

**ARBITRARY WITHHOLDING OF CONSENT TO HUMANITARIAN
RELIEF OPERATIONS IN ARMED CONFLICT⁺**

Dapo Akande* & Emanuela-Chiara Gillard**

Introduction

The UN Secretary-General has identified enhancing humanitarian access as one of the five core challenges to the protection of civilians in armed conflict.¹ In recent years considerable attention has been devoted to identifying and mapping a wide range of constraints and attempting to find ways of overcoming or at least mitigating them at field level.²

Less attention has been devoted to the legal framework regulating humanitarian assistance – including, in particular, the essential starting point of relief operations: the requirement of consent thereto.³

After briefly outlining the rules of international humanitarian law (IHL) regulating humanitarian assistance, the present paper focuses on the question of what constitutes arbitrary withholding of consent to relief operations and the legal consequences thereof. This focus on the issue of arbitrary withholding of consent to relief operations is particularly justified in the light of the increasing recognition by the international community that arbitrary denial of humanitarian access amounts to a violation of IHL. In its response to the conflict in Syria, the United Nations Security Council, in a presidential statement adopted in October 2013, condemned the denial by parties to the conflict of humanitarian access and recalled “that arbitrarily depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access, can constitute a

⁺ This independent paper does not necessarily represent the position of the United Nations.

^{*} Co-Director, Oxford Institute for Ethics, Law and Armed Conflict and of the Oxford Martin Programme on Human Rights for Future Generations; Associate Professor of Public International Law, University of Oxford

^{**} Senior Research Fellow, Oxford Institute for Ethics, Law and Armed Conflict; Research Associate, Oxford Martin Programme on Human Rights for Future Generations.

¹ Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc S/2009/277, 29 May 2009, para 26. This was repeated in subsequent reports: Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc S/2010/579, 11 November 2010, para 43; Report of the Secretary-General on the Protection of Civilians in Armed Conflict, 22 May 2012, UN Doc S/2012/376, para 57; and Report of the Secretary-General on the Protection of Civilians in Armed Conflict, 22 November 2013, UN Doc S/2013/689, para 51ff.

² OCHA has developed an *Access Monitoring and Reporting Framework*, including a database, based on a typology of nine different access constraints, to facilitate better data collection and analysis and to inform policy and improve field operations’ access.

³ The rules on relief operations raise a number of other important legal questions, including whose consent is required and the impact of binding Security Council decisions. For a fuller analysis of these issues see, for example, Emanuela-Chiara Gillard, *Cross-border Relief Operations: A Legal Perspective*, OCHA Occasional Policy Papers, 2014.

violation of international humanitarian law”.⁴ A few months later, in Resolution 2139 of 21 February 2014, the Council “recall[ed] that arbitrary denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access, can constitute a violation of international humanitarian law.”⁵ However, the question of what would constitute arbitrary reasons for withholding consent to relief operations has not been explored in any detailed manner either in the literature or indeed in practice. As the United Nations Secretary-General noted in his 2013 Report on the Protection of Civilians,⁶ “it is generally accepted that ... consent [to relief operations] must not be arbitrarily withheld. ... This area requires further analysis and development in order to ensure that the law has meaning for those who suffer beyond the reach of assistance”. This paper responds to that call for more detailed consideration of the issue.

A. Basic Rules of International Humanitarian Law Regulating Humanitarian Relief Operations

The conventional rules of IHL regulating the provision of humanitarian assistance are found in different treaties, depending on the nature of the conflict - international or non-international. The rules applicable in international armed conflicts, including occupation, are found principally in Articles 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 contained in 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. According to the ICRC Customary Law Study, these treaty rules are mirrored in customary law applicable in both types of conflict.⁷

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

⁴ Statement by the President of the Security Council, UN Doc S/PRST/2013/15, 2 October 2013. See also the reference by the UN Human Rights Committee to “the prohibition of arbitrary denial of humanitarian access” as a human rights violation in the context of armed conflict: Concluding Observations on the Fourth Periodic Report of Sudan, July 2014, UN Doc CCPR/C/SDN/CO/4, para 8(f).

⁵ Security Council resolution 2139 (2014) of 21 February 2014, pp 5. See also Security Council resolution 2165 (2014) of 14 July 2014, in which the Council noted that it was “[d]eeply disturbed by the continued, arbitrary and unjustified withholding of consent to relief operations ..., and [also noted] the United Nations Secretary-General’s view that arbitrarily withholding consent for the opening of all relevant border crossings is a violation of international humanitarian law ...”

⁶ Report of the Secretary-General on the Protection of Civilians in Armed Conflict, 22 November 2013, *supra*, para 58.

⁷ Louise Doswald-Beck and Jean-Marie Henckaerts, *Customary International Humanitarian Law*, (2006), Rule 55, (ICRC Customary Law Study).

(i) primary responsibility for meeting the needs of civilians lies with the party to the conflict in whose control they find themselves. This responsibility is an essential element of state sovereignty, expressly recognised in a number of international law documents such as the Guiding Principles on Internal Displacement⁸ and General Assembly resolution 46/182.⁹ This notion also lies at the heart of human rights law. For example, the 1966 International Covenant on Economic Social and Cultural Rights (ICESCR) provides for the right to food and water and the Committee on Economic Cultural and Social Rights has noted that whenever an individual or group is unable, for reasons beyond their control, for example in situations of natural or other disasters, to enjoy the rights to adequate food and water by the means at their disposal, states must provide those rights directly.¹⁰ Similar positive obligations form part of states' duty to protect the rights to life and to security of the person.¹¹ Furthermore, in international armed conflicts Article 27 GC IV requires protected persons to be treated humanely and common Article 3 GCs and Article 4 AP II require parties to non-international armed conflicts to treat persons taking no active part in hostilities humanely. "Humane treatment" is an extremely broad concept. It has been interpreted *inter alia* as requiring parties to a conflict to provide persons deprived of their liberty with food and other essential items – such as drinking water and medical supplies.¹² It seems safe to infer a similar obligation also in relation to persons who are otherwise under the control of a party to a conflict, for example those who find themselves in territory under its control. This line of reasoning is particularly important for non-state parties to conflicts, in respect of whom the obligation to meet the needs of civilians based on human rights law rights is not as well-established.¹³

⁸ Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2, 11 February 1998, Principle 3

1. National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.

Principle 25

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

⁹ GA resolution 46/182, Principle 4

Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory.

In relation to natural disasters see also ILC draft Article 12(1) on the Protection of Persons in the Event of Disasters, as adopted on first reading by the ILC, UN Doc A/CN.4/L.L., 15 May 2014.

¹⁰ *CESCR General Comment No.12: The Right to Adequate Food (Art. 11)*, 12 May 1999, UN Doc E/C.12/1999/5, para 15; and *CESCR General Comment No.15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, UN Doc E/C.12/2002/11, para 25.

¹¹ For examples of positive obligations derived by the Human Rights Committee from the right to life, see UN Committee on Human Rights Concluding Observations on Canada's fourth periodic report, UN Doc CCPR/C/79/Add.105, 7 April 1999, para 12, and UN Committee on Human Rights Concluding Observations on Uganda's initial report, UN Doc CCPR/CO/80/UGA, 4 May 2004, para 14.

¹² Article 5 (1) AP II and ICRC Commentary to the APs paras 4507-4514 and 4567-4576.

¹³ In recent years there has been a shift towards imputing obligations to comply with human rights on non-state armed groups in situations where they exercise effective control over territory and populations and discharge a degree of public and administrative functions. See, for example, SC Res 1574 (2004) preambular para. 11: recalling that "all parties, including the Sudanese rebel

(ii) If a party with primary responsibility for meeting needs 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.¹⁴

(iii) In the majority of situations, the consent of affected states¹⁵ is required, but may not be arbitrarily withheld.

(iv) 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.¹⁶

B. The requirement of consent

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 required before relief operations may be implemented.¹⁷

Despite the apparently absolute nature of the requirement that consent be obtained, it was understood during the negotiations of the Additional Protocols that parties did not have “absolute and unlimited freedom to refuse their

groups such as the Justice and Equality Movement and the Sudanese Liberation Army, must respect human rights and international humanitarian law ...”; SC Res 1376 (2001), para 5: SC “expresses concern at the repeated human rights violations throughout the Democratic Republic of the Congo, in particular the territories under the control of the rebel groups . . . and calls on all parties to put an end to such violations”; SC Res 1417 (2002), para 4: SC “reiterates that it holds the Rassemblement Congolais pour la Democratie-Goma, as the de facto authority responsible to bring to an end all extrajudicial executions, human rights violations and arbitrary harassment of civilians in Kisangani and all other areas under RCD-Goma’s control ...”

See, also, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Addendum: Mission to Georgia, UN Doc E/CN.4/2006/71/Add.7, 24 March 2006, para 5.

¹⁴ Article 3(2) GCs, Article 70(1) AP I and Article 18(2) AP II. Nothing precludes offers of assistance being made or indeed assistance being sought also in relation to other needs of the civilian population.

¹⁵ For a discussion of whose consent is required and, in particular, whether, in the case of a non-international armed conflict it is always that of the affected state, as a matter of law, or, in some circumstances, that of non-state groups in control of territory, see Gillard, *supra*.

¹⁶ Article 70(2), (3), and (4) AP I; ICRC Customary Law Study, *supra*, Rule 55 and commentary thereto.

¹⁷ There are two cases where a party is obliged by the Geneva Conventions to provide consent. First, in situations of occupation Article 59 GC IV requires the occupying power to accept relief operations if it is not in a position to ensure the adequate provision of supplies essential to the survival of the civilian population. Secondly, Article 23 GC IV, applicable in international armed conflicts, requires states to allow the free passage of medical supplies and objects necessary for religious worship intended for civilians, as well as essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases. 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), 182.

agreement to relief actions”.¹⁸ A party refusing consent had to do so for “valid reasons”, not for “arbitrary or capricious ones”.¹⁹ 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 the requirement of consent, is that consent “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.”²⁰

It is now generally accepted that although the consent of the affected state to relief actions is required, it may not be arbitrarily withheld.²¹ This position is reflected in subsequent formulations of the rules on humanitarian assistance that expressly note that consent may not be arbitrarily withheld. Examples include the Guiding Principles on Internal Displacement;²² the Resolution on Humanitarian Assistance adopted by the Institute of International Law in 2003;²³ Council of Europe recommendation (2006)6 on Internally Displaced Persons;²⁴ and, beyond situations of armed conflict, in the International Law Commission’s (ILC) work on the protection of persons in the event of disasters,²⁵ to mention but a few. While General Assembly resolution 46/182, only refers to the need for consent of the affected state, it is submitted that it should be read in the light of the above-

¹⁸ Germany, CDDH/II/SR.87, 336-337.

¹⁹ *Ibid.*, Position supported by the USA, the Netherlands, the USSR and the UK. No delegations opposed this understanding. Similar comments were also made in relation to the consent requirement in Article 18 AP II. CDDH/SR.53, 156-157 (Belgium and Germany).

²⁰ 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*, (2nd ed., 2013), 485.

²¹ See, for example, ICRC Customary Law Study, *supra*, Rule 55 and commentary thereto; Report of the Secretary-General on the Protection of Civilians in Armed Conflict, 22 November 2013, UN Doc S/2013/689, para 58; Felix Schwendimann, “The Legal Framework of Humanitarian Access in Armed Conflict”, No 884 (2011) 93 *International Review of the Red Cross* 993, 999.

²² Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2, 11 February 1998, Principle 25.2, provides that: “[i]nternational humanitarian organizations 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.”

²³ Institute of International Law, Bruges Session 2003, Resolution on Humanitarian Assistance, 2 September 2003, Article VIII provides that: “[a]ffected 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.”

²⁴ Council of Europe recommendation (2006)6 of the Committee of Ministers to Member States on Internally Displaced Persons, 5 April 2006, para 4.

²⁵ International Law Commission, Protection of Persons in the Event of Disaster, draft Article 14, adopted on first reading - Consent of the affected State to external assistance. UN Doc A/CN.4/L.831, 15 May 2014

mentioned rules and instruments requiring consent not to be arbitrarily withheld. More recent Security Council practice (referred to above) acknowledges that arbitrary action leading to denial of humanitarian access would be unlawful.²⁶

C. What amounts to arbitrary withholding of consent?

1. Preliminary conditions

Two conditions must be met before the issue 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 must be 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 humanitarian and impartial in character and carried out without any adverse distinction.²⁷

If these conditions are met, consent may not be arbitrarily withheld.

2. Criteria for determining what amounts to an arbitrary withholding of consent

Despite its centrality to the rules regulating humanitarian assistance, there is little clarity as to what constitutes arbitrary withholding of consent. 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.

The crucial task here is to try to identify what constitutes a valid and compelling reason for refusing consent to a relief operation and what would be an arbitrary or capricious one. While there is no single or all-encompassing definition of “arbitrariness”, IHL, international human rights law (IHRL) and general principles of public international law provide guidance on the type of conduct that would justify the conclusion that an actor is acting arbitrarily in withholding its consent to humanitarian relief operations.

Under international law, the notion of arbitrariness has a wide meaning and it is not always possible to capture in advance all the elements which may render a decision arbitrary. However, certain elements, which are discussed below, may be identified and provide a starting point for considering the issue of arbitrariness for the purpose of humanitarian relief operations.

²⁶ See also General Assembly resolution 46/182, 19 December 1991, Guiding Principle 3.

²⁷ Article 70 AP I. See, Bothe, Partsch and Solf, *supra*, 484-5; 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 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.

Essentially, consent is withheld arbitrarily if it is withheld in circumstances that violate a party's other obligations under international law towards the civilian population in question; if it violates the principles of necessity and proportionality; or if it is withheld in an arbitrary manner.

a. Arbitrariness deriving from illegality under other applicable rules of international law

Although the concept of arbitrariness is broader than “unlawfulness”,²⁸ where international law prohibits arbitrary action, conduct which would violate a party's other obligations under international law is regarded as arbitrary.²⁹ This follows from the general principle according to which the interpretation of a treaty must be carried out taking into account “any relevant rules of international law applicable in the relations between the parties.”³⁰ An example of a case in which the notion of arbitrariness was interpreted by reference to other applicable legal obligations is the International Court of Justice's (ICJ) decision in the *Nuclear Weapons Advisory Opinion* that whether a deprivation of life is to be regarded as arbitrary under Article 6 of the 1966 International Covenant on Civil and Political Rights (ICCPR), in a situation of armed conflict, must be determined by reference to the applicable principles of IHL.³¹

Parties to an armed conflict, and other affected states, must comply with all their applicable obligations under international law. Of particular relevance in determining whether consent has been withheld arbitrarily are the obligations in relation to the civilian population in need of assistance. It may be that the effect of those obligations under IHRL and international criminal law, and other relevant bodies of law, in addition to IHL, is to require those states or parties to accept humanitarian relief operations. In circumstances where the withholding of consent to humanitarian relief operations, by a party to an armed conflict or other relevant state, would amount to a violation of its other applicable obligations in relation to the civilian population in question, such withholding of consent would be arbitrary.³²

In sum, where the preliminary conditions for carrying out a humanitarian relief operation are met, and denial of relief, to those in need of it, would amount to a

²⁸ See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, (3rd ed, 2013), 346, para 11.11.

²⁹ See Kevin Boyle, “The Concept of Arbitrary Deprivation of Life”, in Bertrand Ramcharan (ed), *The Right to Life in International Law*, (1985), 221, 234 speaking both of arbitrary deprivation of liberty and of life.

³⁰ Article 31(3)(2) of the 1969 Vienna Convention on the Law of Treaties. In the *Oil Platforms case (Iran v. USA)*, *I.C.J. Reports* 2003, 161, 182, para 41, the ICJ applied this provision in such a way that that it interpreted a bilateral Treaty of Amity, Economic Relations and Consular Rights by reference to applicable principles of the UN Charter and customary international law.

³¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports* 1996, 226, para 25.

³² See Part D below for analysis of the relationship between IHRL and the rules of IHL relating to relief operations.

breach by the affected state or party of its obligations under other relevant rules of international law in relation to the civilian population in question, the withholding of consent must be considered arbitrary, and therefore in violation of the rules regulating relief operations.³³

A non-exhaustive list of examples of arbitrary reasons for withholding consent, as they would violate obligations under international law in relation to the civilian population in question, would include:

(i) The desire to weaken the resistance of an adversary by depriving the civilian population of its means of subsistence.³⁴ Where a civilian population is facing starvation, withholding consent to a humanitarian relief operation 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.³⁵

(ii) The withholding of consent to medical relief operations, including 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.³⁶ No distinction may be made on any grounds other than medical ones. Withholding consent to medical relief operations and supplies, including on the grounds that they might assist wounded and sick enemy combatants, would violate this rule. Moreover, the same equipment and supplies are also likely to be necessary for the civilian population in areas under the control of another party, who would be denied the assistance to which it is entitled by law.³⁷

³³ Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, *supra*, para 82.

³⁴ Bothe in Kalshoven, *supra*, 94.

³⁵ See, for example, ICRC Commentary to the APs, paras 2808 and 4885. The seriousness of withholding consent in such circumstances 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.

³⁶ See, for example, Article 10 AP I and Article 17 AP II.

³⁷ In fact, in international armed conflicts, Article 23 GC IV, 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 this provision lays down significant rights of supervision, 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.

(iii) Selective withholding of consent with the intent or effect of discriminating against a particular group or section of the population will be arbitrary. For example, systematically rejecting offers of humanitarian assistance for crisis-affected regions populated by ethnic groups perceived as favouring the opposition.³⁸ IHL prohibits adverse distinction founded on race, colour, religion or faith, sex or birth or wealth or any other similar criteria;³⁹ while under IHRL, discrimination on grounds of race, colour, language, religion, national or social origin is prohibited.⁴⁰ Furthermore, discriminatory conduct against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious grounds, when committed in connection with any other international crime may amount to the crime against humanity of persecution under the Statute of the International Criminal Court (ICC).⁴¹

(iv) More generally, withholding of consent that is “likely to endanger the fundamental human rights” of the affected civilians will be arbitrary.⁴² Humanitarian assistance is also often considered from a human rights angle, which requires withholding of consent not to violate particular rights, most notably the rights to physical integrity, or prevent the satisfaction of the minimum core of relevant economic, social and cultural 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.⁴³

Limited guidance exists, however, as to the precise circumstances in which withholding 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

³⁸ Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, *supra*, para 83.

³⁹ Common Article 3 GCs; Article 16 1949 Third Geneva Convention relative to the Treatment of Prisoners of War; Article 13 GC IV; Article 75(1) AP I and Article 4(2) AP II.

⁴⁰ Articles 2(1) and 26 ICCPR and Article 2(2) of the 1966 International Covenant on Economic, Social and Cultural Rights.

⁴¹ Article 7(1)(h) ICC Statute.

⁴² Institute of International Law resolution, *supra*, Article VIII (1).

⁴³ See, for example, Walter Kaelin, *Guiding Principles on Internal Displacement: Annotations*, (revised edition), Studies in Transnational Legal Policy, No.38, The American Society of International Law, (2008), 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, UN Doc A/CN.4/643, 11 May 2011, paras 58-60.

available assistance by national or international humanitarian agencies and organizations, to the fullest extent possible under the circumstances and with the least possible delay.”⁴⁴

Fuller analysis of the role that IHRL may play in determining whether consent to relief operations has been arbitrarily withheld is contained in Part D of this paper below.

b. Arbitrariness as a failure to comply with principles of necessity and proportionality

In order for conduct to be non-arbitrary, it must not only be lawful, but it must also be necessary for achieving the ends sought and a proportionate means of achieving those ends. The notions of necessity and proportionality described here are those which find expression in international human rights law. Human rights tribunals that have interpreted the notion of arbitrariness (in the context of the right to life and the right to liberty) have consistently held that the concept requires that the measure taken was necessary, no more than necessary and proportionate to the end sought to be achieved.⁴⁵

Where consent to relief operations is withheld because of imperative considerations of military necessity, for example if foreign relief personnel could hamper military operations, it may be argued that the withholding of consent is not arbitrary.⁴⁶ However, such consent should not be withheld beyond what military necessity demands. Where it is, such a withholding would violate the principle that measures must not exceed that which is necessary.

The principle of proportionality under IHRL can provide guidance on what would amount to arbitrary limitations on the granting of consent. Limitations in terms of time, duration, location, affected goods and services must not go beyond what

⁴⁴ Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, *supra*, para 69.

⁴⁵ Joseph and Castan, *supra*, 169, para 8.07, referring to cases of the UN Human Rights Committee which hold that in order for use of lethal force to be non-arbitrary and lawful, the use of firearms must be strictly unavoidable. See also *A v. Australia*, Human Rights Committee, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993, para 9.2 (30 April 1997), where it was held that the element of proportionality is relevant in the context of assessing arbitrary deprivation of liberty. See generally, Joseph and Castan, *supra*, 168, para 8.04 & Kälin & Künzli, *The Law of International Human Rights Protection* (2009, OUP), 102: “... the [Human Rights] Committee treats as ‘arbitrary’ all cases of interference with a right that are not reasonable or proportionate in the circumstances, or, in other words, that are not proportional to the end sought and are not necessary in the circumstances of a given case”

⁴⁶ Bothe, Partsch and Solf, *supra*, 485 and 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 at 95. Walter Kaelin, UN Resident Coordinator Induction Programme, New York, 23 February 2013, on file with authors.

is absolutely necessary to achieve the legitimate aim of the state withholding consent.⁴⁷

Furthermore, applied by analogy,⁴⁸ the principle of proportionality under IHL, which requires that the civilian casualties expected from an attack do not exceed the direct and concrete military advantage expected from the operation in question, can also provide guidance. Determining whether consent has been arbitrarily withheld will frequently require a difficult balancing of legitimate military considerations with competing humanitarian ones, akin to that required by this test. Withholding consent where legitimate military considerations are relatively unimportant but the consequent suffering of the civilian population particularly severe could be considered arbitrary.⁴⁹ This is the approach adopted in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea,⁵⁰ and in the Manual on Air and Missile Warfare in relation to naval and aerial blockades respectively.⁵¹

c) Arbitrariness as unreasonableness or capriciousness

International tribunals that have been given the task of determining whether conduct by states is arbitrary have in varying contexts held that “‘arbitrariness’ is not simply to be equated with ‘against the law’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability.”⁵² Furthermore, conduct will be regarded as arbitrary when it is unreasonable in all the circumstances.⁵³ Applied to the context of humanitarian relief operations, withholding of consent will be regarded as arbitrary or capricious if the reasons for withholding consent, though not inherently unlawful, fail to accord with the values that underpin IHL and IHRL. Also, withholding of

⁴⁷ Kaelin, UN Resident Coordinator Induction Course, *supra*.

⁴⁸ Bothe in Kalshoven, *supra*, 95.

⁴⁹ Bothe in Kalshoven, *supra*, 95. Of course, there may be instances when the withholding of consent is not based on military considerations.

⁵⁰ Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, (1995). 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”.

⁵¹ HPCR Manual on International Law Applicable to Air and Missile Warfare, (2009). 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.

⁵² See for example, *Taright v. Algeria*, Human Rights Committee (1085/02), Communication No. 1085/2002, U.N. Doc. CCPR/C/86/D/1085/2002, para 8.3 (2006) speaking about arbitrary deprivation of liberty under Article 9 ICCPR. This idea has been reiterated by the Human Rights Committee in many of its cases such as *A v. Australia*, Human Rights Committee, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993, para 9.2 (30 April 1997).

⁵³ See, for eg, *Taright v. Algeria*, *previous note* and *A v. Australia*, *previous note*. See also Joseph and Castan, *supra*, 168, para 8.04, noting that the case law of UN Human Rights Committee “confirms that ‘arbitrary’ is a broader concept than ‘unlawful’ ... The prohibition on the ‘arbitrary’ deprivation of life signifies that life must not be taken in unreasonable or disproportionate circumstances.”

consent will be arbitrary if the manner in which it is done leads to injustice or lack of predictability.

While IHRL seeks to promote human dignity, IHL recognises that in situations of armed conflict, a balance will need to be struck between the demands of military necessity and the protection of humanitarian interests. As discussed in the previous section, withholding of consent on grounds of military necessity might not be arbitrary, provided the measures taken by the state or party comply with the principles of necessity and proportionality. Examples of arbitrary reasons for withholding consent which fall into the category of inappropriate or unreasonable would be withholding of consent simply because of “State sovereignty, the internal legal order, national pride and/or interests, political orientation, the interests of the regime in power, and similar arguments”.⁵⁴

Where consent to assistance is withheld because the offer does not meet the preliminary conditions provided for by IHL, such a withholding of consent will not be arbitrary. Where a state or party is able to provide an adequate and effective response to the humanitarian needs from its own resources, such a denial of consent will not be in breach of its obligations under IHL with respect to relief operations, since those obligations only apply in cases where the party is unable to meet relevant needs. Also, even where there are unmet needs, if the actor offering its services will not provide the assistance in a principled manner - ie in a manner which is exclusively humanitarian and impartial in character and carried out without any adverse distinction – it will not be arbitrary to refuse consent.⁵⁵

In addition to the points in the previous paragraph, and as the ILC has noted in the area of consent to assistance in the event of natural disasters, “withholding consent to assistance from one external source is not arbitrary if an affected State has accepted appropriate and sufficient assistance from elsewhere”.⁵⁶ However, where an offer of assistance which meets the preliminary conditions for relief operations is made and no alternate sources of assistance are available, there would be a strong presumption that a decision to withhold consent is arbitrary.⁵⁷ These principles will apply equally to relief operations in situations of armed conflict.

An example of an arbitrary withholding of consent on the basis of the unreasonable or capricious manner in which it is done would be a rejection of offers of assistance without providing any reasons, or if the reasons are based on

⁵⁴ *Institute of International Law Yearbook*, Vol 70, Part I, 2002-2003, 563.

⁵⁵ Article 70 AP I. See, Bothe, Partsch and Solf, *supra*, 484-5; 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.

⁵⁶ Commentary to Draft Article 11, International Law Commission’s Draft Articles on the Protection of Persons in the Event of Disaster, Report of its sixty-third session, UN Doc A/66/10, 270, para 7.

⁵⁷ *Ibid.*, para 7.

errors of fact, for example, a denial of humanitarian needs without a proper assessment.⁵⁸ While it is uncertain precisely who a party to a conflict is obligated to give reasons to, and whereas that party may not be under an obligation to respond individually to each offer of humanitarian assistance, a blanket failure to provide reasons for withholding consent would be an example of lack of predictability and capriciousness which are indicators of arbitrariness. A failure to provide reasons for withholding consent, in cases where the preliminary conditions for humanitarian relief appear to be met, would make it impossible to assess whether there are valid reasons underlying the refusal of consent. The obligation to provide reasons is a procedural obligation which allows the substantive obligations relating to humanitarian relief operations to be monitored and given effect to. As the ILC has stated in the context of natural disasters, “[t]he provision of reasons is 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”.⁵⁹

However, the ILC has also “recognized that a rigid duty formally to respond to every offer of assistance may place too high a burden on affected States”⁶⁰ and was of the view that maximum flexibility should be given to affected states to decide how best to respond to offers of assistance. It considered that there was “a wide range of possible means of response, including a general publication of the affected State’s decision regarding all offers of assistance”.⁶¹

3. 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:

- *compatibility with other obligations under international law in relation to the civilian population in question*: if withholding consent amounts to a violation of the affected state’s other international obligations *in relation to the civilian population in question* it will be arbitrary. Examples include violations of: the prohibition of starvation of the civilian population as a method of warfare; 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; the prohibition of discrimination; or the rights to physical integrity, the minimum core of relevant economic, social and cultural rights.

⁵⁸ Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, *supra*, para 82.

⁵⁹ Commentary to Draft Article 11, International Law Commission’s Draft Articles on the Protection of Persons in the Event of Disaster, Report of its sixty-third session, *supra*, para 8.

⁶⁰ *Ibid.*, para 9.

⁶¹ ⁶¹ *Ibid.*, para 9.

- *Whether the withholding of consent is necessary and is not a disproportionate means for achieving a legitimate objective*
 - For example, the location of the proposed relief operations should be considered: 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, if it is because the local population is viewed as supportive of the enemy.
 - The timeframe: what may constitute valid reasons for withholding access, 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.
- *Whether the withholding of consent is reasonable and pursues a legitimate objective.* This may depend on consideration of factors such as the following:
 - 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 type of assistance that is needed?

D. International Human Rights Law and Relief Operations

Although the rules on the conduct of relief operations in situations of armed conflict are derived principally from IHL, it has already been noted above that International Human Rights Law (IHRL) also contains rules that are relevant to the interpretation and application of the rules of IHL and may provide guidance in determining the circumstances in which consent is arbitrarily withheld.

It is useful to recall that a state’s obligations under IHRL continue to apply in time of armed conflict. The ICJ has stated that: “the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict ...”⁶² Moreover, a number of international tribunals and/or mechanisms

⁶² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion *I.C.J. Reports* 2004 136, para 106. Some human rights treaties provide that states may take measures which derogate from some of their obligations in time of public emergency, including in time of armed conflict, eg Article 4 ICCPR.

(the ICJ;⁶³ the UN Human Rights Committee;⁶⁴ the European Court of Human Rights (ECtHR);⁶⁵ and the Inter-American Commission on Human Rights⁶⁶) have confirmed that a state's human rights obligations will continue to apply outside of that state's sovereign territory where the state exercises effective control over the territory of another state, for example through occupation.⁶⁷

In time of armed conflict, IHL and IHRL are to be applied in a complementary manner. As indicated in Part C above, treaties are to be interpreted taking into account “any relevant rules of international law applicable in the relations between the parties”.⁶⁸ This principle of “co-ordinated interpretation” means that obligations under IHL and IHRL are to be applied in parallel and simultaneously. In particular, the principle of co-ordinated interpretation means that obligations existing in one of these areas of law can be given content and elaborated on by reference to obligations of the state in the other area of law. This is particularly true in cases where the obligation in one area of law uses concepts and notions of a general character – like “arbitrary” – that need to be given more specific content by reference to the circumstances of particular cases. The content of such notions depends on the interactions between general principles animating the law and that particular scenario being considered.

An example of the complementary application of IHL and IHRL can be seen in ICJ's decision in the *Nuclear Weapons Advisory Opinion* to the effect that, in time of armed conflict, “in principle, the right not arbitrarily to be deprived of one's life, ... falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”⁶⁹ In other words, a breach by a state of its IHL obligations with regard to protection of life in time of armed conflict would amount to a breach of its IHRL obligation to respect the right to life. Moreover, the content of one obligation was determined by reference to obligations in the other area of law.

With respect to relief operations, IHRL provides guidance on two issues. First of all, as developed in Part C above, IHRL provides guidance in determining what is an “arbitrary” withholding of consent. Secondly, IHRL provides guidance on the

⁶³ See, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra*, paras 107–113.

⁶⁴ Human Rights Committee, General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 10.

⁶⁵ *Loizidou v Turkey*, Preliminary Objections, 310 ECtHR, Series A, paras 62–64 (1995); *Al-Skeini v United Kingdom*, App No 55721/07, Grand Chamber, Judgment, 7 July 2011; and *Al-Jedda v United Kingdom*, App No 27021/08, Grand Chamber, Judgment, 7 July 2011.

⁶⁶ *Coard and others v United States*, Case 10.951, Report no 109/00, IACiHR, 29 September 1999, para 37.

⁶⁷ See, for example, Human Rights Committee, General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 10; *Loizidou v Turkey*, Preliminary Objections, 310 ECtHR, Series A, paras 62–4 (1995). On the extraterritorial application of human treaties, see generally, Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (2011).

⁶⁸ Article 31(3)(c) 1969 Vienna Convention on the Law of Treaties.

⁶⁹ *Nuclear Weapons Advisory Opinion*, *supra*, para 25.

sort of assistance that may validly be provided in relief operations mandated by IHL. With regard to the former, IHRL provides a more developed body of rules regarding arbitrariness which help to illuminate the scope and substance of this legal concept. With regard to the latter, IHRL establishes rules which provide substantive rights and obligations with regard to humanitarian assistance which must be taken into account in interpreting and applying the rules of IHL on relief operations. In particular, the right to physical integrity, including the right to life; the right to adequate food, clothing and housing; and the right to an adequate standard of living remain applicable in time of armed conflict and provide benchmarks for the interpretation and application of the rules on relief operations.

1. “Arbitrariness” under IHRL

The notion of “arbitrariness” is one that is used in several areas of IHRL. For example, under the ICCPR states may not “arbitrarily” deprive individuals of their life or their liberty and may not engage in arbitrary interference with privacy, family, home or correspondence.⁷⁰

Where IHRL prohibits arbitrary conduct, the notion of arbitrariness has been interpreted to mean that the conduct in question is “unreasonable”, “disproportionate”, “unnecessary” or “includes elements of inappropriateness, injustice and lack of predictability.”⁷¹ Taking the case law of human rights tribunals into account, conduct will be regarded as arbitrary under IHRL, where it falls into one of the following categories:

- the conduct does not pursue a legitimate objective (which means an objective that is in accordance with the principles, aims and objectives of the law);⁷²
- the measure taken is more than is necessary for the achievement of that legitimate aim;⁷³ and

⁷⁰ See Articles 6, 9(1) and 17(1) ICCPR. Although the European Convention on Human Rights does not express these same rights by reference to arbitrariness, that Convention establishes rules that are practically equivalent to those on arbitrariness set out in the next paragraph.

⁷¹ *Suárez de Guerrero v Colombia* (Human Rights Committee, 1982) with regard to the right to life; *van Alphen v. Netherlands* (Human Rights Committee, 1990) with regard to deprivation of liberty; *General Comment No. 16* (with regard to arbitrary interference with privacy, family, home and correspondence): “[t]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objective of the Covenant and should be, in any event, reasonable in the particular circumstances.” *Toonen v Australia* (Human Rights Committee, 1994): “[t]he Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case”.

⁷² *General Comment No. 16*: arbitrariness indicates that interference “should be in accordance with the provisions, aims and objective of the Covenant”.

⁷³ *Toonen v Australia* (Human Rights Committee, 1994, para 8.3): the concept of arbitrariness means that interference with rights must be reasonable and “the requirement of reasonableness ... impl[ies] that any interference ... must be proportional to the end sought and be necessary in the circumstances of any given case”; *van Alphen v. Netherlands* (Human Rights Committee, 1990, para 5.8): the prohibition of arbitrary deprivation of liberty means that “remand in custody must be necessary in all the circumstances” to achieve certain permitted aims; *Suárez de Guerrero v*

- there is not a reasonable relationship of proportionality between harm caused by the conduct and the aim sought to be achieved.⁷⁴

Thus, for the withholding of consent to a relief operation to be lawful, consent must be withheld for a reason which accords with the principles, aims and objectives of the relevant IHL treaties. A withholding of consent that seeks an objective that is at odds with IHL would not be one consistent with the requirement that consent not be arbitrarily withheld. Thus, although the concept of arbitrariness is not synonymous with a requirement of legality,⁷⁵ conduct which is aimed at achieving an unlawful purpose will invariably be arbitrary or unreasonable.⁷⁶ Therefore, if the reason for the withholding of consent to relief operations is to achieve an aim that would violate the state's other obligations under IHL or IHRL (eg starvation of the civilian population or discrimination against a particular group) or other rules of public international law, the refusal to consent will be deemed arbitrary.

Furthermore, even where the state withholding consent may have legitimate grounds for doing so (perhaps military necessity), the measures it takes and their effect must comport with the principles of necessity and proportionality, and, therefore, must not exceed those which are strictly required. Therefore, the broader the withholding of consent, in terms of time, the areas covered, the affected populations and the relief operations precluded, the more likely it is to fall foul of the requirement of necessity and proportionality.

2. Humanitarian assistance under IHRL

In addition to the guidance that IHRL provides with regard to the content of arbitrariness, it should be recalled that IHRL also recognises rights which, in turn, may impose substantive obligations on states to permit (and certainly not to prevent) the conduct of relief operations. Denial by states of access to materials which are essential for survival will be a violation of the right to life,⁷⁷ which is non-derogable and therefore applicable in time of armed conflict.⁷⁸

Colombia (Human Rights Committee, 1982, para 13.2): the prohibition of arbitrary deprivation of life meant in that case that action of the police must be necessary for self-defence, to effect arrest or to prevent escape.

⁷⁴ *Toonen v Australia* (Human Rights Committee, 1994, para 8.3); *van Alphen v. Netherlands* (Human Rights Committee, 1990, para 5.8): the prohibition of arbitrary deprivation of liberty means that remand in custody must "be reasonable in all the circumstances".

⁷⁵ *Elettronica Sicula SpA (ELSI), United States v Italy*, Judgment, Merits, *I.C.J. Reports* 1989 15, para 124. It should be noted that the ICJ was discussing illegality under national law as opposed to illegality under international law.

⁷⁶ Oliver Corten, "Reasonableness in International Law", *Max Planck Encyclopedia of Public International Law*, (2006), para 16.

⁷⁷ In General Comment No. 6, para 5, the Human Rights Committee noted that the right to life cannot properly be understood in a restrictive matter and that protection of the right requires states to adopt positive measures, eg to eliminate malnutrition and epidemics. See also, Walter Kaelin and Jorg Kunzli, *The Law of International Human Rights Protection*, (2009), 303: "[t]he scope of human-rights-based protection of life is not confined to minimizing the risk of being killed. Access to the basic necessities of life, such as food, shelter and, in the case of life-threatening health problems, minimum medical treatment is equally relevant if not even more

Similarly, the rights provided for in the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) continue to apply in time of armed conflict and will inform the obligation to accept relief operations as well as the content of such operations. Unlike the ICCPR, the ICESCR does not have a derogations clause. Moreover, the ICJ has confirmed that the provisions of this treaty continue to apply in occupation and armed conflict.⁷⁹

Under the ICESCR, everyone has a right to an adequate standard of living, including adequate food, clothing and housing. In addition, under Article 12(1) of the Covenant, States parties recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. Although these rights are to be achieved progressively, there are elements of the rights which entail immediate obligation for states, including states involved in armed conflict. These rights, like others, impose three types of obligations on states: to *respect*, to *protect* and to *fulfil*.

The elements of the rights provided for under the ICESCR relevant to relief operations in times of armed conflict may be summarised as follows:⁸⁰

- obligations of availability: there is a duty make the object of the right (food, water, health services, shelter etc) available;
- the obligation of accessibility: the objects of the right have to be accessible to everyone without discrimination on unjustifiable grounds; and
- the obligation of acceptability and quality – the object of the rights must be culturally acceptable and of sufficient quality.

With respect to the right to food (which also includes the right to water), the obligation to respect entails the obligation to respect existing access to adequate food, which also entails an obligation not to take measures that result in preventing such access. The obligation to protect requires that states take measures to ensure that individuals are not deprived of access to adequate food by other actors. The obligation to fulfil includes an obligation to facilitate access to food, and, in certain circumstances, an obligation to provide adequate food. Despite the progressive nature of some of these obligations, states have an obligation to make every effort to ensure the minimum essential level required to be free from hunger.⁸¹ Moreover, the Committee has stated that if a state claims

important for survival in situations where such access is being blocked or where basic goods are simply not available.”

⁷⁸ Article 4(2) ICCPR. Under Article 15(2) of the 1951 European Convention for the Protection of Human Rights and Fundamental Freedoms, the right to life is derogable only in respect of lawful acts of war.

⁷⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra*, paras 106 and 112.

⁸⁰ See Kaelin and Kunzli, *supra*, 304.

⁸¹ General Comment No. 12 “*The right to adequate food (Art.11)*”, Committee on Economic, Social and Cultural Rights, UN Doc E/C.12/1999/5.

that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, it must demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations, including that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.⁸²

The Committee on Economic, Social and Cultural Rights has stated that it would be a violation of the right to food for a state to prevent humanitarian food aid in time of armed conflict.⁸³ Also, unjustifiable discrimination in providing or permitting access to food would be a violation of a state's obligations under the ICESCR.⁸⁴

The Committee has, in the course of its examination of states' obligations under the ICESCR, made concrete findings to the effect that depriving civilians of access to food and humanitarian assistance, in a situation of armed conflict, amounted to a violation of the right to food. In its 2010 concluding observations on the report of Sri Lanka:

“[t]he Committee expresses deep concern about allegations according to which during the last months of the armed conflict in 2009, civilians were deliberately deprived of food, medical care and humanitarian assistance which constitute violations of article 11 of the Covenant as well as of the international humanitarian prohibition of starvation and may amount to a war crime. (art.11)

In light of its general comment No.12 (1999) on the right to adequate food, the Committee draws the attention of the State party to the fact that the prevention of access to humanitarian food aid in internal conflicts constitutes a violation of article 11 of the Covenant as well as a grave violation of international humanitarian law. The Committee encourages the State party to fully cooperate with the United Nations Secretary-General's panel on accountability.”⁸⁵

⁸² General Comment No. 12: “*The right to adequate food (Art. 11)*”, *supra*, para 17.

⁸³ General Comment No. 12 “*The right to adequate food (Art.11)*”, *supra*, para 19: “[v]iolations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States. These include: ... the prevention of access to humanitarian food aid in internal conflicts”.

⁸⁴ General Comment No. 12 “*The right to adequate food (Art.11)*”, *supra*, para 18: “any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.”

⁸⁵ CESCR, Concluding observations: Sri Lanka, UN Doc E/C.12/LKA/CO/2-4, 9 December 2010, para 28.

In summary, IHRL provides guidance with respect to the concept of arbitrariness, supplying elements for identifying conduct that falls within the scope of that concept. Secondly, IHRL provides substantive obligations which are complementary to the obligations under IHL with regard to relief operations. These obligations provide additional content which are to be applied together with the obligations under IHL.

E. 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 relief operations is not addressed by treaty law. However, it can be presumed that a state is 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 is an arbitrary withholding of consent to what would be an arbitrary withdrawal of consent.

States may withdraw consent expressly, by instructing actors to terminate their operations, as was the case when a number of international NGOs were instructed to leave Sudan following President Bashir's indictment by the International Criminal Court in 2009.

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". However, such states are 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 are violations of the obligation to allow and facilitate rapid and unimpeded passage of relief operations of a nature and extent to effectively

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.

amount to a withdrawal of consent? This determination must be made on an actor-by actor basis, in view of 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 (or is responding) to and whether it was operating in a principled manner.

It would appear that states have a narrower discretion in withdrawing consent to relief operations than in granting it in the first place. Arguably, they would have to demonstrate that the specific 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

F. Legal 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 any unauthorised relief operations.

In addition to IHL, other areas of 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 actor doing so. While all actors - states, international organisations and private actors, such as NGOs – must comply with the rules of IHL relating to relief operations if they want their operations and staff to benefit from the safeguards contained in those rules, the rules on sovereignty, territorial integrity and non-interference are not directly binding on private actors. Instead, their actions are subject to the domestic law of the state where they operate.

⁸⁸ Article 70(3) AP I.

⁸⁹ Consultations of legal experts carried out by authors.

What is clear, possibly counter-intuitively, is that 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 limited circumstances.

1. 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 implementing such operations, violate a number of rules of public international law.

a. 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 and supplies lose their civilians status and consequent immunity from attack. However, in such circumstances, states' duty to allow and facilitate rapid and unimpeded passage of relief supplies and personnel does not arise. In such circumstances humanitarian staff, supplies and equipment 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.

b. State sovereignty and territorial integrity

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

c. Prohibition of interference

The 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 ...⁹⁰

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

⁹⁰ *Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. United States of America*), Merits, Judgment, 27 June 1986, *ICJ Reports* 1986, para 242.

intervention. In its brief consideration of humanitarian assistance, the Court focused on the need for it to be delivered in a principled manner.⁹¹ 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 this was on valid grounds.⁹²

Commentators differ in their interpretation of this aspect of the judgment.⁹³ For one thing, it is not clear that the Court was considering the unauthorised provision of assistance *into* the affected state. It has been suggested that the decision relates only to the provision of relief items at the border to actors operating in-country.⁹⁴ To the extent that the decision does not relate to the provision of assistance into the affected state, the fact the provision of such humanitarian assistance does not amount to intervention does not affect the need for relief operations into the affected state to comply with other rules of international law. Unauthorised relief operations into a country in situations 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.

d. Domestic law

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

Instead, the staff of NGOs do not ordinarily benefit from privileges and immunity, so could face proceedings under the domestic law of the state where they provided the unauthorised assistance 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.⁹⁵

While an affected state may also consider unauthorised relief operations by states and international organisations a violation of its domestic law, ordinarily, the staff of international organisations are entitled to privileges and immunities

⁹¹ *Ibid.*, paras 242 and 243.

⁹² 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 the assistance was provided without the consent of the affected state.

⁹³ See Stoffels, *supra*, 309 and references therein.

⁹⁴ 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. Dieter Schindler, "Humanitarian Assistance, Humanitarian Interference and International Law", in Ronald St John MacDonald (ed), *Essays in Honour of Wang Tieya*, (1993), 689, 698-699.

⁹⁵ 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.

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 of bilateral agreements concluded with host states, including immunity from legal processes before domestic courts.

2. Unauthorised operations where consent is withheld arbitrarily

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 response thereto.

a. Duty to ensure respect for IHL

It has been suggested that such relief operations are permissible.⁹⁶ According to this view, if consent is arbitrarily withheld, the violation of the affected state's territorial integrity would be justified as an implementation of states' duty under common Article 1 GCs and AP I to ensure respect for IHL.⁹⁷

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 could justify the unauthorised operations of states, international organisations and the ICRC.⁹⁸

More fundamentally, even only considering operations carried out by states, the undertaking to ensure respect for IHL under Common Article 1 cannot justify a 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.⁹⁹

b. Grounds 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.¹⁰⁰ Two possible grounds could be possibly be relied upon: counter-measures and necessity.

i. Counter-measures

⁹⁶ Bothe in Kalshoven, *supra*, 96.

⁹⁷ Bothe in Kalshoven, *supra*, 95.

⁹⁸ Bothe in Kalshoven, *supra*, 95-96.

⁹⁹ In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra*, para 159, the ICJ 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.

¹⁰⁰ 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.

To be lawful, counter-measures must meet a number of conditions, only some of which warrant highlighting here.¹⁰¹ 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. Secondly, the purpose of the counter-measure must be to induce the wrong-doing state to comply with its obligations. 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.

Some of these conditions – notably the requirements that countermeasures be brought by a state or international organisation directly affected by the violation and that they be proportionate to the harm suffered by such party – could be side-stepped by relying on the increasingly accepted notion of “third party” countermeasures in response to violations of *erga omnes* obligations ie obligations owed to the international community as a whole.¹⁰² If it is accepted that IHL lays down *erga omnes* obligations, states and international organisations not directly affected by a violation of IHL, such as the arbitrary withholding of consent to relief operations, would nonetheless be entitled to take countermeasures.

Countermeasures may not in any circumstance violate the prohibition on the threat or use of force.¹⁰³ Authorised relief operations may not therefore be implemented by the armed forces. In addition, even with respect to countermeasures in response to violations of *erga omnes* obligations, the obligation of proportionality must be respected. In considering whether the imposition of counter-measures is proportionate, consideration must be given “not only [to] the purely ‘quantitative’ element of the injury suffered, but also ‘qualitative’ factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach.”¹⁰⁴ Furthermore, assessment of proportionality must take into account “the gravity of the internationally wrongful act, and the rights in question.”¹⁰⁵ Since the right of a state not to have its territorial integrity violated is a key attribute of statehood, breach of this right can only be justified as a countermeasure (even when it occurs without a use of force) in the most extreme cases. It will need to be shown that the failure of the

¹⁰¹ 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.

¹⁰² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion *I.C.J. Reports* 2004 136, para 157. The ICRC Commentaries also suggest this. See, for example, ICRC Commentary to the APs, para 45.

¹⁰³ ILC Article 50 on State Responsibility.

¹⁰⁴ ILC Commentary to ILC Article 51 on State Responsibility, para. 6.

¹⁰⁵ ILC Commentary to ILC Article 51 on State Responsibility, para. 6.

party to the conflict to authorise or facilitate humanitarian relief operations amounts to a particularly serious breach of international law with grave consequences.

ii. 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.¹⁰⁶

The essential interest to safeguard can be that of the state or international organisation taking the unauthorised measure or of the international community.¹⁰⁷ 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. Such alternative methods could be the provision of assistance through actors authorised to operate.

In view of the above, necessity could be invoked to justify an exceptional 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.¹⁰⁸

4. Conclusion

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

- if consent is withheld validly, unauthorised relief operations are unlawful.

¹⁰⁶ 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.

¹⁰⁷ Commentary to ILC Article 25 on State Responsibility.

¹⁰⁸ Arguably, necessity could also be invoked in situations where consent to relief operations has been withheld validly. 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 case of protracted hostilities.

- If consent is withheld arbitrarily, 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 as counter-measures or under the principle of necessity. Unauthorised operations by private actors would expose their staff to the risk of proceedings before the courts of the affected state.

G. Legal consequences for the party arbitrarily withholding consent

The discussion so far has focused on the parties trying 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 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 by the withholding of consent 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.

On a small number of occasions the Security Council has adopted binding decisions in relation to relief operations.¹⁰⁹ Careful scrutiny of early precedents reveals that, although addressing impeded relief operations, the Council in those early cases 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. Resolutions 2139 and 2165 (2014) on Syria marked important departures from previous practice. In the former resolution, the Security Council, for the first time, demanded that all parties promptly allow rapid, safe and unhindered humanitarian access including across conflict lines and across borders.¹¹⁰ In resolution 2165, the Council authorised the conduct of a humanitarian relief operation without the consent of the government.

In terms of individual responsibility, arbitrary withholding of consent to relief operations is not listed as a grave breach of the Geneva Conventions or of

¹⁰⁹ See, for example, Security Council resolution 781 (1992), 9 October 1992, OP 1, on Bosnia-Herzegovina; and Security Council resolution 794 (1992), 3 December 1992, OP 10, on Somalia. See also Security Council resolution 688, 5 April 1991, OP 3 and OP 6, on Northern Iraq and Security Council resolution 2165, 14 July 2014 on Syria.

¹¹⁰ Security Council resolution 2139, (2104), 22 February 2014, OP 6.

Additional Protocol I and it was not included in the list of war crimes of any of the *ad hoc* tribunals.

However, 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.”¹¹¹ This crime is only applicable to international armed conflicts. However, under Article 7(1)(b) and 7(2)(b) of the Statute of the ICC, “intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring out the destruction of part of a population” would amount to the crime against humanity of “extermination”, when committed as part of a widespread or systematic attack against a civilian population and with knowledge of the attack. To date, allegations of these crimes have not been included in any investigations by the ICC.

On some occasions, the Security Council has adopted resolutions that provide for the imposition of targeted sanctions on persons obstructing the delivery of, access to, or the distribution of humanitarian assistance. This was done in Security Council resolution 1844 (2008) on Somalia;¹¹² Security Council resolution 1857 (2008) on the Democratic Republic of Congo,¹¹³ and in Security Council resolution 2134 (2014) on the Central African Republic.¹¹⁴ 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.¹¹⁵

¹¹¹ Article 8(2)(b)(xxv) ICC Statute.

¹¹² 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.

¹¹³In 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.

¹¹⁴ 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.

¹¹⁵ 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.

A number of possible avenues thus exist for holding responsible parties and persons who have arbitrarily withheld consent to relief operations, however there has not, thus far, been extensive recourse to such mechanisms. This should not be taken as implying that the rules have never been complied with; as parties initially withholding consent may have eventually granted their consent following negotiations and or other diplomatic ways of encouraging them to comply with their obligations.