathered in camps, ignored by state authorities, and they may face difficulties accessing healthcare services due to a lack of proper documentation, the fact that health facilities in host areas frequently struggle to cope with new arrivals, or a lack of access to medical facilities entirely.³⁷⁴During the IAC between Russia and Ukraine, for instance, it was reported that cities in the West where people were mostly displaced, were becoming overcrowded.³⁷⁵ Living in deplorable conditions and with very little means of survival, they depend on international humanitarian assistance to survive and more so when there is a highly contagious pandemic that necessitates social distancing and the availability of WASH facilities. Internally displaced people in Ukraine as a result of Russia's invasion indeed have the right to humanitarian assistance, particularly that aimed at the prevention and treatment of a deadly pandemic, and it is the responsibility of the Ukrainian government to guarantee that IDPs in its territory receive such assistance.

³⁷⁰ Ibid.

³⁷¹ Jacques M, (n363),194.

³⁷² Ibid.

³⁷³ Françoise Bouchette Saulnier, (n156), 161.

³⁷⁴ Alice Debarre, 'The Unaddressed Plight of Internally Displaced Persons, IPI Global Observatory' (March 16 2018) <<https://theglobalobservatory.org/2018/03/unaddressed-plight-internally-displaced-persons/>> accessed 26 October 2022.

³⁷⁵ ABC NEWS, UN report finds 6.5 million Ukrainians internally displaced due to Russia invasion <https://theglobalobservatory.org/2018/03/unaddressed-plight-internally-displaced-persons/#more-17597>> accessed 29 September 2022.

Regarding the protection of refugees, the responsibility to provide humanitarian aid can be found in Article 73 of Additional Protocol I which requires refugees to be treated as protected persons within the meaning of the Fourth Geneva Convention. By specifying the protection to which refugees are entitled under the Fourth Geneva Convention, it is clear that humanitarian aid for refugees is the responsibility of the State in which they seek refuge and which is a party to the conflict from which they are fleeing.

As civilians' refugees fall under two categories of protection, namely protection as a civilian population irrespective of nationality and protection by virtue of being 'protected persons', being civilians who are not nationals of the Power in whose hands they find themselves.³⁷⁶ As part of the first category, refugees are entitled to relief actions as per Articles 23 and 70 of the Fourth Geneva Convention.³⁷⁷ Article 23 requires the State concerned to allow free passage of all humanitarian relief³⁷⁸ while Article 70 calls for relief actions which are humanitarian and partial in nature to be carried out in the event the civilian population is not adequately provided with the supplies mentioned in Article 69³⁷⁹ which includes medical supplies and other supplies essential to the survival of the civilian population.³⁸⁰

As previously stated, the provision of COVID-19 preventative and mitigation supplies falls within the scope of these categories. Furthermore, as protected persons refugees are entitled to humanitarian aid and the State of refuge must enable as much as possible visits to protected persons by representatives of other organisations whose objective is to give *inter alia* material relief.³⁸¹ They are also entitled to respect for their persons³⁸² which must be understood in its broadest sense to cover all the rights of the individual including the right to physical integrity,³⁸³ which encompasses health and life. In this respect provision of medicines, and other COVID-19 relief can indeed be seen to be essential to preserving the physical integrity and the right to life of refugees.

3.4 THE ISSUE OF CONSENT FOR COVID-19 RELATED HUMANITARIAN OPERATIONS IN INTERNATIONAL ARMED CONFLICTS

³⁷⁶ Commentary OF 1987 to Art73 of AP I, para 2943 and 2944.

³⁷⁷ Ibid para 2944 a.

³⁷⁸ GC IV (n56) Art 23.

³⁷⁹ Ibid Art 70 .

³⁸⁰ Ibid Art 69.

³⁸¹ Ibid Art 30.

³⁸² Ibid Art 27.

³⁸³ Commentary of 1987 to Art 27 of GC IV.

In territories other than occupied territories, humanitarian operations are subject to the consent of the parties concerned according to Article 70(1) of AP I.³⁸⁴ This requirement strikes a compromise between the interests of the civilian population and the receiving State.³⁸⁵ In international armed conflicts, the representatives of the ICRC and other humanitarian aid workers and Protecting Powers must have access to prisoners of war or protected persons.³⁸⁶ In IACs, consent is required from a State on whose territory the assistance must be delivered as well as the adverse and neutral State through the territory of which the assistance must pass or from which the assistance is initiated.³⁸⁷ One may see how this could impede access to aid by making it more difficult to apply the rules of IHL relating to humanitarian access.³⁸⁸ The question then arises as to what extent a State is obliged to accept relief. As a minimum, consent cannot be denied for arbitrary reasons.³⁸⁹ The prohibition of withdrawing consent arbitrarily of consent can be attributed in part from the need to provide an effective interpretation of the relevant treaty texts giving effect to all aspects of those provisions and not rendering parts of them redundant.³⁹⁰ The principle can also be inferred from the intention of the negotiators of the Additional Protocols as well as the practice subsequent to the adoption of the Protocols,³⁹¹ which is a critical criterion to interpret treaty provisions according to the VCLT.³⁹² Whether a decision not to accept assistance is arbitrary depends on a case-by-case basis.³⁹³ As aid agencies continue their efforts to prevent the further spread of the novel coronavirus in these contexts, there undoubtedly face examples where armed actors consistently impede humanitarian access.³⁹⁴

Two conditions ideally must be met before the issue of consent even arises. First, relief must be necessary, i.e., civilians must be inadequately provided with essential supplies and the party with the responsibility to meet their needs must be failing to provide the requisite assistance.³⁹⁵ In the case of

³⁸⁴ Schwendimann F, (n50), 998.

³⁸⁵ Ibid.

³⁸⁶ ‘Consent’ in ICRC Online Casebook: How does law protect in war? (n 21).

³⁸⁷ Sassoli M, *IHL Rules, Solutions to Problems Arising in Warfare and Controversies* (n 83), 583.

ICRC, ‘QandA and Lexicon on Humanitarian Access’ (2014) 96 IRRC 359, 369.

³⁸⁸ Romaric Ferraro, ‘Challenges to implementation of humanitarian access norms in the Sahel’ (2021) IRRC 103(918) 859, 860.

³⁸⁹ ICRC, Volume 93, 884, December 2011, The legal framework for humanitarian access in armed conflicts, 999.

³⁹⁰ Dapo Akande and Emmanuela-Chiara Gillard, Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict, *International Law Studies*, Volume 92, 2016, p 489.

³⁹¹ Ibid.

³⁹² Art 31(2) of the VCLT holds that the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty.

³⁹³ Schwendimann F (n50), 999.

³⁹⁴ Just Security (n42).

³⁹⁵ Dapo Akande and Emmanuela-Chiara Gillard, ‘Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict’, (2016) *International Law Studies*, 92, 483, 492.

international armed conflicts, often local health systems are already overburdened by war and are most likely poorly equipped to deal with new challenges posed by COVID-19³⁹⁶ and any other pandemic. In Ukraine, even before the war with Russia had begun, COVID-19 vaccination rates were lower than in many other countries.³⁹⁷ Because of the Russian attacks, important infrastructure critical to providing COVID-19-related assistance, like hospitals, was damaged or destroyed.³⁹⁸ Indeed, life-saving medicines and health services, as well as safe drinking water, were identified as key humanitarian needs in Ukraine,³⁹⁹ considering the spread of the COVID-19 pandemic, the war and Ukraine's inability to provide this assistance to its citizens. The risk of disease outbreaks, like COVID-19, usually grows due to a lack of access to WASH facilities, crowded conditions in bomb shelters and collective centres and suboptimal coverage for routine and childhood immunisations.⁴⁰⁰ Having stated that, it is clear that civilians were not receiving appropriate supplies for combating COVID-19 during the war, and the Ukrainian government, as the responsible party, was unable to give the necessary help. As a result, the first condition is satisfied.

The second requirement must be that the humanitarian aid organisation offering humanitarian services must provide the assistance in a principled manner, meaning the assistance must be exclusively humanitarian and impartial in character and carried out without any adverse distinction.⁴⁰¹ Undeniably, humanitarian assistance offered to Ukraine as an example met this requirement. The ICRC, one of the main humanitarian actors providing aid to Ukraine works to ensure that there is space for neutral, impartial and independent humanitarian action and that this is protected.⁴⁰² A lot of other aid organisations identify the humanitarian needs in the country and attempt to provide these needs to all civilians in need without distinction. This can be seen to be true, especially for the work of the ICRC, World Food Program, WHO, and UNHCR to name but a few.⁴⁰³ This is unlike for example the support given by the United States to the paramilitary activities of the contras in Nicaragua which the court

³⁹⁶ Just Security (n42).

³⁹⁷ Fran Kritz, 'COVID-19 remains a threat during the war in Ukraine', 16 March 2022 Very Well Health <<https://www.verywellhealth.com/russia-ukraine-war-covid-risk-5222399>> accessed 26 October 2022.

³⁹⁸ Ibid.

³⁹⁹ OCHA, 'Ukraine: Humanitarian Impact: Situation Report', (25 March 2022) <<https://reliefweb.int/report/ukraine/ukraine-humanitarian-impact-situation-report-1200-pm-eet-25-march-2022>> accessed 26 October 2022.

⁴⁰⁰ Ibid.

⁴⁰¹ Akande and Gillard (n395), 492.

⁴⁰² ICRC 'What you need to know about our action in Ukraine', <<https://www.icrc.org/en/document/what-about-our-action-ukraine#:~:text=As%20a%20neutral%2C%20impartial%20humanitarian,reach%20those%20most%20in%20need>> accessed 26 October 2022.

⁴⁰³ United NATIONS 'Ukraine: Aid agencies step up relief deliveries as humanitarian situation worsens', <<https://news.un.org/en/story/2022/04/1116432>> accessed 26 October 2022.

found to be a ‘clear breach of the principle on non-intervention’.⁴⁰⁴ Once this second condition is met, as is seen here, then consent indeed may not be arbitrarily withheld.

Fortunately, some of these humanitarian law principles were put into practice during the Russia/Ukraine war that occurred during the global COVID-19 pandemic. Very quickly after the start of the war, Russian and Ukrainian negotiators consented to the need for humanitarian corridors in Ukraine, which corridors were meant to facilitate the evacuation of civilians and the provision of medicines and food supplies.⁴⁰⁵ This certainly conforms with Article 23 of the 4th Geneva Convention⁴⁰⁶ as well as customary IHL, in particular Rule 55⁴⁰⁷ which calls for parties to the conflict to allow rapid and unimpeded passage of civilians in need. This is, however, not always the case with numerous IAC situations frequently reporting problems and interferences in maintaining humanitarian assistance to a suffering population. During the COVID-19 pandemic for example, where Syria was involved in multiple, parallel international armed conflicts (IACs) against the so-called ‘Global Coalition’ (led by the United States) Turkey, and Israel,⁴⁰⁸ a combination of restrictions from Damascus, the Kurdish regional government and the Security Council prevented aid workers from preparing for an outbreak of COVID-19 in northeast Syria.⁴⁰⁹ Even before the COVID-19 pandemic, this has been a huge problem in international humanitarian law as evidenced for example by the Israeli attack on a flotilla of six ships which carried approximately 10 000 tonnes of humanitarian aid.⁴¹⁰ The issue of consent has therefore been an impediment to delivering humanitarian assistance and continues to be such in the midst of the COVID-19 pandemic.

The requirement of consent for humanitarian access thus poses a significant barrier to adequate and effective humanitarian access. Fortunately, humanitarian law provides some safeguards for this provision, by prohibiting arbitrary withholding of consent. While this can sometimes be interpreted as pushing warring parties to not withhold consent, as was demonstrated in Ukraine with the assent to humanitarian corridors, the situation in Syria where humanitarian access is restricted and not consented to is more typical. Furthermore, Commentary to the Additional Protocols has even gone as far as

⁴⁰⁴ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*; *Merits*, International Court of Justice (ICJ), 27 June 1986, paras 242 and 243.

⁴⁰⁵ David Matyas, ‘Humanitarian Corridors in Ukraine: Impasse, Ploy or Narrow Passage of Hope’, (8 March 2022, Just Security) < <https://www.justsecurity.org/80576/humanitarian-corridors-in-ukraine-impasse-ploy-or-narrow-passage-of-hope/>> accessed 26 October 2022.

⁴⁰⁶ Art 23 of GC IV.

⁴⁰⁷ Rule 25 (n3).

⁴⁰⁸ RULAC, International Armed conflicts in Syria.

⁴⁰⁹ Just Security (n42).

⁴¹⁰ ICRC, ‘Israel, Blockade of Gaza and the Flotilla incident’, ICRC Online casebook (n21).

classifying such a withdrawal of consent as a war crime stating in part ‘*that the intentional deprivation of objects indispensable to civilians’ survival, including wilfully impeding relief supplies as provided under the Geneva Conventions can constitute a war crime*’.⁴¹¹

3.5 CONCLUSION

In this Chapter, we explored the rules and regulations that govern access to humanitarian access and assistance in international armed conflicts other than occupation. It was demonstrated that the rules regulating humanitarian access in military occupation and those applicable in regular IACs, while similar, are separate from one another and specific to the nature of the conflict. Despite the similarities, the rules of humanitarian assistance and access are regulated distinctly by the two bodies of law, catering to the specificities of each type of conflict. The humanitarian needs of the civilian population in military occupations differ from those in a regular IAC and thus call for different provisions on access to humanitarian assistance. This Chapter also looked at the specific and unique protection of special categories of people to be found in International Armed Conflicts, including refugees and internally displaced people. Finally, it was elaborated in this Chapter, on how the issue of consent can present a barrier to the work of organisations intending to grant access to humanitarian assistance to affected populations.

⁴¹¹ Commentary of 1987 on the Additional Protocols , paras 2808 and 4885.

CHAPTER 4: HUMANITARIAN ASSISTANCE IN NON-INTERNATIONAL ARMED CONFLICT

In this Chapter, we will investigate the rules that regulate and establish provisions for the right of the civilian population to access humanitarian assistance in Non-International Armed Conflicts. It will similarly also look at the responsibility to provide this assistance to those in need. In order to accomplish this, the first step will be to define non-international armed conflicts and differentiate them from the conflicts that have already been described, namely IACs and Military Occupation. The laws that are considered to be applicable will next be investigated, and a determination will be made on whether or not they are enough to provide protection to victims of non-international armed conflicts by means of the provision of humanitarian assistance and access to such help

4.1 AN OVERVIEW OF NON-INTERNATIONAL ARMED CONFLICTS

Non-International Armed Conflicts (NIACs) are protracted armed confrontations occurring between governmental armed forces and insurgents or between armed groups.⁴¹² For a conflict to be considered a NIAC, two conditions must be met, namely that they must reach a minimum level of intensity and that they must meet a minimum degree of organisation.⁴¹³ Examples of NIACs during the COVID-19 pandemic include the NIAC in Syria where multiple and overlapping NIACs were occurring,⁴¹⁴ with the Syrian Government and its allies being involved in NIACs against several rebel groups (including the Syrian National Army, Hay'at Tahrir al-Sham, the Islamic State group, the Syrian Democratic Forces and other smaller armed rebels). There were also parallel NIACs between those armed groups operating in the territory. Other NIACs were also found to be also occurring in Afghanistan, Burkina Faso, Cameroon, Colombia, the Central African Republic, and the DRC *inter alia*.⁴¹⁵

⁴¹² Kolb (n60) 23.

⁴¹³ Tadić case (n69).

⁴¹⁴ RULAC, Non-International Armed conflicts in Syria < <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria> > accessed 26 October 2022.

⁴¹⁵ RULAC, non international armed conflicts < <https://www.rulac.org/browse/conflicts> > accessed 26 October 2022.

NIACs are the most frequently occurring armed conflict with a recent report noting that these categories of conflict formed eighty-two per cent (82%) of all global strife, in 2020.⁴¹⁶ In light of this, the long-term effects of the COVID-19 pandemic may indeed be a cause for concern, with the pandemic having magnified socio-economic circumstances *inter alia*.⁴¹⁷ Certainly, there was a significant increase in the number of people in need of assistance in the aftermath of other emergencies besides conflict,⁴¹⁸ as the COVID-19 pandemic highlighted. In this regard, it is important that some of these effects be mitigated making humanitarian assistance and access very relevant in NIACs during the COVID-19 pandemic.

4.2 APPLICABLE RULES FOR HUMANITARIAN ASSISTANCE IN NON-INTERNATIONAL ARMED CONFLICTS

Generally, there are fewer rules applicable to NIACs than IACs, with the initial development of IHL having been influenced by the need to regulate IACs, while NIACs which were then generally referred to as civil wars were left to be regulated by domestic jurisdictions.⁴¹⁹ Nevertheless, albeit less extensive, customary and treaty IHL governing non-international armed conflict obliges each party to a conflict to allow and facilitate the delivery of impartial humanitarian relief consignments for civilians in need of supplies essential to their survival.⁴²⁰ More precisely the basic law applicable to NIACs, namely Common Article 3 to the four Geneva Conventions⁴²¹ (CA3) defines the scope of application of the rules it contains as being linked to armed conflicts ‘not of an international character’.⁴²²

CA3 was the first legal regulation of internal armed conflict to be included in an international instrument⁴²³ and is therefore significantly instructive in regulating NIACs. In addition to CA3, Additional Protocol II as well as customary IHL also apply to NIACs.⁴²⁴ It must be noted however that

⁴¹⁶ Ramatoulie Jallow, ‘Global Campus on Human Rights, COVID-19 and intrastate armed conflicts in Africa ‘referring to Alert 2021, (n36) < <https://gchumanrights.org/preparedness/article-on/covid-19-and-intrastate-armed-conflicts-in-africa.html>> accessed 26 October 2022.

⁴¹⁷ Ibid.

⁴¹⁸ Bright Toebes, ‘Health and Humanitarian Assistance: Towards an Intergrated Norm under International Law’ (2013) *Tilburg Law Review* 18 133,134.

⁴¹⁹ Berita Mutinda Musau ‘Implementing International Humanitarian Law and the Responsibility to Protect in Non-International Armed Conflicts (NIACs) – A Delicate Balance: The Case of the Tigray Crisis in Ethiopia’ (2021) *Journal of Conflict Management and Sustainable Development* 7(2) 79, 85.

⁴²⁰ Melzer (n 58), 260.

Rules 55 and 56 ICRC, *Customary International Humanitarian Law*, (n 3).

⁴²¹ Common Article 3.

⁴²² Kolb (n60) 23.

⁴²³ Musau (n 419) 85.

⁴²⁴ FDFA 2011 (n 328) 25.

the scope of application of Additional Protocol II does not cover all forms of NIACs. AP II applies only to armed conflicts between governmental armed groups and dissident armed forces or other organised armed groups which under responsible command exercise control over a part of a State's territory. In this way, AP II strengthens and further develops the fundamental guarantees established by CA3 for situations of NIACs.⁴²⁵ However, while this distinction exists between AP II and CA3 type armed conflicts, States do not in practice make this distinction with respect to humanitarian relief.⁴²⁶ Indeed, the commentaries to Rule 55 relating to access to humanitarian relief for civilians in need highlight the fact that in State practice and *opinio juris* the obligation to allow humanitarian relief applies to all types of NIACs. It is stated that the obligation to allow and facilitate access to humanitarian relief to civilians in need is also supported by official statements and reported practices as well as found in many military manuals.⁴²⁷ As such, discussions on humanitarian assistance in this research will be applicable without distinction to all types of NIACs.

THE RIGHT TO AND THE CORRESPONDING RESPONSIBILITY TO PROVIDE HUMANITARIAN ASSISTANCE DURING THE COVID-19 PANDEMIC IN NON-INTERNATIONAL ARMED CONFLICTS

Article 18 of Additional Protocol II, applicable in NIACs establishes the right to humanitarian assistance, imposing on the parties to the conflict, the obligation to accept humanitarian aid essential to the survival of the population.⁴²⁸ It is important that the 'parties to a NIAC' be identified. Most parties to these conflicts are non-State armed groups.⁴²⁹

Generally, in international law, the discourse on international relations including discussions on how to solve COVID-19 challenges in armed conflict have focused on territorial States and the measures they have adopted to address these difficulties. Seeing as the nature of international law is to bind States in their relations with each other,⁴³⁰ this is comprehensible. However, international law, particularly international humanitarian law may find itself having to apply to groups that are not States. This is particularly true with regard to NIACs where non-state armed groups (NSAGs) are concerned. The source of obligations binding on non-State parties differ from those of State party obligations even

⁴²⁵ Melzer (n58) 43.

⁴²⁶ FDFA 2011 (n328) 26.

⁴²⁷ Rule 55 ICRC *Customary International Humanitarian Law*, (n 3).

⁴²⁸ Stoffels (n 213) 539

⁴²⁹ Sassoli M, *IHL Rules, Solutions to Problems Arising in Warfare and Controversies* (n 83), 583.

⁴³⁰ Dugard's International Law, p1.

in non-international armed conflicts.⁴³¹ COVID-19 and the need for humanitarian assistance really brought into focus the conundrum of NIACs and the regulation of NSAGs in the context of humanitarian access.

CA3 explicitly addresses non-State armed groups that are parties to a NIAC, and all other rules of IHL of NIACs necessarily address them,⁴³² undoubtedly, including those obliging parties to provide or facilitate humanitarian aid. In this regard, one can see that the rules of IHL of NIACs bind non-State armed groups according to the same thresholds of applicability as States.⁴³³ In fact, *prima facie*, the rules are the same for States and non-State armed groups.⁴³⁴ It is arguable that all parties to NIACs must be equal at least when it comes to obligations under IHL,⁴³⁵ with CA3 explicitly obliging ‘each Party’ to a NIAC to respect its provisions. Despite the State centric nature of international law, therefore, IHL binds all parties to NIACs, whether State or organised armed groups.⁴³⁶ For NSAGs that are classified as parties to armed conflicts, IHL provides a generally accepted set of legal obligations.⁴³⁷ IHL does this by *inter alia* imposing limitations on permissible behaviour by NSAGs⁴³⁸ which in the specific context of COVID-19 or really any other pandemic, aims to protect the lives and dignity of civilians and address their acute humanitarian needs. This includes the provision of vaccinations, medicines and PPE amongst others.

The IHL rules of NIACs can therefore be invoked to protect civilians in territories of NIACs, from the deadly effects of a pandemic like COVID-19. The responsibility rests on the parties to the conflict which can be State or non-State armed groups. Failure to provide these supplies requires parties to the conflict to look to impartial humanitarian organisations to intervene.

The issue of humanitarian assistance is not expressly stated in CA3.⁴³⁹ CA3 instead mentions the general principle that persons taking no active part in hostilities must be treated humanely, without any adverse distinction.⁴⁴⁰ In this regard, CA3 in Article 1 holds in part

⁴³¹ Stoffels (n 213) 520

⁴³² Sassoli M, *IHL Rules, Solutions to Problems Arising in Warfare and Controversies* (n 83), 583.

⁴³³ Sassoli M, *IHL Rules, Solutions to Problems Arising in Warfare and Controversies* (n 83), 584.

⁴³⁴ Sassoli M, *IHL Rules, Solutions to Problems Arising in Warfare and Controversies* (n 83), 584.

⁴³⁵ *Ibid* 585.

⁴³⁶ International Development Department, College of Social Sciences ‘International Legal Framework for Humanitarian Action’ (2013, University of Birmingham), 42.

⁴³⁷ Tilman Rodenhäuser and Mathilde Pirete, ‘Armed Groups and International Law: COVID-19 measures by armed groups? What legal framework applies?’ < <https://www.armedgroups-internationallaw.org/2022/02/28/covid-19-measures-by-armed-groups-what-legal-framework-applies/> > accessed 26 September 2022.

⁴³⁸ *Ibid*.

⁴³⁹ FDFA (2011) (n328) 26.

⁴⁴⁰ *Ibid*.

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' *hors de combat* ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.⁴⁴¹

It is arguable here that this provision regulates humanitarian assistance, with the argument being that the principle of 'humane treatment' includes the responsibility not to deliberately subject civilian peoples to conditions where their human dignity is endangered, and which might result in mental or physical suffering.⁴⁴² The denial of access to essential supplies, necessary for preventing and treating the COVID-19 pandemic could certainly be construed to amount to inhumane treatment and cause serious mental or physical suffering in the sense of Article 3. Furthermore, customary international humanitarian law provides that parties to a NIAC must allow and facilitate rapid and unimpeded passage of humanitarian relief to civilians in need, which is impartial in nature and conducted without any adverse distinction, subject to their right of control.⁴⁴³

CA 3(2) additionally calls for the caring of the wounded and sick. Commentaries to these provisions find that in NIACs, the secondary effects of armed conflict on public health can constitute a much greater health threat than violent injury.⁴⁴⁴ Armed conflict can also favour the spread of infectious diseases and hamper the effective implementation of preventive medicine such as vaccination campaigns.⁴⁴⁵ Due to this, the commentary rightfully argues that the provision of '*caring for the sick and wounded may also entail preventive measures to ensure the basic health of the populations, including vaccinating against infectious diseases*'.⁴⁴⁶ During NIACs therefore, the ensuring of COVID-19 vaccines, treatment of COVID-19 symptoms as well as providing PPE and other essentials necessary to prevent the contracting of the virus by parties to a conflict is mandated by IHL.

Because the obligations to observe CA3 include arguably the provision of humanitarian assistance, the responsibility of meeting the humanitarian needs of the population in an armed conflict is therefore on the parties to a conflict which might mean a State armed group or a non-State armed group whose authority and existence may not be officially recognised such as rebels or insurgents.⁴⁴⁷ Where CA3 fails to mention humanitarian assistance explicitly, Additional Protocol II in Article 18(2) states:

⁴⁴¹ Common Article 3

⁴⁴² FDFA (2011), (n328), 26

⁴⁴³ ICRC Study on Customary Law, Rule 55

⁴⁴⁴ Commentary of 1987 to Common Article 3, para 767

⁴⁴⁵ Ibid

⁴⁴⁶ Ibid, para 804

⁴⁴⁷ Françoise Bouchette Saulnier, (n156).

If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

It is arguable that since CA3 does not mention relief actions, Article 18(2) of AP II is a way to remedy that. It is stated in the commentaries to this provision that the gap created by CA3 ‘has always been clear in practice, and consequently the ICRC and the Red Cross Movement as a whole had wished to remedy it for a long time.’⁴⁴⁸ Indeed, it is clearly not possible to draw up an exhaustive list of criteria to determine at what point the population is suffering undue hardship,⁴⁴⁹ and whether COVID-19 caused undue hardship to civilians in conflict-affected populations is a matter of interpretation of the term. It is essential that we turn to the rules of treaty interpretation in this regard. The ordinary meaning of the word ‘undue’, as called for by Article 31 of the VCLT as a step towards treaty interpretation is defined by Oxford as synonymous with excessive, or more than you think is reasonable or necessary.⁴⁵⁰ In the same vein, ‘hardship’ is defined as a situation that is difficult and unpleasant because of a lack of essential supplies.⁴⁵¹ First, for a disease to be declared a pandemic, which term is defined as ‘an outbreak of a disease that occurs over a wide geographic area...and typically affects a significant proportion of the population’,⁴⁵² it seems logical to state that the impact it causes is indeed excessive, as per the definition of ‘undue’. Further, the pandemic as mentioned above caused many deaths because of a lack of treatment, vaccinations and other PPE to prevent the spread of the virus. Undeniably, medical supplies are particularly mentioned in the commentaries as being essential⁴⁵³ in an armed conflict, even more so in a global pandemic erupting during conflicts.

If a party to a conflict is unable to provide these essential supplies, CA3 further provides that any ‘impartial humanitarian organisations may offer their services to the Parties to the conflict’ which services may include humanitarian relief. While this establishes the right of impartial humanitarian organisations to offer their services to the parties to NIAC, it should not be considered interference in domestic affairs or an unfriendly act.⁴⁵⁴ During the COVID-19 pandemic, it was made apparent that a lot of parties to NIACs could indeed not cater to the needs of the population regarding COVID-19

⁴⁴⁸ Commentary to AP II , Art 18(2) para 4869

⁴⁴⁹ Ibid, para 4881

⁴⁵⁰ Oxford Advanced Learner’s Dictionary, International Student’s Edition, p 1645.

⁴⁵¹ Oxford Advanced Learner’s Dictionary, International Student’s Edition, p 696.

⁴⁵² “Pandemic.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/pandemic> Accessed 19 Oct. 2022

⁴⁵³ Commentary to Art 18, AP II para 4881

⁴⁵⁴ Commentary to GC I

relief. In Syria for example, it was established that the country, after nine years of NIACs was in an extremely poor position to confront the pandemic.⁴⁵⁵ In this regard, all parties to the various NIACs in Syria could be offered by the ICRC as an example to provide relief supplies to them.⁴⁵⁶ A similar provision is also seen in Article 18(1) of AP I which states that ‘*relief societies located in the territory of the High Contracting Party such as Red Cross ‘may offer their services...’.*

As in IACs, relief operations in NIACs must be humanitarian, impartial and conducted without any adverse distinction. The interpretation of the principles of ‘humanitarian’, ‘impartial’, and ‘without distinction’ which was given above in the context of IACs, applies *mutatis mutandis* to conflicts not of an international character. In other words, this obligation is found in both treaty and customary law and has to be understood in the same way in IACs other than occupation as already detailed in the relevant Chapter and NIACs.⁴⁵⁷

THE PROTECTION OF HUMANITARIAN WORKERS IN NIACS

Article 9 of AP II calls for the protection of medical and religious personnel. Article 9(1) holds that ‘*medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties...’*⁴⁵⁸. It must be noted that CA3 is silent on this point, instead merely laying down the principle that the wounded and sick should be protected.⁴⁵⁹ Medical Personnel as articulated in Article 9 covers “those persons whose role is the search for, collection, transportation, diagnosis, or treatment, of the wounded sick and shipwrecked, or the prevention of disease⁴⁶⁰ including a pandemic like the COVID-19. The extent to which ‘all available help for the performance of their duties’ as articulated in Article 9 is to be given, is arguably more restricted in NIACs than in IACs⁴⁶¹. The fact that Rule 25⁴⁶² does not even include the duty to provide medical personnel with ‘all available help for the performance of their duties’ raises questions as to whether the obligation in Art. 9(1) AP II can be interpreted broadly, and othersone include the rules applicable to IACs⁴⁶³. This is thus, one

⁴⁵⁵ Muriel Asseburg and others ‘The COVID-19 Pandemic and Conflict Dynamics in Syria’, 2020 Stiftung Wissenschaft und Politik 8, doi:10.18449/2020C21

⁴⁵⁶ FDFA (2011), (n328), 26

⁴⁵⁷ FDFA (2011), (n328), 21

⁴⁵⁸ Art 9(1) AP II

⁴⁵⁹ Commentary of 1987, to Art 9 of AP II, para 4658

⁴⁶⁰ Ibid, para 4664

⁴⁶¹ Amrei Müller, ‘The Relationship Between Economic, Social and Cultural Rights and International Humanitarian Law’ (2013, Martinus Nijhoff Publishers), 229

⁴⁶² Rule 25, ICRC Database on Customary Humanitarian Law

Rule 25 ICRC Study, Vol I, p. 97, reads: ‘Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy.’

⁴⁶³ Müller A, (n466), 229

of the provisions which is indicative of the scantiness of the IHL NIAC regime on humanitarian assistance, alluded to above, particularly in comparison with the IAC regime on the same.

Additionally, the protection of humanitarian relief personnel and relief objects guaranteed in the IAC regime on humanitarian assistance⁴⁶⁴ is non-existent in the NIAC treaty regulations on humanitarian assistance.⁴⁶⁵ In the context of COVID-19, this would imply that relief personnel in a NIAC zone, offering say vaccinations against the pandemic, would not be entitled to special protection under the law of non-international armed conflict. This could result in an unwillingness by relief operation organisations, to send personnel to these areas, for fear of their lack of protection. In fairness, however, this protection is granted to humanitarian personnel operating in NIACs through the application of customary IHL, and from extensive practice as cited in the ICRC Study on which the rules are based.⁴⁶⁶ There is also little reason to assume that non-state armed groups lack the capacity to implement these obligations.⁴⁶⁷ Nonetheless, it is important and instructive that this is under development in the NIAC treaty provisions in order to get a full comprehension of the rules in question.

4.3 THE ISSUE OF CONSENT BY NSAGS IN NIACS

A key issue to consider in the analysis of humanitarian assistance provisions in NIACs is the issue of consent. In ongoing NIACs, many of the provisions CA3 give impartial humanitarian bodies the right to offer their services to the Parties to a NIAC. This right can be exercised *vis-à-vis* Parties to a conflict, including non-State parties.⁴⁶⁸ Other humanitarian law rules dealing with this subject qualify the way in which this right is to be exercised: *in order to undertake the proposed activities, an impartial humanitarian organization needs to have consent.*⁴⁶⁹ Article 18(2) for example calls for humanitarian actions to be undertaken subject to the consent of the High Contracting Parties concerned.⁴⁷⁰ Furthermore, the commentaries to Rule 55 of the ICRC Customary Law Study clarify that access remains subject to consent in both IACs and NIACs.⁴⁷¹

⁴⁶⁴ Art 71 of AP 1, Art 26 of GC I, Art 25 GC II, Art 70(4) of AP I, protect objects used for humanitarian relief operations

⁴⁶⁵ The Relationship Between Economic, Social and Cultural Rights and International Humanitarian Law, 258

⁴⁶⁶ Ibid

⁴⁶⁷ Ibid

⁴⁶⁸ ICRC Updated Commentary to Common Article 3, para 816

⁴⁶⁹ Ibid

⁴⁷⁰ Art 18(2) to AP II

⁴⁷¹ Jessica Schaffer, 'State Consent to the Provision of Humanitarian Assistance in Non-International Armed Conflicts' (2004) University of Queensland Law Journal 40(1) 68, 74

In NIACs, the wording of the provision has been interpreted to indicate that only the territorial State's consent is needed.⁴⁷² Under this interpretation, which is followed in Syria and beyond by the ICRC,⁴⁷³ if the government withholds its consent, the consent of an armed group would be insufficient even though the population living in the territory it controls needs assistance.⁴⁷⁴ However, from a practical standpoint, the consent of relevant NSAGs controlling or operating in the territory in question is necessary for relief actions to be carried out.⁴⁷⁵ It must be emphasised however that according to IHL, to request from a NSAG its consent to the delivery of humanitarian assistance does not establish recognition nor does it confer any legal status upon that actor.⁴⁷⁶ In fact, CA3 holds that '*the application of the preceding provisions shall not affect the legal status of the Parties to a conflict*'.⁴⁷⁷ Therefore, COVID-19-related supplies were to be brought into areas of NIACs by impartial humanitarian bodies only after the consent of the relevant parties to a conflict, including Non-State Armed Groups where relevant, without conceding any legal status upon such NSAG.

Like in IACs, this consent cannot be withheld arbitrarily. It is important to explore what arbitrary means in the context of NIACs and COVID-19. First, in NIACs, the movement of impartial humanitarian organisations may only be temporarily constrained in cases of imperative military necessity.⁴⁷⁸ The question of whether a party to armed conflict may lawfully turn down an offer of humanitarian services is inherently connected to its obligations *vis-à-vis* the population under its control, notably its ability to fulfil its primary obligation to meet the basic needs of that population.⁴⁷⁹ The ICRC argues rather persuasively that if a belligerent is not able to fulfil its primary obligation to meet the basic needs of the population under its control, the requirement to allow impartial humanitarian organisations to step in becomes more of a must⁴⁸⁰ as opposed to a voluntary act. It would be illogical in a time of a global pandemic, such as the one which is the subject of this research, killing millions of people across the world⁴⁸¹ to deny COVID-19 relief to curb these deaths. In fact, because of the criticalness of these relief supplies to populations in an armed conflict who would have no access to COVID-19 relief if not for humanitarian organisations, the refusal to grant consent may result in the

⁴⁷² Sassoli M, *IHL Rules, Solutions to Problems Arising in Warfare and Controversies* (n 83), 578

⁴⁷³ ICRC, 'QandA and Lexicon on Humanitarian Access' (2014) 96 IRRC 359, 369

⁴⁷⁴ Sassoli M, *IHL Rules, Solutions to Problems Arising in Warfare and Controversies* (n 83), 578

⁴⁷⁵ Schwendimann F (n50), 1001

⁴⁷⁶ Ibid

⁴⁷⁷ Common Article 3, para 4

⁴⁷⁸ Schwendimann F (n50), 1001

⁴⁷⁹ ICRC, *IHL Rules on Humanitarian Access and Covid-19*, 2

⁴⁸⁰ Ibid

⁴⁸¹ World Health Organisation, Coronavirus (COVID-19) Dashboard < <https://covid19.who.int/>> accessed 19 October 2022

withholding of consent being seen as arbitrary. That being said restrictions on aid deliveries for example, from Damascus and Iraq to populations of North-East Syria, needed to prevent, contain and treat COVID-19⁴⁸² must therefore be found unlawful as the population of North East Syria, and indeed other NIAC territories were during the time of COVID, stuck without the tools to tackle outbreaks of COVID-19.⁴⁸³

4.4 CONCLUSION

In this chapter, we explored the regulations that govern access for humanitarian organisations during non-international armed situations. These rules have taken on new significance in light of the widespread COVID-19 outbreak. As a result of doing this, it was discovered that the law of NIAC regimes regarding humanitarian assistance is not nearly as comprehensive as that of IAC regimes. However, some regulations do exist and have been found that could be utilised to guarantee that people living in territories affected by NIACs have access to relief activities connected to the COVID-19 pandemic. It was established that the primary responsibility for meeting the basic needs of affected populations in NIACs lies in the parties to the conflict who have control over them which includes non-State armed groups. It was further established that for IHL to apply to the regulation of humanitarian assistance, the relief actions must be humanitarian, impartial and done without adverse distinction. In NIACs, like in IACs other than occupation, humanitarian operations are subject to the consent of the parties concerned including non-State armed groups who have control over a specific territory.

⁴⁸² Human Rights Watch, 'Syria: Aid Restrictions Hinder Covid-19 Response: UN Should Reauthorize Assistance from Iraq; Damascus Should Allow Passage (April 28 2020)< <https://www.hrw.org/news/2020/04/28/syria-aid-restrictions-hinder-covid-19-response>> accessed 27 October 2022

⁴⁸³ Ibid.

CHAPTER 5: INTERNATIONAL HUMAN RIGHTS LAW AS SUPPLEMENTARY IHL REGIME ON HUMANITARIAN ASSISTANCE DURING THE COVID-19 PANDEMIC.

The purpose of this chapter is to provide a description of the possible role that international human rights law could play in bridging the gaps in the IHL framework on humanitarian assistance and access and assistance. In order to evaluate if and to what extent international humanitarian law and human rights law complement one another, the relationship and interlink between these two bodies of law will be analysed. The relevant rules of human rights law applicable to the provision of humanitarian assistance in situations of the interplay between pandemics and armed conflict will also be explored.

5.1 THE RELATIONSHIP BETWEEN IHL AND IHRL

IHL and IHRL are intrinsically linked and often interrelated, with academic literature referring constantly to the ‘fusing’, ‘meshing’, ‘complementarity’, ‘convergence’ or ‘confluence’ of these two areas of law.⁴⁸⁴ Further, legal and jurisprudential developments have clearly confirmed the concurrent application of IHL and IHRL in times of armed conflict.⁴⁸⁵ IHL developed early within public international law, for it predominantly regulates inter-state relations, while human rights law only entered the field of public international law after the Second World War.⁴⁸⁶ These two bodies of law are both premised on respect for human dignity and therefore are separate parts of a single order committed to respecting human rights in armed conflict.⁴⁸⁷

The idea that IHL and IHRL had several points of commonalities gained momentum in the early 1970s, where it was argued that the two *corpa juris* were not only related but also that the law of war was a derogation from the normal regime of human rights.⁴⁸⁸ The debate about the interrelatedness of IHL

⁴⁸⁴ Noëlle Quénivet, ‘The History of the Relationship Between International Humanitarian Law and Human Rights Law’, in Arnold R and Quénivet Noëlle (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff Publishers 2008), 1

⁴⁸⁵ [Application of IHRL in Times of Armed Conflict and the Interrelationship with IHL \(ebrary.net\)](#)

⁴⁸⁶ *Ibid.*, at 2.

⁴⁸⁷ John Dugard, *International Law, A South African Perspective*, 4th edition, 532

⁴⁸⁸ Quénivet N (n489),5

and IHRL was confirmed by the ICJ in the Nuclear Weapons opinion,⁴⁸⁹ where the ICJ undoubtedly declared that although IHL was the governing body of law applying in times of armed conflict, human rights law continued to apply.⁴⁹⁰ Additionally, in its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory⁴⁹¹, the ICJ rejected Israel's argument that IHL as *lex specialis* was alone applicable to its administration in the oPt. Instead, it held that Israel's conduct in the oPt was to be judged in accordance with norms of both humanitarian and human rights law.⁴⁹² In essence, human rights, humanitarianism and IHL are linked: they are universal in their application and based on the recognition of shared humanity.⁴⁹³

The relationship between IHL and IHRL is thus regarded to be one of complementarity.⁴⁹⁴ Their concurrent application often leads to the same result and has the potential to offer greater individual protections.⁴⁹⁵ Each can enhance the other body of law to strengthen areas of relative weakness,⁴⁹⁶ in this regard IHRL can be used to close the lacunae in IHL on humanitarian assistance during the convergence of a pandemic like COVID-19 and an armed conflict. It is also helpful to rely on IHRL in situations of internal armed conflict, where the treaty rules of IHL are limited,⁴⁹⁷ and require some reinforcing to achieve intended results. In this regard, this author regarded IHRL to be the best body of law to supplement IHL rules on the provision of humanitarian assistance.

5.2 IHRL PROVISIONS ON HUMANITARIAN ASSISTANCE AND ACCESS IN TIMES OF CONFLICT DURING THE COVID-19 PANDEMIC

While aware that the protection of the civilian population in an armed conflict, viewed from a rights-based approach as this Chapter attempts to do, includes other bodies of law, the focus here is on those deemed to be the most relevant provisions, first IHL as explored in the preceding Chapters and secondly IHRL relative to the implementation of Chapter VII⁴⁹⁸ of the United Nations Charter's

⁴⁸⁹ *Legality of the Threat or Use of nuclear weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, para 25

⁴⁹⁰ Quénivet N (n489),8

⁴⁹¹ Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004

⁴⁹² John Dugard, *International Law: A South African Perspective*, (2011, Juta 4th edition), 532

⁴⁹³ Haider H (n10),20

⁴⁹⁴ *Ibid*,21

⁴⁹⁵ *Ibid*, referring to Droege, C. (2008). Elective affinities? Human rights and humanitarian law. *International Review of the Red Cross*, 90(871), 501-548

⁴⁹⁶ *Ibid*

⁴⁹⁷ *Ibid*

⁴⁹⁸ Katarina Månsson, (n13),568

mandate to protect civilians.⁴⁹⁹ The UN has spelled out in several documents the continuing applicability of human rights in armed conflict.⁵⁰⁰ The first “basic principle for the protection in armed conflict” identified in GA Resolution 2675⁵⁰¹ were indeed “fundamental human rights, as accepted in international law and laid down in international instruments [which] continue to apply fully in situations of armed conflict.⁵⁰² GA Resolution 2675 furthermore spells out that the provision of international relief, which as seen above includes COVID-19 prevention, treatment and mitigation supplies *inter alia*, to civilian populations is in conformity with the humanitarian principles of the UN Charter, the UN Declaration of Human Rights and other international instruments in the field of human rights⁵⁰³ The system of basic human rights applicable in all situations, including those of armed conflict, during which such rights are violated on a large scale, should encourage all steps taken to ensure respect for those rights.⁵⁰⁴ Humanitarian action particularly in the context of a deadly pandemic, like the COVID-19, is certainly instrumental in the implementation of the right to life and health.⁵⁰⁵

The major IHRL instruments largely do not refer expressly to humanitarian assistance and access.⁵⁰⁶ Although this is the case, a number of basic human rights are of relevance⁵⁰⁷ and particularly so with regard to humanitarian assistance, including the right to life,⁵⁰⁸ the prohibition of torture and other cruel and inhumane treatment or punishment,⁵⁰⁹ the right to health,⁵¹⁰ the right to livelihood⁵¹¹ and the principle of non-discrimination,⁵¹² to name a few. It is arguable that the right to humanitarian

⁴⁹⁹ Missions with a protection of civilian mandate are typically authorised under Chapter VII of the UN Charter, to use all necessary means, including, where necessary, the use of force up to and including deadly force, to protect civilians under threat of physical violence.

See United Nations Department of Peace Operations Ref 2019.17 Policy document on the Protection of Civilians in United Nations Peacekeeping, 5

This research is not concerned with issues of use of force however, and merely cites this example as a way to illustrate the complementarity of IHRL and IHL rules in all aspects of protection of civilians.

⁵⁰⁰ Katarina Månsson, (n13), 572

Footnote 95 lists some of these UN documents

⁵⁰¹ GA. Res. 2675 (XXV) (1970), para. 1

⁵⁰² Katarina Månsson, (n13),572

⁵⁰³ *Ibid*

⁵⁰⁴ Jakovljevic B (n304), 476

⁵⁰⁵ *Ibid*

⁵⁰⁶ FDFA (2011), (n328), 30

⁵⁰⁷ *Ibid*, 32

⁵⁰⁸ Universal Declaration of Human Rights (UDHR), Art 3; International Covenant on Civil and Political Rights (ICCPR) Art 6(1); African Charter on Human and People’s Rights (AfCHPR), Art 4; *inter alia*

⁵⁰⁹ UN Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment (CAT); UNDHR, Art 5; ICCPR Art 7 and 10(1); AfCHPR, Art 5 *inter alia*

⁵¹⁰ UNDHR, Art 25; AfCHPR, Art 16(1); *inter alia*

⁵¹¹ UNDHR, Art 25(1), AfCHPR, Arts 14,16 and 18(1); *inter alia*

⁵¹² International Convention on the Elimination of All Forms of Racial Discrimination (CERD); ICCPR, Art 2(1); *inter alia*

assistance is implied in the entire system of basic human rights.⁵¹³ Furthermore, the system of basic human rights does not make provision for different situations; it commands States to guarantee and protect these rights in every kind of situation,⁵¹⁴ including during armed conflict. When an emergency such as the COVID-19 pandemic makes special, unexpected and additional efforts necessary to ensure enjoyment of basic human rights, there is an obligation on the part of all concerned to apply such additional efforts.⁵¹⁵

5.3 SPECIFIC IHRL RIGHTS RELEVANT TO HUMANITARIAN ASSISTANCE IN A PANDEMIC DURING ARMED CONFLICT

The right to life is the most fundamental right which is a non-derogable right⁵¹⁶. In General Comment No.36,⁵¹⁷ the United Nations Human Rights Committee, has emphasised that this right must not be narrowly interpreted.⁵¹⁸ Thus, individuals are entitled to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death,⁵¹⁹ including undoubtedly the failure to provide for supplies essential to preventing, treating or mitigating a lethal disease like COVID-19. Its application in situations of armed conflict should be interpreted in accordance with the rules of international humanitarian law, including those related to the conduct of hostilities.⁵²⁰ Respect for the right to life also imposes a positive obligation to protect and safeguard life.⁵²¹ During the COVID-19 pandemic, and with regards to the right to life States, have at least minimal obligations to protect the lives of their inhabitants through taking steps to address clear health threats to the populations, such as the deadly COVID-19 virus.⁵²² Where the State is unable to respond effectively to the needs of the population including the need to avoid disease that might threaten their lives, arguably a refusal by that State to accept humanitarian assistance could constitute a threat to civilians’

⁵¹³ Jakovljevic B (n304), 472

⁵¹⁴ Jakovljevic B (n304), 472

⁵¹⁵ Ibid

⁵¹⁶ FDFA (2011), (n328), 32

⁵¹⁷ UN International Covenant on Civil and Political Rights, General Comment No.36, Article 6, right to life CCPR/C/GC/36

⁵¹⁸ Oona Hathaway, Preston Lim and Mark Stevens, Just Security, Covid-19 and International Law Series: Human Rights Law-Right to life < <https://www.justsecurity.org/73426/covid-19-and-international-law-series-human-rights-law-right-to-life/>> accessed 18 October 2022

⁵¹⁹ Oona Hathaway, Preston Lim and Mark Stevens, Just Security, Covid-19 and International Law Series: Human Rights Law-Right to life < <https://www.justsecurity.org/73426/covid-19-and-international-law-series-human-rights-law-right-to-life/>> accessed 18 October 2022

⁵²⁰ FDFA (2011),(n328),32

⁵²¹ Ibid, referring to Human Rights Committee, General Comment No.6, para.5

⁵²² Oona Hathaway, Preston Lim and Mark Stevens, ‘COVID-19 and International Law Series: Human Rights Law-Right to Life’ < <https://www.justsecurity.org/73426/covid-19-and-international-law-series-human-rights-law-right-to-life/>> accessed 05 October 2022

right to life.⁵²³ Conversely, the provision of humanitarian assistance or the facilitation can indeed be seen as enabling the guaranteeing civilians' right to life, and can in this regard be invoked to supplement the IHL rules on humanitarian assistance.

Another pertinent IHRL right in the context of humanitarian assistance in armed conflict is the prohibition of torture and other forms of ill-treatment including cruel, inhuman or degrading treatment. In this regard, the phrase 'cruel, inhuman or degrading treatment' is particularly relevant to issues of humanitarian access.⁵²⁴ The mere fact of denying essential services to the population may indeed constitute cruel, inhuman or degrading treatment⁵²⁵. Thus, in conflict situations, where it has already been established that healthcare facilities are often dilapidated and ineffective, the hindrance of humanitarian assistance aimed at the provision of COVID-19 supplies, whether prevention or treatment can indeed be seen to be cruel, inhuman or degrading. This is in accordance with the definition of 'inhuman' which has been defined in this regard to mean measures that cause 'if not actual bodily injury, at least intense physical and mental suffering'.⁵²⁶ It is safe to assert that the lack of supplies essential to the survival of the population can indeed cause intense physical and mental suffering.⁵²⁷

A more obvious right under IHRL, particularly relevant to the pandemic is the right to health. With regards to the right to health and humanitarian assistance, the minimum core obligations inherent to the right to health requires States to 'ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups'⁵²⁸ including victims of armed conflict. Medical supplies, personnel, and equipment *inter alia*, required for controlling the COVID-19 pandemic as in situations of armed conflict as discussed in the previous Chapter are all important elements of a well-developed health system for the realisation of the minimum fundamental components of the right to health.⁵²⁹ Further, this right has the potential to partially compensate for another limit of IHL.⁵³⁰ Under IHL, the recognition and authorisation requirement together with the restricted definition of 'medical personnel' *inter alia*, places IHL's focus on the protection of

⁵²³ FDFA (2011), (n328),32

⁵²⁴ FDFA (2011), (n328),34

⁵²⁵ Ibid

⁵²⁶ European Court of Human Rights, *Ireland v United Kingdom*, 1978, Series A, No.25, para. 167

⁵²⁷ FDFA (2011), (n328),34

⁵²⁸ Ibid., at 36.

⁵²⁹ Michael O'Flaherty and David Harris (eds), *The Relationship between economic, social and cultural rights and International Humanitarian Law, An Analysis of Health-Related Issues in Non-International Armed Conflict* (2013, Martinus Nijhoff Publications), 226.

⁵³⁰ Ibid., at 233.

recognised and authorised national medical personnel, units and transports that were present in a territory before a NIAC started.⁵³¹ While undoubtedly important, in many low-income countries such (restricted) protection might be less appropriate for guaranteeing minimal health care for conflict-affected populations.⁵³² While the concurrent applicability of the right to health will not give foreign medical personnel, units or transports of international humanitarian organisations the right to display the distinctive emblem, the more proactive obligations to facilitate their work will extend to them.⁵³³ By giving special attention to the protection of medical transport, and services, *inter alia*, IHL underscores the significance of this particular medical service for the protection of the right to health during NIACs,⁵³⁴ and indeed in all types of conflict when potentially more sick individuals have to be medically cared for in the context of the COVID-19. In this regard, the right to health can also be raised to complement IHL's rules on humanitarian assistance during an unfortunate intersection between conflict and a pandemic like COVID-19.

5.4 A HUMAN RIGHTS-BASED APPROACH TO HUMANITARIAN ASSISTANCE IN CONFLICT: LESSONS FROM COVID-19

The current COVID-19 pandemic represents what may be an indication of a future of international public health challenges, the consequences of which are exacerbated by the impacts of armed conflict.⁵³⁵ By way of a current example, it is useful to look at the state of affairs in Yemen, where the health system is crumbling after years of conflict and the response to COVID-19 is crippled as a result.⁵³⁶ Where gaps in IHL are seen, it is instructive therefore that we look at other bodies of law that address these lacunae.

There has been in recent years growing discussion of the benefits of a rights-based approach to humanitarian assistance.⁵³⁷ This approach becomes particularly pertinent in health emergencies like the COVID-19 pandemic because IHL does not fully address the needs for availability of and access to health services for the civilian population.⁵³⁸ A rights-based approach redefines recipients of

⁵³¹ Michael O'Flaherty and David Harris (ed), (n534), 233

⁵³² Ibid, 234

⁵³³ Ibid, 234

⁵³⁴ Ibid, 226

⁵³⁵ Van Hout MC and Wells JSG, "The Right to Health, Public Health and Covid-19: A Discourse on the Importance of the Enforcement of Humanitarian and Human Rights Law in Conflict Settings for the Future Management of Zoonotic Pandemic Diseases" (2021) 192 Public Health 3,4

⁵³⁶ Ibid, referring to Devi S, Fears of 'highly catastrophic' COVID-19 spread in Yemen, Lancet 2020

⁵³⁷ Haider H (n10),20

⁵³⁸ Footer KH and Rubenstein LS, "A Human Rights Approach to Health Care in Conflict" (2013) 95 International Review of the Red Cross 167, 168

assistance, both women and men, as active subjects and rights-holders with entitlements (and obligations) rather than as passive victims and recipients of charity.⁵³⁹

When concerned with humanitarian crises that result in heavily reduced access to materials and services essential to a life of dignity, often referred to as ‘subsistence rights’ (such as healthcare, food, and water and sanitation) economic, social and cultural rights are of the utmost relevance.⁵⁴⁰ In the present context of subsistence rights, human rights law has not only been given more content than the relevant humanitarian law norms but also provides (in theory) more extensive protection of access to essential materials and services.⁵⁴¹ Indeed, humanitarian assistance (i.e. the provision of food, water and healthcare) as such is scarcely regulated during NIAC, which may raise a presumption that human rights law constitutes the *lex specialis*.⁵⁴² The very vagueness of the protection offered by Article 18 to Additional Protocol II⁵⁴³ extending to “foodstuffs and medical supplies” suggests that the much more embellished human rights law would offer more protection of subsistence rights than humanitarian law.⁵⁴⁴

IHRL thus forms an important additional framework, in particular during NIACs, whereby economic social and cultural rights are of particular importance.⁵⁴⁵ As these rights grant individuals rights to basic socio-economic services, they are strongly linked to the provision of humanitarian assistance.⁵⁴⁶

Regarding guarantees of rights for example, in IHL, except in situations of occupation, where Article 56 of the Fourth Geneva Convention⁵⁴⁷ states that ‘*the occupying power has the duty of ensuring and maintaining with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory*’, is strikingly vague in terms of rights assurances to provision and continuity of healthcare for civilians.⁵⁴⁸ During the COVID-19 pandemic, for example, Israel violated this provision in relation to the oPt, with ^{the} imposition by Israel of severe limitations on freedom of movement in the oPt, limited access to medical help outside of the territories, leading to significant concerns in relation to pandemic spread and

⁵³⁹ Ibid

⁵⁴⁰ Lottie Jane, ‘Mitigating humanitarian crises during non-international armed conflicts—the role of human rights and ceasefire agreements’ (2016) *Journal of International Humanitarian Action* 1(2), 5

⁵⁴¹ Ibid

⁵⁴² Ibid, 4

⁵⁴³ Art 18, AP II

⁵⁴⁴ Ibid

⁵⁴⁵ Toebes B (n423), 134

⁵⁴⁶ Ibid

⁵⁴⁷ Art 56 of GC IV

⁵⁴⁸ Van Hout MC and Wells JSG (n540), 4

response.⁵⁴⁹ At no point has Israel been brought to account in relation to these violations.⁵⁵⁰ These gaps in health rights assurances in conflict settings during the COVID-19 pandemic can be filled by IHRL by virtue of the right to health by supporting access to healthcare which includes measures to prevent and treat infectious diseases in conflict settings.⁵⁵¹

Further, where the issue of consent was shown in the previous Chapter to present a hurdle to the delivery of humanitarian assistance, under human rights law an obligation to accept or even request international assistance even if the civilian population's survival is not instantly threatened would clearly be confirmed by the parallel applicability of the ICESCR,⁵⁵² including the components of the minimum core right to health that aim to mitigate short- and long-term health consequences of NIACS.⁵⁵³ This obligation is clear from the wordings of Art 2(1) of the ICESCR which obligates all State parties to '*undertake to take steps individually and through international assistance and co-operation...*'⁵⁵⁴. The issue of consent can therefore be seen to present less of an obstacle in IHRL than it does in IHL, consequently offering more extensive protection.

A human rights-based approach to humanitarian assistance in armed conflict promotes human rights accountability which can and should provide a welcome addition to the more limited number of mechanisms available to enforce compliance with IHL.⁵⁵⁵ Further IHRL applies at all times unless States decide to derogate from it, and all actors are obliged to respect the right to health as found in IHRL.⁵⁵⁶ This approach to humanitarian assistance in the context of COVID-19 and other pandemics during armed conflict can further support a viable route to ensuring rights are honoured, particularly based on a normative framework where States are obliged to respect, protect and ensure a right to health across all conflict situations as enshrined in IHRL.⁵⁵⁷

Additionally, IHRL regulates the obligations of States towards individuals, applying at all times, and continuing to apply alongside humanitarian law, in times of armed conflict.⁵⁵⁸ Whereas the latter is mainly implemented by inter-state, i.e. traditional, means and has only recently integrated the

⁵⁴⁹ Ibid, Moss D and Majadle G, "Battling Covid-19 in the Occupied Palestinian Territory" (2020) *The Lancet Global Health*, 8, 9

⁵⁵⁰ Ibid

⁵⁵¹ Ibid.

⁵⁵² ICESCR (n310)

⁵⁵³ Michael O'Flaherty and David Harris (ed), (n534), 242.

⁵⁵⁴ Ibid, referring to Art 2(1) of the ICESCR.

⁵⁵⁵ Footer KH and Rubenstein LS (n543), 187

⁵⁵⁶ Van Hout MC and Wells JSG, (n540), 5

⁵⁵⁷ Ibid.

⁵⁵⁸ FDFA 2011 (n328) 29.

individual in its enforcement mechanism, the former has from inception offered individuals a significant place in the implementation system.⁵⁵⁹ Further, it is clear that IHRL grants individuals more rights than IHL does. This is linked to the different origins of the two legal regimes: IHL is meant to regulate the behaviour of states in armed conflict while HRL aims at protecting individuals from the state.⁵⁶⁰

It is further arguable that the developments of IHRL will reinforce and advance the establishment of the majority of norms concerning humanitarian assistance in armed conflict as part of customary law.⁵⁶¹ The link between these two bodies of law will allow the mechanisms established by both to be used to guarantee respect for the right of victims to humanitarian assistance and to ensure that States fulfil the duties associated with this right.⁵⁶²

Given that the right to humanitarian assistance is instrumental in guaranteeing the right to life and other IHRL rights, the obligation imposed on non-State parties to guarantee the right to humanitarian assistance effectively binds them to comply with obligations associated with human rights observance. It should therefore be possible in theory to use the mechanisms provided for in IHRL to enforce compliance.⁵⁶³ Given further that the right to humanitarian assistance is directly derived from the fundamental norms of both IHRL's right to life and IHL's principles of inviolability, and that these principles form the hard core of obligation *erga omnes*, it can be concluded that the right to humanitarian assistance generates obligation *erga omnes* for all parties of the conflict.⁵⁶⁴ In international law, the concept of *erga omnes* obligations refers to specifically determined obligations that States have towards the international community as a whole.⁵⁶⁵

5.5 CONCLUSION

Indirectly, human rights treaties provide a legal framework in the form of certain fundamental rights, such as the right to life, the prohibition of torture and other forms of cruel, inhuman, or degrading treatment or punishment, and the right to health, all of which are obligations that states are obligated

⁵⁵⁹ Cátia Lopes and Noëlle Quénivet, 'Individuals as Subjects of International Humanitarian Law and Human Rights Law' in Arnold R and R. Quénivet Noëlle N (eds) 'International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law' (Martinus Nijhoff Publishers 2008), 215.

⁵⁶⁰ Lopes and Quénivet (n 539) 218.

⁵⁶¹ Stoffels (n 213) 516.

⁵⁶² Ibid 517.

⁵⁶³ Ibid 520.

⁵⁶⁴ Ibid 524.

⁵⁶⁵ Memeti Ardit and Nuhija Bekim, "The Concept of Erga Omnes Obligations in International Law"[2013] New Balkan Politics :Journal of Politics, 31.

to respect, protect, and fulfil. This chapter presented a brief summary of how some of these IHRL requirements can be utilised to supplement the norms of IHL on humanitarian aid. It also discussed how this approach is more effective in providing the necessary support to civilian populations impacted by armed conflict. It was established that in the context of the COVID-19 pandemic, during conflict, a shortage of or a lack of essentials including those required for sustaining the health of a population is often closely linked to a lack of protection of corresponding human rights. As a result, humanitarian assistance cannot be regarded exclusively as an action to provide relief to lessen the needs of a civilian population, but also to protect human rights. This is because it was established that a shortage of essentials including those required for sustaining It was discovered that the IHRL regime has the ability to eliminate several legal gaps in the IHL regime on humanitarian assistance. This is necessary for the distribution of humanitarian aid to be efficient and helpful to those who have been affected by armed conflict.

CHAPTER 6: CONCLUSION

The COVID-19 outbreak has demonstrated how much the modern world is shaped by interwoven political, economic, and social systems. COVID-19 posed a significant new threat, particularly to life in war-torn countries. International humanitarian law (IHL) is a key legal framework that provides crucial safeguards to people affected by armed conflicts. The key goals of this study were to identify the humanitarian needs of populations affected by conflict as a result of the COVID-19 pandemic and evaluate the pertinent regulations that guarantee these populations the right to have their humanitarian needs met through analysis of the regulations governing access to humanitarian assistance.

To accomplish this, the research was built around four main questions: identifying the humanitarian needs of various populations affected by conflict during the pandemic; identifying and analysing the applicable IHL provisions governing humanitarian assistance in terms of their sufficiency in protecting civilian populations in conflict-affected areas during the pandemic. This research also tried to identify whether any extra or complementary international laws may be applied to the relevant IHL humanitarian assistance regulations identified.

The catastrophic potential of such a confluence of crises, i.e., a pandemic and an armed conflict, was demonstrated using examples of the COVID-19 pandemic and other armed conflicts, including, among others, the Russia-Ukraine war and the Occupied Palestinian territory. In this sense, it was emphasised how important it was to combat and mitigate the impacts of this intersection. Furthermore, this study demonstrated how critical COVID-19 mitigation, treatment, and preventative materials were to the survival of civilian people in armed conflict. In light of this, the current study sought to determine whether IHL requires the provision of these materials by finding and analysing applicable IHL laws governing humanitarian assistance in circumstances where a pandemic overlaps with armed conflict, as in the case of COVID-19.

This research came to the conclusion that humanitarian law does, in fact, have laws that make provisions for the supplies that are required to combat the spread of the COVID-19 pandemic, as well as any other pandemic or similar health emergency. In addition, it was determined that the implementation of humanitarian aid in nations that are experiencing armed conflict is necessary for the preservation of human life at times of public health and other emergencies, such as the COVID-19 pandemic.

It was determined that Section III of the Hague Regulations, notably Articles 42–56, Section I, Section III, and Section IV of the Fourth Geneva Convention, and Additional Protocol I form the main

guidelines for military occupation. Humanitarian assistance under military occupation during the COVID-19 epidemic was considered to be particularly pertinent to Articles 55(1) of the Fourth Geneva Convention and Article 69 of Additional Protocol I, *inter alia*. The occupying powers have obligations under IHL to offer and/or facilitate the supply of humanitarian assistance in the areas they control, according to an interpretation of these provisions that complies with the standards of treaty interpretation.

In IACs other than occupation, this research found that Articles 70 and 71 of AP I as well as Rules 55 and 56 of customary international humanitarian law were the most relevant in dealing with humanitarian assistance in IACs during COVID-19. An interpretation and analysis of these provisions revealed that there are significant differences between the laws governing humanitarian aid in IACs and during military occupation. Given that this is not a requirement, under instances of military occupation, the subject of consent to humanitarian assistance was brought up during the discussion on IACs. It was also shown by this research that humanitarian assistance in armed conflict is least regulated in NIACs. Additionally, consent is necessary for humanitarian assistance under NIACs, unlike in military occupation but similar to IACs. This study also evaluated the functions and responsibilities of non-State armed groups in providing humanitarian assistance.

On the question of the responsibility to provide these supplies to the civilian population, this research found that, under the law of armed conflict, each party to an armed conflict bears the primary responsibility to meet the basic needs of the population under its control. Impartial humanitarian organizations have the right to offer their services when these supplies are inadequate in situations of armed conflict. Once relief schemes have been agreed to by the parties concerned, the parties to the armed conflict and third States shall allow and facilitate the rapid and unimpeded passage of the humanitarian relief subject to their right of control.

The Chapters on how IHL governs humanitarian assistance also underscored the fact that IHL's regulation of this aspect of armed conflict indeed has some shortcomings. For example, it was said in the preceding Chapters that the laws on humanitarian assistance in NIACs are limited and underdeveloped, especially when compared to the rules on the same in IACs or military occupation. Humanitarian assistance in NIACs is not specifically mentioned in the applicable treaty rules. Additionally, it was noted that providing humanitarian aid to civilians in need is significantly hampered by the requirement of consent under NIACs and IACs other than occupation. The challenges of obligating to NSAGs to comply with IHL were also briefly explored in the context of the provision of humanitarian assistance during the COVID-19 pandemic. In order to give a more thorough framework,

this dissertation advocated in the penultimate Chapter a human rights-based strategy for humanitarian assistance in armed conflicts. In doing so, the interplay between IHL and IHRL was evaluated. It was determined that IHRL could be used in conjunction with IHL for various reasons, including its applicability at all times, including during armed conflict.

According to the findings of this study, the IHL standards on humanitarian aid and access provide as a firm framework for the acceptance and distribution of humanitarian help. They do, however, require supplementation since they fall somewhat short in guaranteeing adequate protection. IHL lacks the clarity required for a comprehensive and successful humanitarian aid policy. When a pandemic occurs on a territory where an armed conflict is already in process, as demonstrated by the COVID-19 pandemic, the IHRL regulations can be used to enhance IHL. It is impossible to dismiss the relevance and significance of IHRL in filling gaps identified in IHL, especially for pandemics happening in armed conflict settings. The analysis in this paper demonstrates that, while IHL is clearly useful as a foundation in mixed situations, it is not perfect for ensuring that all victims of mixed situations receive effective and efficient assistance.

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