

CROSS-BORDER RELIEF OPERATIONS
- A LEGAL PERSPECTIVE

OCHA Policy Series



On a number of occasions in recent years, humanitarian actors have been confronted with serious challenges in mounting effective operations for civilians in opposition-held territories. Access has gone from being a key operational prerequisite to becoming the central and most contested, yet misunderstood, concept in humanitarian and political discussions and negotiations.

One particular challenge has been the reluctance of many parties to provide their consent for cross-border operations. Recent efforts to assist people affected by conflict in Syria and in the Sudanese states of South Kordofan and Blue Nile highlight this concern.

The Secretary-General has identified improving access for humanitarian operations as one of the five 'core challenges' to enhancing the protection of civilians in armed conflict. In his report to the Security Council of November 2013, the Secretary-General recommended that "parties to conflict should ensure that the most efficient means are available for reaching people in need with humanitarian assistance and protection, including in situations where this involves humanitarian operations that cross lines of conflict or international borders." He also called upon OCHA to engage with a range of actors, examine the relevant rules, and consider options for providing further guidance on consent to relief operations.

The present paper, commissioned jointly by OCHA, the Oxford Institute for Ethics, Law and Armed Conflict and the Oxford Martin Programme on Human Rights for Future Generations is therefore intended both as an initial step to provide some clarity on the basis of international humanitarian law and international human rights law and as a resource for humanitarian practitioners and policy makers active in this area. The paper provides a review of the existing legal framework relevant to cross-border relief operations into opposition-held areas, pointing both to certain conclusions and to areas where further clarification and guidance may be desirable. The paper addresses a series of legal questions raised by practitioners and advocates of cross-border relief operations, including:

- What are the basic rules of international humanitarian law on relief operations?
- Whose consent is required for cross-border relief operations?
- How can consent be given, and how can it be withdrawn?
- What amounts to arbitrary withholding of consent?
- In what circumstances, if any, might unauthorised cross-border operations be lawful?

- What courses of action are open to humanitarian actors whose offers of assistance have not been accepted?
- What, if any, is the role of the Security Council, and how has the Council engaged on this issue in the past?

As an independently commissioned piece of research, the paper does not necessarily reflect the legal position of the United Nations. Rather, it is intended to provide a basis for further analysis and debate among Member States and both governmental and non-governmental humanitarian actors.

As part of a broader partnership aimed at providing legal background and research for further consideration of access, consent and related issues, OCHA, the Oxford Institute for Ethics, Law and Armed Conflict and the Oxford Martin Programme on Human Rights for Future Generations will also publish a more focused legal background paper on the issue of 'arbitrary withholding of consent' to relief operations. For too long it appeared that states and non-state armed groups had an unfettered discretion to turn down offers of humanitarian assistance, mostly, without any consequences. A closer look at international humanitarian and human rights law suggests a far more nuanced picture, allowing for more proactive advocacy and promotion of respect of the law, in the interest of tens of thousands of civilians caught in the crossfires of conflict. It is hoped that, taken together, the papers will contribute to a more informed and productive debate on both the relevant rules, and practical options for humanitarian actors, to ensure the most efficient provision of humanitarian assistance to people in desperate need.



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CROSS-BORDER RELIEF OPERATIONS **- THE LEGAL FRAMEWORK**

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The present paper outlines the principal rules of international law relevant to cross-border operations for civilians in opposition-held areas. It must be noted at the outset that the central legal issue is whether the state in whose territory operations are intended to be implemented (“the affected state”) consents to them. The modalities for implementing operations – whether in-country or cross-border – do not affect the basic rules, but raise additional legal questions because of the involvement of third states.

A number of preliminary remarks are warranted.

First, the present paper addresses humanitarian relief operations – ie the provision of supplies and services that are exclusively humanitarian in nature and essential to the survival of the civilian population, such as food, water, medical supplies, clothing and means of shelter. It does not touch upon concepts such as “humanitarian intervention” or “responsibility to protect” inasmuch as, in their current articulation, they focus on preventing and putting an end to genocide, crimes against humanity and war crimes.

Second, “cross-border operations” are not referred to in any treaty nor defined anywhere. This term is employed to refer to the provision of assistance from third states. This can be done in a number of ways, including by so-called “remote management programming”;² or by the provision of relief supplies from neighbouring states to actors operating in the affected state. There have been a number of instances in the past when assistance was provided in this way.

While past examples provide valuable insight as to how to implement such operations, from a legal point of view what matters is the reason underlying the decision to operate cross-border. In the vast majority of past cases this has been due to a security situation in the affected state that prevented international actors from establishing offices or adequate operations in-country. Such situations must be distinguished from those addressed in the present paper, where cross-

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² Remote management programming (or limited access programming) is described as “an adaptation to insecurity, the practice of withdrawing international (or other at-risk staff) while transferring increased programming responsibilities to local staff or local partner organisations”, Jan Egeland, Adele Harmer and Abby Stoddard, *To Stay and Deliver: Good practice for humanitarians in complex security environments*, (2011), Glossary, xiv.

border operations are being considered either because the affected state does not consent to in-country presence, operations or activities across the lines of territory controlled by parties to the conflict; or because a combination of security restrictions and onerous administrative requirements make cross-border operations the most efficient way of assisting people in opposition-held areas.

Third, the present paper sets out the rules relating to agreement to relief operations in the first instance. It should not be assumed that once such initial consent has been obtained, humanitarian operations will be unimpeded and safe. Other rules, not discussed here, come into play at this subsequent stage, requiring parties to allow and facilitate relief operations that have been authorised. Obviously, these obligations will not arise if operations are carried out without the consent of the affected state.

Fourth, the present paper focuses on international law while recalling that private humanitarian actors, such as NGOs, also have obligations under the domestic law of the states where they operate. Moreover, it must also be read in conjunction with the internal legal and policy positions that may be adopted by individual organisations.

Finally, at a more factual level, discussions on cross-border operations for civilians in opposition-held areas sometimes appear to proceed on the assumption that the opposition is unified; that it exercises a fairly permanent degree of control over a well-defined territory; and that the civilian population tends to remain in place, either in government- or in opposition-held territory. While this is occasionally the case – for example in the LTTE-held Vanni in Sri Lanka during the 1990s until the end of the conflict in 2009 – the situation on the ground is usually far more fluid and complex.³ This must be borne in mind when considering the practical feasibility of cross-border operations.

1. Putting the legal analysis in context

Legal analysis must be put in its proper context. An understanding of the law is necessary to ensure those considering cross-border operations act lawfully. However, it is essential to bear a number of considerations in mind.

First, in the situations under review, arguments based on law will not be used for litigation, where an independent and impartial judicial body makes a determination of the relative merits of the legal arguments of those wishing to provide assistance and of affected states. Instead, they will be the background to guide negotiations with affected states; negotiations which are unlikely to be legal in nature and which will be shaped by political considerations. Accordingly, an argument that might win the day in court might not lead to any progress in the dialogue with the affected state.⁴

³ See, for example, Pierre Krähenbühl, “There are no ‘good’ or ‘bad’ civilians in Syria – we must help all who need aid”, *The Guardian*, 3 March 2013.

⁴ See, for example, Steve Ratner “Beyond Courtroom Arguments: Why International Lawyers Need to Focus More on Persuasion”, 10 and 11 September 2013, EJIL:Talk!

Second, the law is not of itself the answer nor the only element to consider; policy and operational considerations are equally important. The lawfulness of a particular course of action in no way ensures the safety of relief operations or of the people they seek to assist.

Third, operationally, it is important to consider the repercussions of unauthorised operations in opposition-held areas on activities in the rest of the affected state, notably those in government-held areas, both by the agencies carrying out the unauthorised operations and by other actors.

Related to this, the issue of consent to relief operations is one of the most delicate and politically sensitive in humanitarian action. The positions adopted in one context are likely to have consequences for the perceptions of humanitarian actors globally, both operationally and at a policy level in discussions within the United Nations and beyond.

It is for these reasons that for most humanitarian actors the decision of whether to carry out relief operations without the consent of the affected state tends to be a *policy* decision *informed* by the law.

2. Basic Rules of International Humanitarian Law Regulating Relief Operations

The conventional rules of international humanitarian law (IHL) regulating the provision of humanitarian assistance are found in different treaties, depending on the nature of the conflict - international or non-international. Those applicable in international armed conflicts, including occupation, are found principally in common Article 9 of the First, Second and Third Geneva Conventions of 1949, Articles 10, 23 and 59 of the Fourth Geneva Convention of 1949 (GC IV) and Articles 69-71 of the First Additional Protocol thereto of 1977 (AP I). Those applicable in non-international conflicts are common Article 3(2) of the Geneva Conventions of 1949 (GCs) and Article 18 of Additional Protocol II of 1977 thereto (AP II). Customary law rules of IHL apply alongside these treaty provisions.

The rules regulating humanitarian assistance are simple and essentially the same in both types of conflict:⁵

<http://www.ejiltalk.org/beyond-courtroom-arguments-why-international-lawyers-need-to-focus-more-on-persuasion-part-i/> and <http://www.ejiltalk.org/beyond-courtroom-arguments-why-international-lawyers-need-to-focus-more-on-persuasion-part-ii/#more-9085>.

⁵ Article 70(1) AP I provides that:

... relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts.

The treaty rules applicable in non-international armed conflicts are essentially the same. Along similar lines, but in a more general manner, common Article 3(2) GCs provides that:

- primary responsibility for meeting the needs of civilians lies with the party to the conflict in whose control they find themselves.
- If this party is unable or unwilling to meet these needs, states and humanitarian organisations may offer to carry out relief actions that are humanitarian and impartial in character and conducted without any adverse distinction.
- In the majority of situations, the consent of affected states is required⁶ but may not be arbitrarily withheld.
- Once relief actions have been agreed to, all parties must allow and facilitate rapid and unimpeded passage of relief consignments, equipment and personnel, even if assistance is destined for the civilian population under the control of the adverse party. Parties may prescribe technical arrangements under which such passage is permitted.⁷

3. The requirement of consent

a. The general rule

The principal element of complexity in these otherwise simple rules is the requirement of consent. While states and humanitarian organisations may offer their services, consent is usually required before relief operations may be implemented. This requirement – implicit in Common Article 3(2) GCs, which states that an impartial humanitarian organisation may “offer its services” - was introduced in Article 70 AP I and Article 18 API II in the final stages of the negotiations of the Additional Protocols out of a concern to protect the sovereignty of the state receiving the relief.⁸

Despite the apparently absolute nature of this requirement, it was already understood during the negotiations that parties did not have “absolute and

[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

Article 18(2) AP II provides that:

[i]f 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.

According to the ICRC Customary Law Study, these treaty rules are essentially mirrored in customary law applicable in both types of conflict. Louise Doswald-Beck and Jean-Marie Henckaerts, *Customary International Humanitarian Law*, (2006), Rule 55.

⁶ For a discussion of whose consent is required, and in particular of whether, in non-international armed conflicts it is just that of affected states or also/only that of the opposition, see Section 4 below.

⁷ Article 70(3) AP I.

⁸ With regard to Article 70 AP I see, for example, Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949*, (1987), (“ICRC Commentary to the APs”), para 2805.

unlimited freedom to refuse their agreement to relief actions”.⁹ A party refusing consent had to do so for “valid reasons”, not for “arbitrary or capricious ones”.¹⁰

In relation to non-international armed conflicts, Article 18 AP II was one of the most hotly debated articles during the Diplomatic Conference that led to the adoption of the Protocols. For states opposed to the idea of regulating non-international conflicts, provision of external assistance was particularly problematic, as relief was often equated with foreign intervention and foreign assistance to rebellion.¹¹ Nonetheless, similar comments were also made in relation to the consent requirement in Article 18 AP II.¹²

It is now generally accepted that although consent to relief actions is required, it may not be arbitrarily withheld.¹³

This position is reflected in subsequent formulations of the rules on humanitarian assistance, that expressly note that consent may not be arbitrarily withheld, including the Guiding Principles on Internal Displacement;¹⁴ the Resolution on Humanitarian Assistance adopted by the Institute of International Law in 2003;¹⁵ Council of Europe recommendation (2006)6 on Internally

⁹ Germany, CDDH/II/SR.87, 336-337.

¹⁰ *Ibid.*, Position supported by the USA, the Netherlands, the USSR and the UK. No delegations opposed this understanding.

¹¹ Michael Bothe, Karl Josef Partsch and Waldermar Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, (1982), 694.

¹² CDDH/SR.53, 156-157 (Belgium and Germany).

¹³ See, for example, ICRC Customary Law Study, *supra*, Rule 55 and commentary thereto.

¹⁴ Guiding Principles on Internal Displacement, Principle 25

1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.

2. International humanitarian organisations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.

3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

(UN Doc E/CN.4/1998/53/Add.2, 11 February 1998)

¹⁵ Institute of International Law, Bruges Session 2003, Resolution on Humanitarian Assistance, 2 September 2003,

Article VIII - Duty of affected States not arbitrarily to reject bona fide offer of humanitarian assistance

1. Affected States are under the obligation not arbitrarily and unjustifiably to reject a bona fide offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims or would amount to a violation of the ban on starvation of civilians as a method of warfare.

Displaced Persons¹⁶ and, beyond situations of armed conflict, in the International Law Commission's (ILC) work on the protection of persons in the event of disasters,¹⁷ to mention but a few. General Assembly resolution 46/182, on the other hand, only refers to the need for consent of the "affected country".¹⁸ It is submitted that it should be read in the light of the above-mentioned rules and instruments requiring consent not to be arbitrarily withheld.

b. The exceptions

There are two exceptions to the general rule requiring consent to relief operations.

The first are situations of occupation. If it is not in a position to ensure the adequate provision of supplies essential to the survival of the civilian population, the occupying power must accept relief operations that are humanitarian and impartial in character.¹⁹

The second exception is found in Article 23 GC IV, applicable in international armed conflicts.²⁰

¹⁶ Council of Europe recommendation (2006)6 of the Committee of Ministers to Member States on Internally Displaced Persons, 5 April 2006,

4. Protecting internally displaced persons and their rights as well as providing humanitarian assistance to them is a primary responsibility of the state concerned;
Such responsibility entails requesting aid from other states or international organisations if the state concerned is not in a position to provide protection and assistance to its internally displaced persons;
This responsibility also entails not to arbitrarily refuse offers from other states or international organisations to provide such aid.

¹⁷ International Law Commission, Report of its sixty-third session, Protection of Persons in the Event of Disaster, provisionally adopted draft Article 11 - Consent of the affected State to external assistance

1. The provision of external assistance requires the consent of the affected State.
2. Consent to external assistance shall not be withheld arbitrarily.
3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

(UN Doc A/66/10, 267)

¹⁸ General Assembly resolution 46/182, 19 December 1991

Guiding Principle 3: The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.

¹⁹ Article 59 GC IV.

²⁰ Although not expressly stated, Article 23 GC IV intended to address blockades in international armed conflicts. See, for example, Jean Pictet (ed), *Commentary - IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, (1958), ("ICRC Commentary to GC IV"), 178 *et seq.*

The two other, non-binding, documents referred to also address naval and aerial blockades in international armed conflicts respectively.

The Explanation to the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, notes that, although the provisions of the Manual are primarily intended to apply to international armed conflicts at sea, this was not expressly stated, so as not to dissuade the implementation of the rules in non-international armed conflicts involving naval operations.

Article 23 GC IV requires parties to international armed conflicts to allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended for civilians²¹ in the territory of another state, even if the latter is its adversary. It also requires the free passage of all consignments of essential foodstuffs, clothing and tonics for civilians considered the most vulnerable: children under fifteen, expectant mothers and maternity cases.

This article, unlike the other provisions on humanitarian assistance, is not limited to relief operations that are humanitarian and impartial in character. Instead, it covers any consignment of the goods in question, including imports that a state may have acquired through ordinary channels.²²

Although *prima facie* a significant exception to the requirement of consent, it is foodstuffs and clothing for only certain sections of the civilian population, considered particularly vulnerable, that must be granted free passage. Moreover, the impact of the first paragraph of Article 23 GC IV is considerably reduced by the safeguards for the benefit of the blockading party in the second paragraph that aim to ensure the consignments are only used for the identified humanitarian purposes.²³

If blockading states have serious reason to believe that the consignments may be diverted from their intended beneficiaries, or that the control over them is not

Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, (1995), *Explanation*, Section I, para 1, 1.1, 73.

The Commentary to the Manual on Air and Missile Warfare instead specifies that aerial blockades are a method of warfare exclusively applicable in international armed conflicts. *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, version 2.1, (2010), 287.

²¹ The reference to medical supplies intended for civilians is not to be interpreted *a contrario* as implying that medical supplies intended for wounded and sick combatants should not also be granted free passage. ICRC Commentary to GC IV, 180. This issue is also touched upon in the Second Geneva Convention of 1949 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea (“GC II”). Article 38 GC II requires that ships chartered to transport equipment exclusively intended for the treatment of wounded and sick members of the armed forces or for the prevention of disease be given free passage.

²² ICRC Commentary to GC IV, 181.

²³ The second paragraph of Article 23 GC IV provides that:

[t]he obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

effective, they need not allow free passage.

More problematic is the exception permitting blockading states not to allow free passage if there are serious reasons for fearing that “a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods”.²⁴

In situations of blockade it is understandable that states may wish to limit the entry of items that could indirectly provide a definite military advantage to the enemy. However, Article 23 GC IV lays down an overly-broad range of ways in which this advantage could accrue: first, by direct substitution of the goods received in the consignments. In view of the limited types of goods covered by Article 23 GC IV – medical supplies and essential foodstuffs and clothing for expectant mothers and children - and considering that medical supplies for combatants must also be allowed to enter, the military advantage, if any, that could accrue in this manner is unlikely to be significant.²⁵

Second, and more problematic, is military advantage accruing by “the release of materials, services, or facilities” that would otherwise be required for the production of the goods in question. This is potentially extremely broad and may undermine the general obligation in the first paragraph of Article 23 GC IV. This provision has been rightly criticised for granting the blockading state too much discretion.²⁶

More recent non-binding re-statements of the law on blockades, have attempted to remedy the weaknesses of Article 23 GC IV, at least in relation to medical supplies. Both the San Remo Manual and the Manual on Air and Missile Warfare specify that in naval and aerial blockades respectively, the blockading party must allow the passage of medical supplies for both the civilian population and for wounded and sick members of armed forces. Although it may prescribe technical

²⁴ Article 23, second paragraph, point c, GC IV.

²⁵ The ICRC Commentary notes that “generally speaking, that the contribution represented by authorized consignments should be limited: in the majority of cases, such consignments will be hardly sufficient to meet the most urgent needs and relieve the most pitiable distress; it is hardly likely, therefore, that they would represent assistance on such a scale that the military and economic position of a country was improved to any appreciable extent. Nevertheless, if, however unlikely it may seem, a belligerent has serious reason to think that the size and frequency of the consignments are likely to assist the military or economic efforts of the enemy, he would be entitled to refuse free passage”. ICRC Commentary to GC IV, 182.

²⁶ ICRC Commentary to GC IV, 182 *et seq.* According to the Commentary, “the Diplomatic Conference of 1949 had to bow to the harsh necessities of war; otherwise they would have had to abandon all idea of a general right of free passage. Some delegations had originally intended to accept the principle of free passage only in the form of an optional clause. It was only after the insertion of the safeguards set out under (a), (b), and (c) above, that it was possible to make the clause mandatory”. *Id.*

arrangements, including search, under which such passage is permitted, the blockading party's consent is not required nor, importantly, does it benefit from the onerous safeguard clauses of Article 23 GC IV.²⁷

4. Whose consent is required?²⁸

a. International armed conflicts

In international armed conflicts, Article 70 AP I requires the consent of “the Parties concerned in [the] relief actions” in the plural. Most important is that of the state party to the conflict in whose territory the operations are intended to be implemented.

Although treaties do not expressly address this, it is clear that consent is required both for relief actions carried out in-country and for cross-border operations entering from neighbouring states.²⁹ The modalities of the intended operations do not affect the requirement of consent.

Additionally, the consent of states from whose territory a relief action is undertaken is also required.³⁰

In situations of occupation, in recognition of the fact it is exercising effective control over the occupied territory and, consequently, has assumed responsibilities towards the civilian population, it is the occupying power that must consent to relief operations.³¹

b. Non-international armed conflicts

The position in non-international armed conflicts is more complex. A divergence of views exists as to whether the consent of the state party to the conflict is

²⁷Paragraph 104 of the San Remo Manual provides that:

[t]he blockading belligerent shall allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces subject to the right to prescribe technical arrangements, including search, under which such passage is permitted.

Rule 159 of the Air and Missile Warfare Manual is virtually identical:

[t]he Blockading Party must allow the passage of medical supplies for the civilian population or for the wounded and sick members of armed forces, subject to the right to prescribe technical arrangements, including inspection, under which such passage is permitted.

²⁸ For a detailed discussion of this issue see Ruth Abril Stoeffels, *La Asistencia Humanitaria en los Conflictos Armados: Configuración jurídica, principios rectores y mecanismos de garantía*, (2001), Chapter VI.3.

²⁹ See also the discussion on indirect provision of assistance in Section 12 below.

³⁰ ICRC Commentary to the APs, paras 2806-2807. The position of states through whose territory relief supplies and personnel must pass is less clear. While they are definitely covered by Article 70(2) AP I, which, *once* consent has been granted, requires them to allow and facilitate the rapid and unimpeded passage of relief supplies, equipment and personnel, the consultations of legal experts carried out by the author have revealed a divergence of views as to whether their consent to the relief operations is also required.

³¹ Article 59 GC IV.

required for relief operations into territory controlled by the opposition that can be reached without transiting through territory controlled by the state.

The situation is complicated further by the fact that the two relevant treaty provisions – Article 3(2) GCs and Article 18(2) AP II – can be interpreted as laying down different requirements.³²

i. The position under common Article 3(2) to the Geneva Conventions

Common Article 3(2) GCs provides that an “impartial humanitarian body ... may offer its services to the Parties to the conflict”.³³ Offers of assistance can be made to either side without them being considered an unfriendly act or interference. The provision is silent as to whose consent is required.

Some commentators consider that this expression puts the government and the opposition on an equal footing, and implicitly allows relief operations to be carried out if the party to which an offer was made accepts it, regardless of the position adopted by its opponent. On this view, the right to offer assistance presupposes a right to deliver it if the offer is accepted, without the need of consent of any party other than that to which it was made. Provided operations do not have to transit through territory under the control of the other side, its consent is not required.³⁴ All that is required is the consent of the party to whom the offer of services was made.

Some proponents of this view consider that carrying out operations that are not authorised by the affected state in such circumstances would not be a violation of its sovereignty or territorial integrity as, by ratifying the Geneva Conventions, the state has agreed to such a possibility.³⁵

³² This also has consequences for the rule under customary law. An analysis of this issue is beyond the scope of the present paper.

³³ This provision only refers to offers by “impartial humanitarian bodies”, so does not cover offers of assistance by states.

³⁴ See, for example, Yves Sandoz, “Le Droit d’initiative du Comité international de la Croix Rouge”, *German Yearbook of International Law*, Vol 22 (1979) 352, 364-366; implicitly, Dietrich Schindler, “Humanitarian Assistance, Humanitarian Interference and International Law”, in Ronald St John Macdonald, *Essays in Honour of Wang Tieya*, (1993), 689, 700; Maurice Torrelli “From humanitarian assistance to ‘intervention on humanitarian grounds’?”, *International Review of the Red Cross*, No.288, May-June 1992, 228, 234; and, extensively, Francois Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, (2003), 448 *et seq.* See also, most recently, Marco Sassoli, “When are states and armed groups obliged to accept humanitarian assistance?”, *Professionals in Humanitarian Assistance and Protection*, 5 November 2013, <http://phap.org/articles/when-are-states-and-armed-groups-obliged-accept-humanitarian-assistance>.

³⁵ See, for example, Bugnion, *supra*, 420 and 450. Such an interpretation of Article 3(2) GCs would probably surprise a number of the participants in the diplomatic conference that led to the adoption of the Geneva Conventions. In discussing common Article 3(2) GCs, the ICRC Commentaries to the four conventions do not touch upon the question of which party’s consent is required: Jean Pictet (ed), *Commentary – I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (1958) (“ICRC Commentary to GC I”); Jean Pictet (ed), *Commentary – II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, (1960); Jean

Others are of the view that there is no basis for interpreting the silence of common Article 3(2) GCs on the question of whose consent is required in this manner, particularly in view of the significant infringement of the affected state's sovereignty it would entail. They consider that the provision allows humanitarian actors to offer their services to all sides, so states are precluded from considering such offers an unfriendly act³⁶ or from criminalising engagement with the opposition. However, by agreeing to allow offers to be made to the opposition, states did not necessarily also agree that assistance could be provided without their consent. Moreover, an interpretation of Article 3(2) GCs that would not require the consent of the affected state would sit uncomfortably with the more stringent requirements in Article 18(2) AP II, particularly as it is generally accepted that the later instrument expands the protections of the Geneva Conventions.³⁷

ii. The position under Article 18(2) AP II

Article 18(2) AP II is more explicit on this issue, requiring the consent of the “High Contracting Party concerned”. An early draft of this provision referred to the consent of “the party or parties concerned”, implicitly also referring to the non-state party to the conflict. However, in the negotiations of the Protocol any language that could be interpreted as a recognition of insurgent parties or as granting rights to their members was removed, including this reference.³⁸

Different views exist as to the reasons for this change. While there is agreement that the revised wording was adopted without any discussion likely to explain its meaning, some commentators believe that this renders it impossible to determine whether it was purely a “cosmetic change” or whether the intention had been to alter the provision radically.³⁹ Others, instead, consider that such a significant change cannot be considered as purely stylistic but that it must have been the intention of the drafters to modify the substantive content of the article.⁴⁰

Pictet (ed), *Commentary – III Geneva Convention relative to the Treatment of Prisoners of War*, (1960); and ICRC Commentary to GC IV.

³⁶ The ICRC Commentaries focus on this aspect of Article 3(2) GCs. See, for example, ICRC Commentary to GC I, 58. The Commentaries to the other three conventions are essentially identical. Such an interpretation is also supported by the ICRC Commentary to Additional Protocol II, which notes that Article 18(2) thereto, unlike common Article 3(2) GCs, does not expressly mention the ICRC, but considers that this does not reduce the latter's right of initiative: “[c]onsequently the ICRC continues to be entitled to offer its services to each party without such a step being considered as interference in the internal affairs of the State or as infringing its sovereignty”. ICRC Commentary to the APs, para 4892. See also Heike Spieker, “The Right to Give and Receive Humanitarian Assistance”, in Hans-Joachim Heintze and Andrej Zwitter (eds), *International Law and Humanitarian Assistance*, (2011), 7, 15.

³⁷ Exchanges on file with author. On the final point see also Georges Abi-Saab, “Non-International Armed Conflicts”, in *International Dimensions of Humanitarian Law*, Henry Dunant Institute, (1988), 218, 224.

³⁸ Bothe, Partsch and Solf, *supra*, 696 and Stoffels, *supra*, 301-308.

³⁹ Bugnion, *supra*, 452.

⁴⁰ Stoffels, *supra*, 307.

Who is “the High Contracting Party concerned”? It is hard to see how this expression could refer to any state other than the one involved in the non-international armed conflict. This is the view of a number of commentators and also that expressed by some states when forwarding the Additional Protocols to their parliaments for ratification.⁴¹

Nonetheless, it has been suggested that in certain circumstances the consent of the state is not required. Those taking this view consider that the state involved in the non-international conflict is not “concerned” by operations for civilians in opposition-held areas and, consequently, its consent required, only if the relief actions must transit through territory under its effective control. If the territory controlled by the opposition is accessible by sea or can be reached from another country directly, the consent of the government is not required.⁴² This position is

⁴¹ See, for example, Knut Doermann and Hans-Peter Gasser, “Protection of the Civilian Population”, in Dieter Fleck (ed), *The Handbook of International Humanitarian Law*, (3rd ed), (2013), 231, 236; Frits Kalshoven and Liesbet Zegveld, *Constraints on the Waging of War - An Introduction to Humanitarian Law*, (3rd ed), (2001), 139; Denise Plattner, “Assistance to the civilian population: the development and present state of international humanitarian law”, *International Review of the Red Cross*, No.288, June 1992; Spieker, *supra*, 16; implicitly, Abi-Saab, *supra*, 224; and Report of the Representative of the Secretary-General on the human rights of internally displaced persons, UN Doc A/65/282, 11 August 2010, para 85. See also, ILC, Fourth report on the protection of persons in the event of natural disasters, UN Doc A/CN.4/643, 11 May 2011, para 65.

The explanatory memoranda prepared by the governments of the Netherlands and Switzerland for transmission of the Additional Protocols to their respective parliaments for ratification note that Article 18(2) AP II requires the consent of the state in whose territory the conflict is taking place. The Swiss document even specifically notes that state consent is required even if relief is provided directly from a third country into opposition-held territory: Tweede Kamer, vergaderjaar 1983-1984, 18 277 (R1247), nr.3, 52 and Message concernant les Protocoles additionnels aux Conventions de Genève du 18 Février 1981, 81.004, Feuille fédérale, 133 année, Vol.I, 973.

⁴² This view was put forward as a possible alternative to a literal interpretation of Article 18(2) AP II in recognition of the fact that, as a matter of practice, the consent of the opposition is required if operations are to be carried out in areas under its control. Bothe, Partsch and Solf, *supra*, 696. The view has been expressed with increasing conviction, although it has also been admitted that it does not correspond with state practice. See for example, Michael Bothe, “Relief Actions: the Position of the Recipient State”, in Frits Kalshoven (ed), *Assisting the Victims of Armed Conflict and Other Disasters – Papers Delivered at the International Conference on Humanitarian Assistance in Armed Conflict, The Hague, 22-24 June 1988*, (1988), 91, 94; and Michael Bothe, “Relief Actions” in *Encyclopedia of Public International Law*, (2000) 168, 171; as well as exchanges with author.

Bugnion reaches the same conclusion but for different reasons: first, if Article 18(2) AP II were interpreted as only referring to the consent of the state party, this would be the only occasion in Additional Protocol II where the state and opposition are granted different rights and obligations. Secondly, it would not make sense for Article 18(2) API II to contradict the position adopted in Article 3(2) GCs, which, in his view, does not require the consent of the affected state. Thirdly, in view of the frequent difficulties of determining who is the legitimate government in situations of non-international armed conflict, he does not think the drafters intended to force humanitarian actors to weigh up rival claims. In view of this, while acknowledging that such an interpretation appears contrary to the actual letter of Article 18(2) AP II, Bugnion concludes that each party has the right to grant or withhold consent to relief operations within the territory it effectively

based *inter alia* on an analogy with the rules applicable in occupation, where it is not the consent of the state with legal title to territory that is required but that of the state with effective control over it - ie the occupier.⁴³

This position is questionable for a number of reasons: first, according to this interpretation, in situations where relief operations can reach the opposition-held territory without transiting through government-controlled territory there would in fact, be *no* “High Contracting Party concerned”, a possibility that sits uncomfortably with the clear reference in Article 18(2) to “the” High Contracting Party concerned. Secondly, in such circumstances, as Additional Protocol II does not require the consent of the non-state side, as a matter of this instrument *no* consent would be required. This interpretation is unrealistic and inconsistent with the approach in Article 3(2) GCs, which even under the broadest interpretation, requires the consent of the party to whom the offer of services was made. Finally, Article 18(2) AP II must be interpreted taking into account other principles of international law. The principle of territorial integrity and inviolability is a principle of general international law, so consent would be required anyway unless one takes the view that Article 18(2) AP II and the suggested interpretation of the use of the word “concerned” there derogate from an otherwise applicable principle. It is unlikely that states would have been ready to derogate from a principle so central to sovereignty in such a passing and indirect manner.

Moreover, this interpretation is not borne out by the reality that affected states consider themselves extremely concerned by relief operations in opposition-held parts of their territory. For example, during the Nigerian civil war in the late 1960s a number of humanitarian agencies operated a cross-border air-bridge into Biafra from Sao Tome without the consent of the government, whose airforce shot down several planes participating in the operations.⁴⁴ Similarly, but less violently, in 1987 Sri Lanka strongly objected to the air drop by India of relief supplies for the Tamil population into the besieged city of Jaffna.⁴⁵

controls. He adds that, in view of the risk of protest from the affected state, the ICRC would resort to such a practice only if the situation of the victims made this imperative. Bugnion, *supra*, 451-455.

⁴³ Bothe in Kalshoven, *supra*, 94.

⁴⁴ Hugo Slim and Emanuela-Chiara Gillard, “Ethical and legal perspectives on cross-border humanitarian operations”, *Humanitarian Exchange*, Issue 59, November 2013.

⁴⁵ Bothe in Kalshoven, *supra*, 94. Operation Poomalai, was an airdrop of supplies by the Indian airforce over Jaffna on 4 June 1987, when the city was under siege by Sri Lankan troops as part of the offensive against the Tamil Tigers. A first attempt by India to deliver assistance by sea was intercepted by Sri Lankan forces. Two days, later India carried out the airdrop.

In the wake of Operation Poomalai, Sri Lanka accused India of violating its sovereignty and territorial integrity. Pakistan, Bangladesh, Nepal and the Maldives also protested the action. India defended its actions as a “mercy mission”. Outside the region the reaction was muted. The United States expressed regret but refused to comment further on the incident. The United Nations Secretary-General issued a statement appealing to both states to act with restraint. http://en.wikipedia.org/wiki/Operation_Poomalai; Asoka Bandarage, *The Separatist Conflict in Sri Lanka – Terrorism, Ethnicity and Political Economy*, (2009); and *New York Times*, “India Airlifts and Tamil Rebels”, 5 June 1987.

Other possible interpretations have been put forward. For example, that the rule in Article 3(2) GCs – which, even if understood as not requiring the consent of the state for operations that can reach opposition-held territory directly – is applicable to humanitarian bodies, while the more restrictive rule in Article 18(2) AP II, which always requires the consent of the affected state, is applicable to other actors wishing to provide assistance, most notably states.⁴⁶

The instruments on relief operations referred to in Section 3 above employ various terms to describe the state whose civilians are in need of assistance and in whose territory relief operations are intended to be implemented:

- the Guiding Principles on Internal Displacement refer to “the national authorities”⁴⁷. The Annotations to the Guiding Principles do not address the possibility of the consent of the state not being required;⁴⁸
- the Bruges Resolution of the Institute of International Law speaks of “affected states”;⁴⁹
- the Council of Europe recommendation on internal displacement uses the term “the state concerned” to refer to the state in whose territory IDPs find themselves. The entire document focuses on states and does not consider the possibility of IDPs being in opposition-held territory;⁵⁰
- the ILC draft articles on protection in natural disaster use the term “the affected state” to refer to the state where the natural disaster has occurred;⁵¹ and
- General Assembly resolution 46/182 refers to the need for the consent of “the affected country”.⁵²

These instruments can be considered as supporting the view that the territorial state’s consent is always required, as they do not mention any other possibility. Not requiring consent for relief operations that do not transit through its territory to reach civilians in opposition-held areas would be such a significant limitation of state sovereignty that it is hard to imagine that the issue would not have been expressly mentioned in the instruments themselves or in the explanatory materials, where they exist. Moreover, as already pointed out, not requiring the affected state’s consent in such circumstances would make the references to that party redundant, and the relevant provisions devoid of purpose, something that is unlikely to have been the drafters’ intention in all of these instruments.

A possible compromise position would be to accept that the affected state’s

⁴⁶ Stoffels, *supra*, 304.

⁴⁷ Guiding Principle 25.

⁴⁸ Walter Kaelin, *Guiding Principles on Internal Displacement: Annotations*, Revised edition, Studies in Transnational Legal Policy, No.38, The American Society of International Law, (2008).

⁴⁹ *Inter alia*, Article VIII.

⁵⁰ *Inter alia*, operative paragraph 4.

⁵¹ Draft Article 11.

⁵² Principle 3.

consent is always required, but to argue that where relief actions are intended for civilians in opposition-held areas that state would have a more limited range of grounds for withholding consent.⁵³ For example, it would have to show that the intended assistance was not in fact humanitarian but of benefit to the opposition's military efforts or, related to this, that the actors providing it were not acting in a principled manner. Grounds based on military necessity would be limited to considerations of military necessity in the opposition-held territory or where military activity outside that territory could affect the safe passage of relief operations to it. Withholding consent out of concerns that the relief operations could legitimize the opposition or cement its control as well as prohibitions on humanitarian actors engaging with the opposition for purely humanitarian purposes would be arbitrary.⁵⁴

An alternative suggestion is that in circumstances where the opposition effectively controls territory and exercises state-like functions to the exclusion of the government, its consent may be both necessary and sufficient. No legal basis has been provided for this suggestion, other than equating the circumstances with those in which, exceptionally, non-state actors have, on occasions, been imputed with responsibilities under human rights law.⁵⁵ These are onerous conditions and this situation is unlikely to arise frequently in practice.

Recognising the complexity and lack of clarity that frequently accompanies non-international conflicts, it has been recommended that Article 18(2) AP II should be applied flexibly. In many cases it may not be clear which party constitutes the "established" or "legitimate" government and which the "rebels". When it comes to humanitarian relief, the competing claims of international status should not be allowed to determine the question of consent. Instead, it is physical control of the areas through which relief consignments have to pass or where they will be distributed, which, for practical reasons, should be decisive.⁵⁶ A similar approach should also be adopted when the opposition is fragmented, with different parties controlling different pockets of territory, and control over territory frequently changing hands.

⁵³ See, for example, Michael Meyer, who suggests that "the established government should not object to humanitarian relief actions fulfilling the required conditions of impartiality and non-discrimination being undertaken in territory not under its control". Michael Meyer, "Development of the Law concerning Relief Operations", in Michael Meyer (ed), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, (BIICL 1989) 209, 221. See also Sandesh Sivakumaran, "The Provision of Humanitarian Assistance in Non-International Armed Conflicts", in Philip Ambach et al (eds), *The Protection of Non-Combatants During Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society*, (forthcoming 2015).

⁵⁴ Consultations of legal experts carried out by author and Sivakumaran, *supra*.

⁵⁵ Consultations of legal experts carried out by author. On the emerging practice of imputing non-state actors with human rights obligations see, for example, Yael Ronen, "Human Rights Obligations of Territorial Non-State Actors", 46 *Cornell International Law Journal*, (2013), 21.

⁵⁶ Bothe, Partsch and Solf, *supra*, 697.

Whatever the legal position, the agreement or acquiescence of the opposition to operations for civilians in territory it holds, or transiting through such territory, will be required in practice to implement the operations in a safe and unimpeded manner.

Finally, although not referred to in Article 3(2) GCs or in Article 18 AP II, the consent of any state from whose territory operations are being carried out is also required.⁵⁷

A state's entitlement to regulate activities carried out in its territory is a fundamental element of state sovereignty and particularly important as in situations where unauthorised cross-border relief operations are carried out from their territory, third states risk being accused by the state in whose territory the assistance is delivered of allowing their territory to be used for unlawful activities.⁵⁸

5. Who represents the government whose consent is required?

When should the government authorities involved in a non-international conflict no longer be considered as representing that state and, consequently, no longer the party whose consent to offers of humanitarian assistance is required?

Recognition of the opposition as the "sole legitimate representative of the people" of the state in question must be distinguished from its recognition as the government of that state.⁵⁹

The former type of recognition is an expression of political support and approval for the group, bolstering its position, including internally, by encouraging factions to coalesce under its umbrella. It does not have legal consequences.

Recognition of an entity as the government usually occurs after an un-constitutional change in regime. Although there is an important political dimension to recognition, states do not have unfettered discretion. Two conditions must be met, with a degree of flexibility:

⁵⁷ Arguably, the expression "the High Contracting Party concerned" in Article 18(2) AP II could cover a neighbouring state from whose territory operations are initiated.

⁵⁸ See, in particular, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to GA Res 2126, (XXV), 24 October 1970. See also Stoffels, *supra*, 324.

⁵⁹ See Dapo Akande, "Self Determination and the Syrian Conflict – Recognition of the Syrian Opposition as the Sole Legitimate Representative of the Syrian People: What Does this Mean and What Implications Does it Have?", 6 December 2012, (<http://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/>); Stefan Talmon, "Recognition of the Libyan National Transitional Council", *American Society of International Law, Insights*, Volume 15, Issue 16, 16 June 2011; and Stefan Talmon, "Recognition of Opposition Groups as the Legitimate Representative of a People", *Chinese Journal of International Law*, 12 (2013). See also, more generally, Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law, Volume 1 - Peace*, (9th edition), (1992), paras 42-54.

- the entity in question must exercise effective control over the state's territory; and
- albeit to a lesser degree in case of revolutionary change, it must do so with the support or acquiescence of the mass of the population.⁶⁰

As a state cannot have two governments simultaneously, recognition of a group as the government entails “de-recognition” of the incumbent authorities. The newly recognized government becomes the recognising state's counter-part in diplomatic relations. It will take over the embassy and other state assets in the recognising state's territory and appoint diplomats who will be entitled to diplomatic privileges and immunities, while those of the representatives of the previous government will cease.

States can recognise governments expressly or implicitly, in which case recognition can be inferred from the nature of the relations between representatives of the two states.

International organisations also implicitly recognise governments by virtue of whom they accept as representing states. Within the United Nations, the General Assembly Credentials Committee is responsible for checking that credentials are in the appropriate form. In case of competing claims of representation, it effectively makes a recommendation to the General Assembly as to which party is to be considered as representing the government of the state in question.⁶¹

Although the legal position is straightforward, the challenges of applying it in practice should not be underestimated. Recognition is a sensitive political issue and situations in which some states recognise one entity as the government and others its opponent are not infrequent.

6. What amounts to arbitrary withholding of consent?

a. Preliminary conditions

Two conditions must be met before the issue of the arbitrariness or otherwise of withholding of consent even arises:

- relief must be necessary, ie civilians must be inadequately provided with essential supplies and the party in whose control they are, unable or unwilling to provide the necessary assistance; and
- the actor (state, international organisation, NGO) offering its services must provide the assistance in a principled manner - ie it must be exclusively

⁶⁰ Jennings and Watts, *supra*, para 45.

⁶¹ Jennings and Watts, *supra*, para 53.

humanitarian and impartial in character and carried out without any adverse distinction.⁶²

If these conditions are not met, consent need not be given; but if they are met, consent may not be arbitrarily withheld.

b. Examples of valid and arbitrary grounds for withholding consent

Despite its centrality to the rules regulating humanitarian assistance, there is little clarity as to when consent is arbitrarily withheld.⁶³ There is no definition or guidance in any treaty and, to date, the issue has not been addressed by any international or national tribunal, human rights mechanism or fact-finding body. It is extremely difficult to determine – legally and factually - whether consent to relief operations has been withheld arbitrarily in a particular situation.

According to a leading commentator, who participated in the negotiations of the Additional Protocols, an interpretation that does justice to both the requirement that relief actions be undertaken and that of consent, is that agreement “has to be granted as a matter of principle, but that it can be refused for valid and compelling reasons. Such reasons may include imperative considerations of military necessity. But there is no unfettered discretion to refuse agreement, and it may not be declined for arbitrary or capricious reasons”.⁶⁴

But what constitutes a valid and compelling reason and what an arbitrary or capricious one? While no generally accepted definition exists, commentators have put forward a number of valid and arbitrary reasons.

Suggested valid reasons include:

- imperative considerations of military necessity, for example if foreign relief personnel could hamper military operations or can be suspected of unneutral behaviour in favour of the other party to the conflict.⁶⁵
- On-going combat operations.⁶⁶

While suggested arbitrary reasons include:

⁶² Article 70 AP I. See, Bothe, Partsch and Solf, *supra*, 435; ICRC Commentary to the APs, para 4883; and Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, UN Doc A/65/282, 1 August 2010, para 81.

⁶³ For a recent analysis of this issue see Dapo Akande and Emanuela-Chiara Gillard, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict*, OCHA Policy Series, 2014.

⁶⁴ Bothe, Partsch and Solf, *supra*, 434.

⁶⁵ Bothe, Partsch and Solf, *supra*, 434 and Michael in Kalshoven, *supra*, 95.

⁶⁶ Walter Kaelin, UN Resident Coordinator Induction Programme, New York, 23 February 2013, on file with author. Article 71(3) AP I expressly foresees the possibility of temporarily restricting the freedom of movement of authorised humanitarian relief personnel in case of imperative military necessity, but this provision relates to access *once* consent to carry out relief operations has been granted.

- the desire to weaken the resistance of an adversary by depriving the civilian population of its means of subsistence.⁶⁷
- A withholding of consent that violates the state's other international obligations.⁶⁸ An uncontroversial example is the situation where the civilian population is facing starvation. Withholding consent in such situations would amount to a violation of the prohibition of starvation of the civilian population as a method of warfare in Article 54(1) AP I and Article 14 AP II.⁶⁹

Another example is withholding consent to medical relief operations on the ground that medical supplies and equipment could be used to treat wounded enemy combatants. It is a fundamental rule of IHL that the wounded and sick – including enemy combatants - must receive, to the fullest extent practicable and with the least possible delay, the medical care required by their condition.⁷⁰ No distinction may be made on any grounds other than medical ones. Withholding consent to medical relief operations and supplies on the basis that they may assist wounded enemy combatants would violate this rule. Moreover, the same equipment and supplies are also likely to be necessary for the civilian population in opposition-held areas, who would be denied the assistance to which it is entitled by law.⁷¹

⁶⁷ Bothe in Kalshoven, *supra*, 94.

⁶⁸ Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, *supra*, para 82.

⁶⁹ See, for example, ICRC Commentary to the APs, paras 2808 and 4885.

Naval blockades that have the sole purpose of starving the civilian population or denying it other objects essential for its survival are prohibited according to Paragraph 102(a) of the San Remo Manual. Similarly, Rule 157 of the Manual on Air and Missile Warfare prohibits the establishment or maintenance of aerial blockades if their sole or primary purpose is to starve the civilian population or to deny it other objects essential for its survival. See also Commentary to Rule 158.

The seriousness of withholding consent when the civilian population is facing starvation is evidenced by the fact that under the ICC Statute it is a war crime in international armed conflicts to

intentionally us[e] starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.(Article 8(2)(b)(xxv) ICC Statute.)

Although not specified in the adopted version of the Elements of Crime for this offence, delegations agreed that the crime would cover “the deprivation not only of food and drink, but also, for example, medicine or in certain circumstances blankets”. See Knut Doermann, *Elements of Crime under the Rome Statute of the International Criminal Court: Sources and Commentary*, (2003), 363.

⁷⁰ Most notably Article 10 AP I and Article 7 AP II. See also Paragraph 104 of the San Remo Manual, which requires a blockading belligerent to allow the passage of medical supplies for the civilian population or for the wounded and sick members of the armed forces, subject to the right to prescribe technical arrangements, and the virtually identical provision in Rule 159 of the Manual on Air and Missile Warfare.

⁷¹ See the discussion on Article 23 GC IV in Section 3 above. This provision requires all states to “allow the free passage of all consignments of medical and hospital stores ... intended only for civilians of another High Contracting Party, even if the latter is its adversary”. Although Article

- Selective withholding of consent with the intent or effect of discriminating against a particular group or section of the population. For example, systematically rejecting offers of humanitarian assistance for crisis-affected regions populated by ethnic groups perceived as favouring the opposition.⁷²
- Withholding of consent that is “likely to endanger the fundamental human rights” of the affected civilians.⁷³ Humanitarian assistance is also often considered from a human rights angle, which requires withholding of consent not to violate particular rights, most notably the right to life, or prevent the realization of economic and social rights, such as the rights to an adequate standard of living, to food and to be free from hunger, to housing and to health and medical services.⁷⁴

Limited guidance exists, however, as to the precise circumstances in which withholding of consent would violate these rights. One of the most specific indications to date is that provided by the SRSG on IDPs:

[a] State is deemed to have violated the right to an adequate standard of living, to health and to education, if authorities knew or should have known about the humanitarian needs but failed to take measures to satisfy, at the very least, the most basic standards imposed by these rights. State obligations thus include the responsibility to follow up on these situations of concern and assess relevant needs in good faith, and ensure that humanitarian needs are being met, by the State itself or through available assistance by national or international humanitarian agencies and organizations, to the fullest extent possible under the circumstances and with the least possible delay.⁷⁵

- “State sovereignty, the internal legal order, national pride and/or interests, political orientation, the interests of the regime in power, and similar arguments”.⁷⁶

²³ GC IV contains significant safeguards for the blockading state, it does not mention the requirement of consent, suggesting that medical supplies benefit from privileged treatment. See also ICRC *Commentary to GC IV*, 177-184.

⁷² Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, *supra*, para 83.

⁷³ Institute of International Law resolution, *supra*, Article VIII (1).

⁷⁴ See, for example, Walter Kaelin, *Guiding Principles on Internal Displacement: Annotations*, *supra*, 117; Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, *supra*, paras 68-69; and *Humanitarian Access in Situations of Armed Conflict, Handbook on the Normative Framework*, Version 1.0 (2011), Chapter 4. In relation to assistance in natural disasters see, ILC, Fourth report on the protection of persons in the event of disasters, *supra*, paras 58-60.

⁷⁵ Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, *supra*, para 69.

⁷⁶ *Institute of International Law Yearbook*, Vol 70, Part I, 2002-2003, 563.

- Rejecting offers of assistance without providing any reasons or if the reasons are based on errors of fact, for example, a denial of humanitarian needs without a proper assessment.⁷⁷

c. Conclusion

In view of the above, the following general conclusions can be drawn: the determination of whether consent has been withheld for valid or arbitrary reasons must be made on a case-by-case basis, taking into consideration a number of inter-related elements, including:

- the needs of the population: what are they in terms of types of supplies and services and how acute are they?
- Who, if anyone, is providing assistance? The starting point of the analysis are the needs of the civilian population, rather than any “entitlement” of relief organisations to provide assistance. If the affected state itself or some other humanitarian actor is providing the necessary assistance in a principled manner, the state is entitled to turn down other offers of relief.
- The actor offering the assistance: does it have a record of operating in a principled manner? And can it provide the assistance that is needed?
- The location of the proposed relief operations: despite needs, a state may be entitled to withhold consent to offers of assistance on certain grounds; for example, if the location of the intended operations is the theatre of on-going hostilities. Other grounds would not be acceptable, for example, it is because the local population is viewed as supportive of the enemy.
- The timeframe: what may constitute valid reasons for withholding consent, such as on-going hostilities or other reasons of security, could turn into arbitrary ones if their duration is such that the needs of the affected civilian population become severe.
- Compatibility with other obligations under international law: if withholding consent amounts to a violation of the affected state’s other international obligations it would be arbitrary. Examples include the prohibition of starvation of the civilian population as a method of warfare and the entitlement of the wounded and sick to receive, to the fullest extent possible and with the least possible delay, the medical care required by their condition without discrimination.

⁷⁷ Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, *supra*, para 82. In relation to humanitarian assistance in natural disasters, the ILC also highlighted the importance of giving reasons when consent to assistance is withheld. It considered this “fundamental to establishing the good faith of an affected State’s decision to withhold consent. The absence of reasons may act to support an inference that the withholding of consent is arbitrary”. ILC Report, UN Doc A/66/10, 270.

Determining whether consent has been withheld for valid reasons frequently requires a difficult balancing of legitimate military considerations with competing humanitarian ones, akin to that required by the proportionality test in IHL.⁷⁸ It has been suggested that, applied by analogy,⁷⁹ this could provide guidance in determining the validity of withholding consent in a particular situation. Withholding consent where legitimate military considerations are relatively unimportant but the consequent suffering of the civilian population particularly severe could be considered arbitrary.⁸⁰ This is the approach adopted in the San Remo Manual,⁸¹ and in the Manual on Air and Missile Warfare in relation to naval and aerial blockades respectively.⁸²

Similarly, it has been suggested that guidance could be drawn from the principle of proportionality under human rights law: limitations in terms of time and duration, location and affected goods and services must not go beyond what is absolutely necessary to achieve the legitimate aim of the state withholding consent.⁸³

7. How can consent be given?

The law does not stipulate how consent to relief operations is to be given. Although some suggest that the requirement of “consent” in Article 18 AP II “implies less formality” than the word “agreement” in Article 70 AP I,⁸⁴ too much weight should probably not be given to this difference in terminology.

More significantly, it is suggested that consent need not be expressed or public: “private assurances or an attitude which can in good faith be construed as acquiescence are sufficient”.⁸⁵ A failure by the authorities to respond to repeated requests for authorisation to operate or their failure to react despite being aware of unauthorised operations could be interpreted as a rebuttable presumption of authorisation of relief operations. The less overt the relief operations, the less justified it is to infer acquiescence, as the authorities could be merely unaware of them.

⁷⁸ Bothe in Kalshoven, *supra*, 95.

⁷⁹ By analogy only, because in IHL the proportionality test is relevant to determining the lawfulness of a particular attack by balancing expected incidental civilian deaths, injuries or damage to civilian property against the concrete and direct military advantage expected from the attack. (Article 51(4)(b) AP I)

⁸⁰ Bothe in Kalshoven, *supra*, 95. Of course, there may be instances when the withholding of consent is not based on military considerations.

⁸¹ Paragraph 102.1(b) of the San Remo Manual prohibits the establishment of a blockade if “the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade”.

⁸² Rule 157(b) of the Manual on Air and Missile Warfare prohibits the establishment or maintenance of an aerial blockade when the suffering of the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the aerial blockade.

⁸³ Kaelin, UN Resident Coordinator Induction Course, *supra*.

⁸⁴ Bothe, Partsch and Solf, *supra*, 697.

⁸⁵ *Id.*

8. Withdrawal of consent

More common in practice than situations where consent is withheld, are those where consent is granted but where, subsequently, significant impediments are imposed on operations.

The question of withdrawal of consent to previously agreed to relief operations is not addressed by treaty law. However, it can be presumed that a state may be entitled to withdraw its consent and that the rules regulating withholding of consent also apply to its withdrawal: consent to relief operations may only be withdrawn for valid reasons, not arbitrary ones. It would make sense to apply the same criteria for determining what are valid and what arbitrary reasons.

States may withdraw consent expressly, by instructing actors to terminate their operations, as was the case when a number of NGOs were instructed to leave Sudan following President Bashir's indictment by the ICC.

More complex is determining whether consent has been withdrawn implicitly or "constructively" when a state impedes authorised operations to a degree that the relevant actors are unable to operate meaningfully or in a principled manner.

Once relief operations have been agreed to, the affected state and, in fact, all states are required to "allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel". This obligation is not absolute: they are *inter alia* entitled to prescribe technical arrangements, including search, under which such passage is permitted.⁸⁶ Relief personnel must be respected and protected, and parties must, to the fullest extent practicable, assist them in carrying out their relief mission. Only in case of imperative military necessity may their activities be limited or their movements temporarily restricted.⁸⁷

At what point do violations of the obligation to allow and facilitate effectively amount to a withdrawal of consent? This determination must be made on an actor-by-actor basis based on the nature, extent and duration of the impediments.

Once it has been determined that consent has been withdrawn, it is necessary to establish whether this was for valid or arbitrary reasons. This determination must be made considering all the actors providing assistance, rather than just the specific one whose operations have been impeded, and must start with the questions of whether there are unmet needs that only the actor in question could respond to and whether it was operating in a principled manner.

⁸⁶ Article 70(2) and (3) AP I. In non-international armed conflicts, neither Article 3(2) GCs nor Article 18 AP II address this issue; similar provisions had been included in an early draft of the instrument but were not retained in the final version. According to the ICRC Customary Law Study the rules in AP I reflect customary law applicable in both types of conflict. (Commentary to Rule 55.)

⁸⁷ Article 71(3) AP I.

It would appear that states have a narrower discretion in withdrawing consent to operations than in granting it in the first place. Arguably, they would have to demonstrate that the actor in question was either providing goods and services for which there was no longer a need or that it had actually operated in an unprincipled manner or had otherwise violated international or national law. The situations in which consent can be considered as having been validly withdrawn are, therefore, quite limited. In the vast majority of cases states would thus remain bound by the more onerous obligation to allow and facilitate relief operations they had agreed to. More onerous as it is absolute - apart from the specific rights of supervision⁸⁸ - rather than subject to the margin of discretion granted by the qualification that consent may not be withheld or withdrawn *arbitrarily*.⁸⁹

9. Which actors fall within these rules?

Article 3(2) GCs states that an “impartial humanitarian body, such as the International Committee of the Red Cross”, may offer its services. Article 70 AP I does not specify who can offer to provide humanitarian assistance; it provides that “relief actions shall be undertaken”. The issue was discussed in negotiations and intentionally left vague. Article 18 AP II is similarly drafted in the passive voice.

Provided they operate in the requisite principled manner, states, international organisations and private actors like NGOs may all offer their services; are all bound by the same rules and entitled to the same protections and safeguards.⁹⁰ The only difference lies in the consequence of their non-compliance with these rules.

10. Consequences of withholding of consent for actors seeking to carry out relief operations

While the rules regulating relief operations are, for the most part, straightforward, it is more complex to determine the legal consequences of their violation and, in particular, the lawfulness of unauthorised relief operations.

In addition to IHL, other areas of public international law come into play, most notably the rules safeguarding state sovereignty and territorial integrity and the prohibition on interference in states’ internal affairs.

A further element of complexity is that the consequences of carrying out unauthorised relief operations vary with the status of the party doing so. While all actors - states, international organisations and NGOs – must comply with the relevant rules of IHL if they want their operations and staff to benefit from its protections and safeguards, the rules just mentioned on sovereignty, territorial

⁸⁸ Article 70(3) AP I.

⁸⁹ Consultations of legal experts carried out by author.

⁹⁰ Bothe, Partsch and Solf, *supra*, 433.

integrity and non-interference are not binding on private actors. Instead, their actions are subject to the domestic law of the state where they operate.

What is clear, possibly counter-intuitively, is that an arbitrary withholding of consent does not give rise to a general entitlement to carry out unauthorised relief operations. As will be seen, such operations are lawful only in extremely limited circumstances.

a. Unauthorised operations where consent is withheld on valid grounds

As outlined above, a state is entitled to withhold consent to relief operations on valid grounds. Unauthorised relief operations in such circumstances could, depending on the actor impeding the operations, amount to a violation of a number of rules of public international law.

i. IHL

Any actor - state, international organisation, NGO - carrying out unauthorised operations in situations where consent has been withheld for valid reasons is not acting in compliance with IHL.

Operating without consent does not mean that humanitarian staff, supplies and equipment lose their civilian status and consequent protection from attack.⁹¹ However, states' duty to facilitate rapid and unimpeded passage of relief supplies and personnel does not arise for unauthorised operations. They may be turned back at the border or, if already in country, goods and equipment may be confiscated and staff, if not entitled to privileges and immunities, may face proceedings before the courts of the state where they carried out the unauthorised operations.

ii. Other rules of public international law: state sovereignty, territorial integrity and non-interference

Unauthorised relief operations carried out by a state or international organisation are a violation of the affected state's sovereignty and territorial integrity.⁹²

The International Court of Justice (ICJ) briefly considered whether relief operations constituted unlawful intervention in the case of *Military and Paramilitary Activities in and against Nicaragua*. It held that:

[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be considered as unlawful intervention, or as in any other way contrary to international law.⁹³

⁹¹ Stoeffels, *supra*, 314-316.

⁹² See the discussion of India's Operation Poomalai above. In response to India's unauthorised airdrop, Sri Lanka complained of violations of its sovereignty and territorial integrity.

⁹³ *Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. United States of America*), Merits, Judgment, 27 June 1986, *I.C.J. Reports* 1986, para 242.

Caution should be exercised before drawing general conclusions from this statement. It appears in a part of the decision where the Court was contrasting humanitarian assistance with military and paramilitary activities and, in this context, concluded that the former, unlike the latter, did not amount to intervention. In its brief consideration of humanitarian assistance, the Court focused on the need for it to be delivered in a principled manner.⁹⁴ It did not address the issue of consent, leaving open the question of whether such assistance did not amount to interference only when consent had been arbitrarily withheld or also when denied for valid reasons.⁹⁵

Moreover, and most importantly, the Court was not considering the unauthorised provision of assistance *into* the affected state but, rather, the provision of relief items at the border to actors operating in-country.⁹⁶

Commentators differ in their interpretation of this aspect of the judgment.⁹⁷ In any event, even if it were to apply to all situations, the fact that the provision of humanitarian assistance does not amount to intervention does not affect the need for relief operations to comply with other rules of international law. Unauthorised relief operations where consent has been withheld for valid reasons would still not comply with IHL and would violate the rules on state sovereignty and territorial integrity.

iii. Domestic law

Private actors, such as NGOs and their staff are not bound by the rules of public international law on sovereignty, territorial integrity and non-interference.

However, the staff of NGOs do not ordinarily benefit from privileges and immunities, so could face proceedings under the domestic law of the state where they provide unauthorised assistance. Such proceedings may be brought on a number of possible grounds, ranging from illegal entry into the country to the provision of support to the enemy. They may not, however, be punished for providing medical assistance, including to wounded enemy combatants.⁹⁸

⁹⁴ *Ibid.*, paras 242 and 243.

⁹⁵ Although the Court did not specify this either, from the context of the decision it can be assumed that it was addressing situations in which assistance was provided without the consent of the affected state.

⁹⁶ On this see, for example, Schindler, who suggests that the Court's statement should not be understood as conferring a right on states or humanitarian organisations to cross the borders of another state to provide assistance to people in need. In his view, the Court was only considering the "right to make humanitarian supplies available to parties to an armed conflict, even to rebels in a civil war, but does not imply a right to penetrate into the territory of another State" to deliver the supplies. Schindler, *supra*, 698-699.

⁹⁷ See Stoffels, *supra*, 309 and references therein.

⁹⁸ Article 16 AP I and Article 10 AP II provide that under no circumstances people may be punished for having provided medical assistance. According to the ICRC, the same rule exists under customary law in both international and non-international armed conflicts. ICRC Customary Law Study, *supra*, Rule 26.

While the affected state may also consider unauthorised operations by international organisations a violation of its domestic law, ordinarily, the staff of international organisations are entitled to privileges and immunities either on the basis of multilateral treaties (like the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies), or on the basis of bilateral agreements concluded with host states including immunity from legal processes before domestic courts.

This being said, bilateral agreements grant immunity in the state party to a particular agreement. A bilateral agreement with a state from which cross-border operations are launched does not grant immunity in the state in whose territory the operations are carried out. Immunity would have to be granted by an agreement with that state. Where no bilateral agreement exists between the organisation and the state where the unauthorised operations are carried out, immunity will only exist where there is a multilateral treaty covering the official in question or where a general entitlement to immunity can be determined to exist under customary law.

b. Unauthorised operations where consent is withheld on arbitrary grounds

While arbitrary withholding of consent to relief operations is a violation of IHL, opinions are divided as to the lawfulness of unauthorised relief operations in such circumstances.

i. IHL

One commentator considers such relief operations permissible.⁹⁹ He suggests that if consent is arbitrarily denied, the violation of the affected state's territorial integrity would be justified as an implementation of states' undertaking under common Article 1 GCs and AP I to ensure respect for IHL.¹⁰⁰

This reasoning is problematic. Common Article 1 is addressed to "High Contracting Parties" - ie states. Consequently, only states could, arguably, rely on this provision to justify their actions. However, it is suggested that this basis may justify the unauthorised operations of states, international organisations and the ICRC.¹⁰¹

More fundamentally, even only considering operations carried out by states, the undertaking to ensure respect for IHL under Common Article 1 cannot justify the violation of sovereignty and territorial integrity that unauthorised operations entail, as it is generally agreed that this provision may not be relied upon as a basis for violating other rules of international law.¹⁰²

⁹⁹ Bothe in Kalshoven, *supra*, 96.

¹⁰⁰ Bothe in Kalshoven, *supra*, 95.

¹⁰¹ Bothe in Kalshoven, *supra*, 95-96.

¹⁰² In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, I.C.J. Reports 2004, 36 at 200, para. 159, the ICJ

ii. Other rules of public international law: circumstances precluding wrongfulness: counter-measures or necessity

An alternative approach based on general public international law, and thus pertinent for states and international organisations but not for private actors, would be to accept that unauthorised operations do not comply with IHL and violate the affected state's sovereignty and territorial integrity, but to argue that their wrongfulness is precluded on an accepted ground.¹⁰³ Two possible grounds could be potentially be relied upon: counter-measures and necessity.

Countermeasures

To be lawful, counter-measures must meet a number of conditions, only some of which warrant highlighting here.¹⁰⁴ First, they may only be brought by a state or international organisation directly affected by a violation so, for present purposes, one whose offer of assistance was arbitrarily rejected or, possibly, a state whose nationals were denied assistance. Second, the purpose of the counter-measure must be to induce the wrong-doing state to comply with its obligations. It is questionable whether unauthorised relief operations do this. Rather, they are a performance of the responsibilities not discharged by the recipient state. They aim to remedy the violation of the obligation. Thirdly, counter-measures must be proportionate to the harm suffered by the actor having recourse to them. In this case, the harm suffered by the state or international organisation is minimal. It is the civilian population that suffers. Finally, in no circumstance may counter-measures violate the prohibition on the threat or use force. In view of these requirements, it appears unlikely that counter-measures could be a basis for precluding the wrongfulness of an unauthorised relief operation.

One possible way of side-stepping some of these conditions – notably the requirements that countermeasures be brought by a state affected by the violation and that they be proportionate to the harm suffered by such a state – would be to argue that IHL lays down *erga omnes* obligations ie obligations owed to the international community as a whole.¹⁰⁵ In such circumstances states not directly affected by the violation might be entitled to take counter-measures. It is

stated that obligations arising from Common Article 1 are to be fulfilled “while respecting the United Nations Charter and international law”. See also ICRC Commentary to the APs, para 46.

¹⁰³ The ILC Articles on Responsibility of States for Internationally Wrongful Acts, (2001), (ILC Articles on State Responsibility), identify six grounds precluding wrongfulness: consent, self-defence, countermeasures, *force majeure*, distress and necessity.

¹⁰⁴ ILC Articles 22 and 49-54 on State Responsibility and Commentaries thereto. Articles 22 and 51-57 of the ILC Articles on the Responsibility of International Organizations set out largely identical rules. (UN Doc A/66/10). On the possibility of invoking counter-measures to justify unauthorised relief operations see Oliver Corten and Pierre Klein “L'Assistance Humanitaire Face à la Souveraineté des Etats”, *Revue Trimestrielle des Droits de l'Homme*, (1992), 343 and Schindler, *supra*, 698-699.

¹⁰⁵ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, supra* para. 157. The ICRC Commentaries also seem to suggest this. See, for example, ICRC Commentary to the APs, para 45.

unclear, however, whether *all* the rules in the Geneva Conventions and Additional Protocols are *erga omnes* obligations.¹⁰⁶

At the time of the adoption of the draft Articles on State Responsibility in 2001, the ILC was unable to determine with certainty whether international law provided a right for states to adopt countermeasures in response to violations of *erga omnes* obligations. Accordingly, Article 54 leaves open the possibility for any state to take “lawful measures” rather than counter-measures against the responsible state to ensure cessation of the breach and reparation in the interest of the injured state or the beneficiaries of the obligation breached.¹⁰⁷

This being said, in the years since the adoption of the ILC Articles, there have been some instances of states taking countermeasures in response to violations of *erga omnes* obligations, most notably, the imposition of unilateral economic sanctions in response to serious violations of human rights.¹⁰⁸

Necessity

The second possible ground precluding wrongfulness is necessity. Necessity may be invoked by a state or international organisation if the otherwise wrongful act was the only way for it to safeguard an essential interest against a grave and imminent peril and it does not seriously impair an essential interest of the injured state or of the international community.¹⁰⁹

¹⁰⁶ In the *Nuclear Weapons Advisory Opinion* the International Court of Justice stated that “a great many rules of humanitarian law ... are so fundamental to the respect of the human person and elementary considerations of humanity” that they are “to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law” (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports* 1996 (I), 226 at 257, para 79). In its Advisory Opinion on the *Construction of a Wall in Occupied Palestinian Territory* the Court referred to this statement, explaining that, in its view, the rules it had referred to in the earlier opinion “incorporate obligations which are essentially of an *erga omnes* character”. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra*, para 157. In both cases the Court was referring to some – “a great many” – but not all the rules of IHL. It did not address the question of which rules it considered as having an *erga omnes* character.

¹⁰⁷ See, for example, ILC Article 54 and para 6 of the Commentary thereto.

¹⁰⁸ Some instances of this already existed at the time of the adoption of the ILC draft Articles. For example, the Commentary to ILC Article 54 refers to the imposition for assets freezes and flight bans by European Union Member States in response to the humanitarian crisis in Kosovo in 1998, which in some cases entailed the non-performance of bilateral aviation agreements. More recent examples include the imposing of asset freezes by the European Union and the United States in response to the escalating violence against the civilian population in Syria. See for example, Chapter VIII, Council Decision 2013/255/CFSP of 31 May 2013, (OJ L 147, 01.06.2013, 14); and Section 1(a) US Executive Order 13582 of 17 August 2011, (Federal Register, Vol 76, No 162, Monday, August 22, 2011, Presidential Documents, 52209).

¹⁰⁹ ILC Article 25 on State Responsibility. See also ILC Article 25 on the Responsibility of International Organizations. The ILC considers that necessity should not be invoked by international organisations as frequently as by states, so this provision contains an additional condition: only international organisations with a function to protect the essential interest in peril may rely upon it.

The essential interest to safeguard can be that of the state or international organisation taking the unauthorised measure or of the international community.¹¹⁰ While necessity is most frequently invoked in relation to imminent environmental emergencies, preventing severe suffering of the civilian population can also be considered an essential interest of the international community.

Unauthorised relief operations would impair an essential interest of the injured state – its territorial integrity. However, this need not inevitably be to the serious degree precluded by the rule.

The unlawful act justified by necessity must be the only way of preserving the essential interest. If other, lawful, ways exist for doing so, necessity cannot be invoked. In the case of relief operations, such alternative methods could be the provision of assistance through actors authorised to operate.

Necessity could thus be invoked to justify a one-off relief operation by a state or international organisation to bring life-saving supplies to a population in a specific location in extreme need, when no alternatives exist. Such a scenario would meet the requirements of grave and imminent danger but not seriously impair the injured state's essential interest.¹¹¹

c. Conclusion

In view of the above, the following conclusions can be drawn:

- if consent is withheld for valid reasons, unauthorised relief operations are unlawful.
- If consent is withheld for arbitrary reasons, the position is unsettled. At best, unauthorised operations by states and international organisations might be justifiable violations of the affected state's sovereignty and territorial integrity in extremely limited circumstances where they could be justified under the legal principle of necessity or, possibly, under the emerging notion of countermeasures in response to violations of *erga omnes* obligations. Unauthorised operations by private parties would expose their staff to the risk of proceedings before the courts of the affected state.

In view of this lack of legal clarity and, possibly even more importantly, of the reality that unauthorised operations are likely to be extremely difficult to implement in safety, whether to carry out such operations tends to be principally a policy decision for humanitarian organisations taken on a context-by-context

¹¹⁰ Commentary to ILC Article 25 on State Responsibility.

¹¹¹ Arguably, necessity could also be invoked in situations where consent to relief operations has been withheld on valid grounds. However, if the plight of the civilian population is so severe as to give rise to a situation of necessity, reasons for withholding consent that might initially have been valid would have probably become arbitrary, as in the example of protracted hostilities given earlier.

basis after balancing a number of sometimes competing considerations. These considerations will include:

- the urgency of providing assistance to civilians;
- the possibility of actually implementing unauthorised operations and doing so in safety;
- the likely impact of unauthorised operations in opposition-held areas on humanitarian organisations' activities and those of other actors in the rest of the affected state; and
- the likely impact of carrying out unauthorised operations on humanitarian organisations' activities and those of other actors in other contexts.

11. Consequences for the party arbitrarily withholding consent

The discussion so far has focused on the parties wishing to provide humanitarian assistance. What are the legal consequences for the party that arbitrarily withholds consent and for the persons involved in that decision?

Arbitrary withholding of consent to relief operations is a violation of IHL and also, possibly, of human rights law, giving rise to state responsibility. This being said, there appear to be no instances in which steps have been taken to enforce such responsibility, for example through dispute settlement mechanisms. A possible reason for this is that no other state considers itself sufficiently injured to initiate proceedings in a forum with jurisdiction.

Arbitrary withholding of consent also gives rise, for a state injured thereby, to the possibility of taking counter-measures in accordance with international law. As just touched upon, which states would be entitled to do so and the precise form such counter-measures could take is not settled as a matter of law. As a matter of practice, this justification has never been invoked.¹¹²

As will be seen, there have been a small number of instances in which the Security Council has resorted to enforcement actions under Chapter VII of the UN Charter to ensure the delivery of assistance to populations in need.

In terms of individual responsibility, arbitrary withholding of consent to relief operations is not a grave breach of the Geneva Conventions or of Additional Protocol I. It was not included in the list of war crimes of any of the *ad hoc* tribunals.

Although the ICC Statute includes the war crime of

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

¹¹² India justified its airdrop of supplies to the besieged city of Jaffna in Operation Poomalai as a "mercy mission" rather than as a counter-measure.

it is fairly limited in scope, only covering the extreme situation where civilians are being intentionally deprived of objects indispensable to their survival, and only applicable in international armed conflicts.¹¹³ To date, allegations of this crime have not been included in any ICC investigation.

On three occasions to date the Security Council imposed targeted sanctions on persons or entities who impeded humanitarian activities or access to humanitarian assistance: Security Council resolution 1844 (2008) on Somalia;¹¹⁴ Security Council resolution 1857 (2008) on the Democratic Republic of Congo;¹¹⁵ and Security Council resolution 2134 (2014) on the Central African Republic.¹¹⁶ The resolutions are formulated broadly, covering both persons or entities who arbitrarily withhold consent to relief operations and those who impede access once agreement has been given. To date the Council has imposed sanctions on this ground – among others – only once, on Al-Shabaab in Somalia.¹¹⁷

While a number of possible avenues thus exist for holding responsible parties and persons who have arbitrarily withheld consent to relief operations, there has only been very limited recourse to them and, consequently, limited accountability for violations. This should not be taken as implying that the rules have never been complied with: parties initially withholding consent may have eventually granted it following negotiations and or other diplomatic ways of encouraging them to comply with their obligations.

12. Alternatives - Indirect provision of assistance

¹¹³ Article 8(2)(b)(xxv) Rome Statute of the International Criminal Court 1998.

¹¹⁴ In OP 8(c) of Security Council resolution 1844 (2008) of 20 November 2008 the Council imposed a travel ban and asset freeze on persons or entities designated by the relevant Sanctions Committee as

obstructing the delivery of humanitarian assistance to or access to, or distribution of humanitarian assistance in, Somalia.

¹¹⁵ In OP 4(f) Security Council resolution 1857 (2008) of 22 December 2008 the Council imposed a similar travel ban and asset freeze on persons designated as

obstructing the access to or the distribution of humanitarian assistance in the eastern part of the Democratic Republic of the Congo.

¹¹⁶ In OP 37(e) of Security Council resolution 2134 (2014) of 28 January 2014, the Council imposed a travel ban and asset freeze on persons or entities designated by the relevant Sanctions Committee as

obstructing the delivery of humanitarian assistance to CAR, or access to, or distribution of, humanitarian assistance in CAR.

¹¹⁷ UN Security Council Sanctions Committees, *List of Individuals and Entities Subject to the Measures Imposed by Paragraphs 1, 3 and 7 of Security Council Resolution 1844 (2008)*, http://www.un.org/sc/committees/751/pdf/1844_cons_list.pdf.

In view of the preceding analysis, what course of action is open to states and international humanitarian organisations whose offers of humanitarian assistance have been rejected?

a. Indirect provision of goods or funds

If other actors are operating in the requisite principled manner and with the consent of the affected state, the simplest option would be to provide assistance through them, by supplying them with relief items or funding their operations.

From an international law point of view, such indirect additional support does not raise problems. Difficulties may arise at a policy and operational level. If the affected state has rejected offers of assistance from the actor providing the indirect assistance, or if it believes the latter has not adopted a neutral position in the conflict, the affected state may consider the operations it had previously authorised and that are now receiving support, as no longer impartial, neutral and independent and withdraw its consent to them.

Thus, to state the obvious, the provision of indirect assistance should only be pursued if humanitarian agencies operating in country actually have a need for additional supplies or funding and are willing to accept such assistance from the state or international organisation offering it.

More complex is support provided to humanitarian actors carrying out unauthorised operations. Its legality must be assessed under the different areas of public international law discussed earlier.

i. Sovereignty and territorial integrity

If the actors providing indirect support do not enter the territory of the affected state, they do not violate its sovereignty and territorial integrity.

ii. Non-interference

Whatever view is adopted as to the application of the ICJ decision in *Military and Paramilitary Activities* to “direct” relief operations, it is clear that in the case before it the Court was addressing “indirect” assistance by the provision of relief items from outside the territory of the affected state. The Court concluded that such assistance did not amount to interference provided it complied with humanitarian principles:

[a]n essential feature of truly humanitarian aid is that it is given "without discrimination" of any kind. In the view of the Court, if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering" and "to protect life and health and to ensure respect for the human being"; it must also, and above all, be given

without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents.¹¹⁸

To counter claims of unlawful interference it is essential for the actors providing indirect support to satisfy themselves to a high degree of certainty that the operations they assist are exclusively humanitarian and carried out in a principled manner, and that appropriate measures are adopted to avoid diversion of relief supplies and funds. The provision of relief goods rather than funds might make it easier to rebut claims that the assistance provided is intended for or diverted to military or other non-humanitarian activities.

iii. Assistance in the commission of an internationally wrongful act

A state or international organization that assists the commission of an internationally wrongful act by another state or international organisation may itself be violating international law. Article 16 of the ILC Articles on State Responsibility provides that:

[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.

Article 16 is essentially mirrored in Article 14 of the ILC Articles on the Responsibility of International Organizations.¹¹⁹

Whether the provision of assistance or funds raises this secondary responsibility depends on whether the assisted actor carrying out the relief operations is acting in violation of international law. If states or international organisations carry out unauthorised relief operations where consent has been withheld for valid reasons this would be the case. However, it is unlikely that states and international

¹¹⁸ *Nicaragua v. United States of America*, *supra*, para 243.

¹¹⁹ Article 14 of the ILC Articles on the Responsibility of International Organizations provides that:

[a]n international organisation which aids or assists a State or another international organisation in the commission of an internationally wrongful act by the State or the latter organisation is internationally responsible for doing so if:

- (a) the organisation does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that organisation.

The principal difference of relevance for present purposes between the two articles is that Article 16 on State Responsibility is limited to a state's assistance to another state. Article 14 on the Responsibility of International Organizations is broader in this respect and covers an international organisation's assistance to a state or another international organisation.

organisations trying to provide humanitarian assistance in good faith would be providing support in such circumstances.

They are more likely to be doing so in situations where consent has been withheld for arbitrary reasons. As discussed above, it is precisely in such situations that opinions are divided as to the lawfulness of unauthorised operations. The same uncertainty is carried on to the actor providing indirect support. If the unauthorised operations are considered lawful, then assisting them is also unlawful; but if they are unlawful, then a state or international organisation that provides assistance to such operations would also violate international law.¹²⁰

This being said, though secondary responsibility has sometimes been raised in cases where the underlying violation was much more serious (eg the provision of weapons in situations where a substantial risk exists that they will be used to commit violations of IHL),¹²¹ secondary responsibility has not to this day been raised in relation to the indirect support to relief operations.

Additionally, secondary responsibility only arises in relation to assistance to activities that are a violation of international law by states and international organisations. Relief operations carried out by NGOs simply do not fall within the scope of this provision – and, in any event, they may violate domestic law, but not international law. Accordingly, the provision of support to such operations does not give rise to secondary responsibility. As indirect support does not violate the territorial integrity of the affected state, nor amount to interference nor, if provided to NGOs, to assistance in an internationally wrongful act, such indirect provision of assistance is probably the approach least likely to raise legal concerns, particularly if extreme care is taken to ensure supported operations are exclusively humanitarian in nature and carried out in a principled manner. This does not, of course, mean that the affected state will not vigorously object to such support to unauthorised operations.

For the sake of completeness it should be noted that where assistance given by a state or international organization to an NGO or other private actor is such as to make the NGO an agent of the international organization, the acts of the NGO will be attributable to the state or international organization.¹²² Such attribution would mean that the state or international organization would be responsible for breaches of international law resulting from acts of the NGO that amount to a

¹²⁰ It can safely be assumed that a state or international organisation funding or providing material support to an unauthorised relief operation would meet the knowledge condition in ILC Articles 16 and 14 respectively.

¹²¹ See, for example, “Syria: Austrian Position on Arms Embargo”, 13 May 2013, available at <http://www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf>.

See also André Nollkaemper, “A Shared Responsibility Trap: Supplying Weapons to the Syrian Opposition”, EJIL:Talk!, June 17 2013, <http://www.ejiltalk.org/a-shared-responsibility-trap-supplying-weapons-to-the-syrian-opposition/>.

¹²² See Article 6 of the ILC Articles on the Responsibility of International Organizations and Articles 4 and 8 of the ILC Articles on the Responsibility of States.

violation of the state or international organization's international obligations. The threshold that would need to be crossed for the acts of an NGO to be attributed to a state or international organization is a high one.¹²³ Acts of the NGO would be attributable to a state or international organization in circumstances where the NGO is a *de facto* organ of that state or international organization because of the "complete dependence" of that NGO on the state or international organization such that it is "merely an instrument" of the latter.¹²⁴ In this case, all the acts of the NGO would be attributable to the state or international organization and it would be required to comply with all the obligations of the state or international organization. Alternatively, where the NGO acts, in a particular operation, under the instructions, direction or control of the state or international organization, the acts of the NGO in that operation would be attributable to the state or international organization.¹²⁵ Although there has been some controversy regarding the level of control that would make the acts of private actors attributable to a state in this second scenario, the ICJ has insisted that the test is one of effective control.¹²⁶ Arguably, this threshold of control would not be met by merely financing an operation but would require some further element by which it could properly be said that the act in question was directed or controlled by the state or international organization.

Any third state whose territory is used for these indirect operations - usually neighbouring states - may also face claims of assisting in the commission of an internationally wrongful act and of allowing its territory to be used for unlawful activities.¹²⁷ Obviously, the organisation of unauthorised, but nonetheless principled, relief operations is a far less injurious activity than allowing territory to be used for "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State" referred to in the *Declaration on Friendly Relations*.¹²⁸ Nonetheless, the potential liability exists and practice shows that

¹²³ See Stefan Talmon, "The Responsibility of Outside Powers for Acts of Secessionist Entities", (2009) 58 *International and Comparative Law Quarterly* 493.

¹²⁴ See *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007 43, 205, para 392.

¹²⁵ See Article 8 of the ILC Articles on State Responsibility. Although Article 6 of the ILC Articles on the Responsibility of International Organizations uses the language of agents (Articles 2(d) and 6) rather than the words used in Article 8 of the Articles on State Responsibility, the ILC stated in the Commentary to Article 6 of the Articles on International Organizations Articles (para. 11) that "should persons or groups of persons act under the instructions, or the direction or control of an international organization, they would have to be regarded as agents according to the definition given in subparagraph (d) of article 2".

¹²⁶ See *Application of the Convention on the Prevention and Punishment of Genocide, supra*, paras 398-407, rejecting the less stringent "overall control" test adopted by the International Criminal Tribunal for the former Yugoslav Tribunal in the *Prosecutor v. Tadic* case (IT-94-1), 15 July 1999.

¹²⁷ In the *Corfu Channel* case the ICJ underlined "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". *Corfu Channel case, (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949, I.C.J. Reports (1949), 22.

¹²⁸ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to GA Res 2126, (XXV), 24 October 1970.

affected states frequently claim that humanitarian activities are in fact a cover for these threats to its security. These possibilities make relevant third states' consent to cross-border operations or indirect support all the more important.

b. Other forms of support

Other forms of less tangible and direct support to actors operating in opposition-held areas also exist. These include the traditional coordination functions performed by the UN Office for the Coordination of Humanitarian Affairs ("OCHA"), such as the elaboration of so-called "3W maps" ("who is providing what where") and the consolidation of funding requests from such actors in joint appeals for donors.

This form of intangible support is not covered by IHL. As no person or good is entering the territory of the affected state, its territorial integrity is not violated. Provided the operations thus supported are exclusively humanitarian in nature; carried out in a principled manner; and adequate measures are taken to avoid diversions, this form of support cannot be considered as amounting to interference.

While unauthorised operations may be unlawful under international law if carried out by states or international organisations, support activities to such operations are unlikely to contribute sufficiently significantly for questions of assistance in a wrongful act to arise or for the state or international organization to be regarded as directing or controlling the operation.¹²⁹

Concerns are more operational. While a state may tolerate or, possibly, not be aware of certain operations, the publicity and prominence given to them by inclusion in such documents, associated with the UN - an actor which it might perceive as not neutral in the conflict - may lead the state to curtail previously accepted operations.

So, while such support activities are not unlawful, it is essential to ensure that the actors whose operations are mentioned in OCHA products agree to being included.

c. Advocacy

Using information obtained from actors operating in-country for advocacy – be it public or confidential - does not raise any of the legal concerns discussed above.

In this relation too, concerns are more operational, as the use of such information may lead to the termination of hitherto tolerated operations. As is always the case, it is essential to ensure that the actor whose data is being referred to agrees

¹²⁹ According to the ILC, secondary responsibility only arises to the extent that the assisting state or international organization caused or contributed to the wrongful act. It must contribute "significantly" for the support to be unlawful. ILC Commentary to Article 16 on State Responsibility.

with it being used in this way. The risk also exists that information provided by one actor may lead to the termination of activities of others.

13. Overriding the requirement of consent – binding Security Council decisions

The requirement of consent in IHL may be circumvented by Security Council “imposition” of relief operations by binding decisions.

Decisions adopted under Chapter VII of the UN Charter are binding on all United Nations member states and override their rights and duties under other bodies of law, including IHL. If the Council, acting under Chapter VII, demanded that relief operations be allowed into the country, the affected state would be required to comply.¹³⁰

While the binding nature of decisions adopted under Chapter VII is uncontroversial, it has been recognised that Council decisions not adopted under this Chapter may also be binding within the meaning of Article 25 of the Charter if they employ a language of obligation.¹³¹

The Security Council frequently calls upon parties to conflict to grant humanitarian access.¹³² However, the vast majority of these calls are an exhortation to allow relief actions and, in fact, a recognition that the affected state must agree thereto, rather than a Security Council authorisation thereof.¹³³

On a small number of occasions the Council has adopted binding measures under Chapter VII in relation to relief operations. Careful scrutiny of these precedents reveals that although it addressed impeded relief operations, the Council never actually required the affected state to allow access. Instead, the focus was on creating security conditions conducive to the delivery of assistance – a related but distinct issue that, in the cases in question, eventually led to the use of force.

Resolution 2139 (2014) on Syria marked an important departure from previous practice, with the Security Council for the first time demanding that all parties promptly allow rapid, safe and unhindered humanitarian access including across conflict lines and across borders.¹³⁴

¹³⁰ On this issue, see Yoram Dinstein, “The Right to Humanitarian Assistance”, *Naval War College Review*, Vol 54, No.4 (2000) 77.

¹³¹ See for example, Rosalyn Higgins, “The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?” (1972) 21 *International and Comparative Law Quarterly* 270; and Marko Divac Oberg, “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ”, 16 *European Journal of International Law* (2005) 879.

¹³² See *Aide-Memoire for the Consideration of Issues Pertaining to the Protection of Civilians in Armed Conflict*, Addendum, Part I, C, “Humanitarian Access and Safety and Security of Humanitarian Workers”, UN Doc S/PRST/2010/25, 22 November 2010.

¹³³ See, for example, Stoeffels, *supra*, 289.

¹³⁴ Security Council resolution 2139, (2104), 22 February 2014, OP 6.

i. Bosnia Herzegovina

In 1992, the Council adopted resolution 752 calling upon parties to ensure that conditions be established for the effective and unhindered delivery of humanitarian assistance to Bosnia Herzegovina.¹³⁵ Two weeks later, in Resolution 757, acting under Chapter VII, the Council demanded that the parties immediately create these conditions, including by establishing a security zone around Sarajevo.¹³⁶ In Resolution 770, again acting under Chapter VII, the Council called on all states – ie not just the parties to the conflict - to take all measures necessary to facilitate the delivery by humanitarian organisations of humanitarian assistance.¹³⁷ Finally, as its demands remained unheeded, in Resolution 781, the Council imposed a ban on military flights in the airspace of Bosnia Herzegovina,¹³⁸ considering the measure to constitute “an essential element for the safety of the delivery of humanitarian assistance”.¹³⁹

This example relates to a situation where the affected state, Bosnia Herzegovina,¹⁴⁰ consented to the relief operations, that were, instead, being impeded by its opponent.

ii. Somalia

In 1992, following a similar series of resolutions, in which its call to parties to facilitate the delivery of humanitarian assistance to take measures to ensure the safety of humanitarian personnel remained unheeded,¹⁴¹ the Security Council adopted resolution 794 where, acting under Chapter VII, it authorised member states to establish an operation “to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia”.¹⁴²

The resolution led to the establishment of a US-led multi-national force that operated in Somalia between December 1992 and May 1993 to establish a secure environment for humanitarian operations in the southern half of Somalia.

According to the then Secretary-General, at the time of the adoption of Security Council resolution 794, Somalia was considered as not having a government.

¹³⁵ Security Council resolution 752 (1992), 15 May 1992, OP 8. No part of this resolution was adopted under Chapter VII.

¹³⁶ Security Council resolution 757 (1992), 30 May 1992, OP 17.

¹³⁷ Security Council resolution 770 (1992), 13 August 1992, OP 2.

¹³⁸ Security Council resolution 781 (1992), 9 October 1992, OP 1. Interestingly, this measure was not adopted under Chapter VII. However the Council stated that it was acting pursuant to Security Council resolution 770 (1992), where the Council was acting under Chapter VII. *Ibid.*, PP 9.

¹³⁹ *Ibid.*, PP8.

¹⁴⁰ At this time Bosnia Herzegovina was already an independent state, admitted to the United Nations on 22 May 1992.

¹⁴¹ Security Council resolution 733 (1992), 23 January 1992; Security Council resolution 746 (1992), 17 March 1992; Security Council resolution 751 (1992), 24 April 1992; Security Council resolution 767 (1992), 27 July 1992; and Security Council resolution 775 (1992), 28 August 1992. None of the parts of these resolutions relating to relief operations were adopted under Chapter VII.

¹⁴² Security Council resolution 794 (1992), 3 December 1992, OP 10.

Numerous factions were operating in the country that interfered with and attacked UN and other relief agencies.¹⁴³

This is thus an instance in which a multi-national force was authorised to establish a secure environment for relief operations that were being impeded by *de facto* authorities in the absence of a government.

iii. Northern Iraq

In response to Iraq's repression of the civilian population in the Kurdish-populated areas of the country, in April 1991 the Security Council adopted resolution 668, where it insisted that Iraq allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and appealed to all member states and all humanitarian organisations to contribute to humanitarian relief efforts.¹⁴⁴

Although the Council determined that the repression of the civilian population that led to massive population flows across international borders and to cross-border incursions threatened international peace and security, it did not expressly invoke Chapter VII.

The resolution was the basis for a US-led multinational operation. Starting with airdrops, the coalition proceeded to put ground forces into Iraqi territory to protect the displaced persons and build camps. It also established a safe-zone in northern Iraq using ground and air forces to allow civilians to return to their homes.¹⁴⁵

Although Iraq and the UN eventually signed a Memorandum of Understanding on the UN's activities in northern Iraq, the measures adopted pursuant to resolution 688 were initially without Iraq's consent.¹⁴⁶

The precedential value of this example is also limited. As in the previous cases, the focus was the establishment of security conditions permitting the provision of humanitarian assistance, rather than the "imposition" of relief operations themselves. Moreover, the assistance was provided in territory that the multinational force had removed from the affected state's effective control – so arguably, for the purpose of determining whose consent was required for relief operations, it was more akin to a situation of occupation or other forms of foreign administration of territory.

iv. Syria

¹⁴³ Letter dated 29 November 1992 from the Secretary-General addressed to the President of the Security Council. UN Doc S/24868, 30 November 1992.

¹⁴⁴ Security Council resolution 688, 5 April 1991, OP 3 and OP 6.

¹⁴⁵ Airforce Historical Studies Office: *Operation Provide Comfort and Northern Watch*; and GlobalSecurity.org, *Operation Provide Comfort*.

¹⁴⁶ Karin Landgren, "Safety Zones and International Protection: A Dark Grey Area", 7 *International Journal of Refugee Law*, (1995), 437, 443 and Schindler, *supra*, 699.

In October 2013 the Security Council adopted a Presidential Statement on the situation in Syria that addressed humanitarian relief operations in unprecedented detail.¹⁴⁷ In particular, it urged all parties to promptly facilitate safe and unhindered humanitarian access to populations in need in all areas under their control and across conflict lines and urged the Syrian authorities to take a number of specific steps to facilitate the expansion of humanitarian relief operations, and lift bureaucratic impediments and other obstacles.

In February 2014, in view of the escalating deterioration of the humanitarian situation in Syria, in particular that of hundreds of thousands of civilians trapped in besieged areas, and of the limited impact of the October 2013 Presidential Statement, the Council unanimously adopted resolution 2139.

In Operative Paragraph 5 of the resolution the Council, having called upon all parties to immediately lift the sieges of populated areas, including in six particularly affected locations

demands that all parties allow the delivery of humanitarian assistance, including medical assistance, cease depriving civilians of food and medicine indispensable to their survival, and enable the rapid, safe and unhindered evacuation of all civilians who wish to leave ...

More generally, in Operative Paragraph 6 of the resolution the Council

[d]emands that all parties, in particular the Syrian authorities, promptly allow rapid, safe and unhindered humanitarian access for UN humanitarian agencies and their implementing partners, including across conflict lines and across borders, in order to ensure that humanitarian assistance reaches people in need through the most direct routes.

Although the resolution does not state that it is adopted under Chapter VII of the Charter, it seems fairly clear that it imposes binding obligations on Syria and the other parties to the armed conflict in Syria. While most binding Security Council decisions are adopted under Chapter VII of the Charter, the power of the Security Council to adopt binding decisions is derived from Article 25 of the Charter, which is actually in Chapter V, not Chapter VII, of the Charter. Article 25 states that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” The ICJ has held that whether a Security Council decision is binding does not depend on whether it has been adopted under Chapter VII.¹⁴⁸ Rather, the binding

¹⁴⁷ Statement by the President of the Security Council, S/PRST/2013/15, 2 October 2013.

¹⁴⁸ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, 16, 52-54, paras 113-116: “[i]t has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to ‘the decisions of the Security Council’ adopted in

quality of a Security Council decision, according to the ICJ, is to be determined, primarily, by examining the language used by the Council, as well as the discussions leading to it and the circumstances surrounding its adoption.¹⁴⁹ The key is to discern whether the language used in this context indicates that the Council has made a *decision* which entails mandatory action, or, whether, instead, the Council is making a recommendation or is using hortatory language.¹⁵⁰

In the case of resolution 2139, Operative Paragraphs 5 and 6 (and other provisions as well) go beyond hortatory language and “demand” compliance from those to who it is addressed. A distinction is made in the resolution between those provisions where the Council merely “urges” particular action from the cases where it “demands” actions.

The Council’s intention that its demands in *inter alia* Operative Paragraphs 5 and 6 is binding is also confirmed by Operative Paragraph 17 where the Council “expresses its intent to take further steps in the case of non-compliance with this resolution.” The language of non-compliance and the determination of the Council to take action in case of non-compliance suggests that the Council intends to impose an obligation of compliance on the parties.

The effect of the binding obligations is that the Council requires consent to be given.¹⁵¹ It is not open to Syria, or other parties, to withhold consent to humanitarian relief operations, within the terms of the resolution and for the civilians in identified locations as well as more generally, for any valid grounds. While IHL would allow consent to be withheld for valid reasons, Resolution 2139 does not. It is the first time that the Security Council has demanded that parties

accordance with the Charter.” [para. 113]. Also, “when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision ... To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.” [para. 116]

¹⁴⁹ *Ibid.*, p. 53, para. 114: “[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”

¹⁵⁰ See Higgins *supra* and Oberg *supra*.

¹⁵¹ The paragraph in the October 2013 Presidential Statement calling upon the Syrian authorities to promptly facilitate safe and unhindered access to people in need including across conflict lines and, where appropriate, across borders, provided that this be done “in accordance with the UN guiding principles of humanitarian emergency assistance”. These are the principles annexed to General Assembly 46/182 of 19 December 1991, and of particular relevance is the requirement in Principle 3 that “humanitarian assistance should be provided with the consent of the affected country”.¹⁵¹ The removal of this indirect reference to the requirement of consent from Operative Paragraph 6 of resolution 2139 is a further indication of the fact the Council required consent to be given. Preambular Paragraph 5 of the resolution emphasises “the need to respect the UN guiding principles of humanitarian emergency assistance”. This reference, now in a preambular paragraph, is a general exhortation to comply with the principles rather than a reminder of the requirement of consent.

to a conflict allow relief operations, laying down an unqualified obligation to allow rapid, safe and unhindered access to UN humanitarian agencies and implementing partners.

Resolution 2139 expressly covers both cross-line and cross-border relief operations. The term “all parties” is sufficiently broad to also require other relevant states, most notably states from whose territory cross-border relief operations are launched or through whose territory they must transit, and whose consent is ordinarily also required by IHL, to allow such operations.