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IHL Rules on Humanitarian Access and Covid-19

Background:

Populations in armed conflicts, weakened by years of fighting, destruction, erosion of basic services, and displacement, are particularly vulnerable to the spread of Covid-19 in the current pandemic. Many of them depend on humanitarian relief for their survival: displaced persons, detainees, and populations under siege or cut off from basic services.

Yet, as States take measures to contain the spread of Covid-19 (such as restrictions on international travel), freedom of movement of humanitarian workers, transport of medicines and other goods, and humanitarian operations are hampered, leaving some populations without support.

Finding a balance between the legitimate right (and duty) of States to protect public health, and the need for humanitarian relief and access by impartial humanitarian organizations, requires constant dialogue.

International humanitarian law (“IHL”, or the law of armed conflict) provisions give parties to the conflict, third States and international humanitarian organizations important ground rules to guide the dialogue on humanitarian access and the provision of humanitarian activities, including when a pandemic erupts in times of armed conflict. IHL rules governing humanitarian access, in conjunction with general international law, set a framework for what each actor may and may not do while striking a balance between health imperatives, military necessity and humanitarian action.

Key messages:

- Measures taken by States to tackle the Covid-19 pandemic do not exist in a legal void and must be consistent with all applicable rules of international law, including IHL. IHL rules on humanitarian access are not displaced by health regulations and other measures taken by belligerents and third States to combat the spread of Covid-19.
- Impartial humanitarian organizations must seek and obtain consent from the authorities to deliver their activities, including in the context of Covid-19. Consent to humanitarian operations is not discretionary and arguments based on the necessity to counter the spread of Covid-19 are not valid grounds under IHL to deny consent to humanitarian activities undertaken by impartial humanitarian organizations such as the International Committee of the Red Cross (ICRC). Under IHL, permissible grounds to deny such consent are limited and are set out below.
- States are entitled under IHL to prescribe measures of control and other technical arrangements based on health considerations in order to regulate the humanitarian activities they have given their consent to. However, such measures and arrangements cannot, in practice, end up amounting to a refusal of consent, unduly delay humanitarian operations, or make their implementation impossible.



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What does IHL say on humanitarian access when a pandemic erupts in times of armed conflict?

Although the relevant rules vary slightly depending on the nature of the conflict (international armed conflict - “IAC” or non-international armed conflict - “NIAC”), **the IHL framework governing humanitarian access can be summarized into four steps – all of which continue to apply when pandemics occur during an armed conflict:**

- 1) Each party to an armed conflict bears the primary obligation to meet the basic needs (including in terms of health) of the population under its control;
- 2) impartial humanitarian organizations have the right to offer their services in order to carry out humanitarian activities, in particular when the needs of the population are not fulfilled;
- 3) impartial humanitarian activities undertaken in situations of armed conflict are generally subject to the consent of the parties to the conflict concerned; and
- 4) once impartial humanitarian relief schemes have been agreed to, the parties to the armed conflict, as well as all States that are not a party thereto, must allow and facilitate the rapid and unimpeded passage of the relief schemes, subject to their right of control, as outlined below.

1. The primary obligation to meet the basic needs of the population:

The obligation to meet the basic needs of populations is derived from general international law, a number of rules of IHL and human rights obligations of States. These include, amongst others, the obligation to treat humanely persons who are in the power of a party, and the fundamental right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. Offer of services by impartial humanitarian organizations:

Articles 3 and 9/9/9/10 of the four Geneva Conventions of 1949 spell out the so-called “right of initiative” i.e. the legal entitlement given to impartial humanitarian organization to propose their activities to all Parties to an armed conflict. Under IHL, nothing (including pandemic-related measures) restrains the right of such organizations to offer their services. On the contrary, pandemics can place belligerents’ ability to meet the basic needs of the population under considerable strain and therefore render humanitarian activities even more necessary and relevant.

3. Consent of the parties:

Under IHL, impartial humanitarian organizations operating in situations of armed conflict must seek and obtain the consent of the parties to the conflict concerned, including when pandemics affect the territory under their control.

However, **consent to humanitarian operations is not discretionary**. IHL is not entirely deferential to State sovereignty when it comes to humanitarian operations. The question of whether a party to armed conflict may lawfully turn down an offer of humanitarian services is intrinsically linked to its obligations vis-à-vis the population under its control, notably its ability to fulfil its primary obligation to meet the basic needs of that population. In the view of the ICRC, if a belligerent is not in a position to fulfil its primary obligation to meet the basic needs of the



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population under its control, it must consent to the humanitarian activities of impartial humanitarian organizations, including in the field of health.

There are only two grounds that may be invoked to turn down such an offer of services: 1) when an offer of services comes from an organization that does not qualify as impartial or the activities of which are not humanitarian in nature; or 2) when there are simply no needs to meet in the area in question, because, for instance, the party to an armed conflict has the capacity and is willing to fulfill its primary obligation itself.

In sum, under IHL, the necessity to counter the spread of Covid-19 alone is not a valid ground to deny consent to humanitarian activities undertaken by impartial humanitarian organizations such as the ICRC.

Such a refusal may also amount to an unlawful denial of consent when it results in a separate violation of the party's own IHL obligations. This will be the case, for instance, when a party's refusal results in the starvation of civilians as a method of warfare as prohibited under customary IHL or when such refusal would prevent it from fulfilling its primary obligation, referred to above, by depriving the population of supplies essential for its survival, including in the field of health.

4. On the obligation to allow and facilitate relief operations and the right to impose measures of control:

Once relief actions have been agreed to, the belligerents are under an obligation to take positive action to facilitate humanitarian operations while still being **entitled to prescribe technical arrangements, i.e. measures of control**. This is where States, parties to conflicts and humanitarian organizations must find a balance through **dialogue** based on **good faith** and the importance to **preserve principled humanitarian action and medical ethics** –the need to provide basic needs to affected populations being the guiding principle.

On the one hand, parties to the conflict and third states are expected to provide “all facilities” needed for an organization to carry out its agreed humanitarian activities appropriately. In the context of Covid-19, this may include:

- Considering the work of impartial humanitarian organizations as an essential service, and humanitarian personnel accredited by authorities as essential workers benefiting from waivers of movement restrictions;
- Simplifying administrative formalities as much as possible to facilitate visas or other immigration issues (waiving entry-visa requirements for personnel participating in humanitarian operations or establishing a simplified and expedited “transit” visa);
- Speeding up the delivery of field-trip approvals;
- Expediting customs procedures and granting priority to consignments of humanitarian supplies and equipment;
- Allowing the passage of consignments free of charge by not levying entry and exit taxes and other fees; and
- Exempting humanitarian flights from any existing ban on international flights and allowing priority landing of airplanes carrying humanitarian assistance supplies.



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On the other hand, public health concerns that states may have regarding authorizing humanitarian operations could be addressed by adequate measures of control. Technical arrangements, for instance, could take several forms, such as:

- Ensuring that humanitarian supplies and equipment meet minimum health standards. For example, medications may have to be approved for use in both the originating and receiving state or be prequalified by the World Health Organization;
- Requiring that personnel participating in humanitarian schemes be medically vetted, vetted to not be contagious, and/or sufficiently equipped to avoid spreading further the pandemic;
- Adapting medical activities in order to avoid or limit as far as possible the gathering of persons in ICRC-run medical centers, transfer of ICRC patients not infected by the virus in case the authorities decide to designate a hospital as being exclusively dedicated to Covid-19 affected people;
- Foreseeing alternate methods of delivering assistance and providing services to internally displaced persons and host communities. For example, food distribution can be done in phases and in smaller groups to avoid congregation of too many people at once;
- Adjusting, when feasible, ICRC detention activities according to the prevailing circumstances in order to avoid cross-contamination risks (up to suspension of visits). For instance, discussions with authorities or detainees (including interviews without witnesses) in the open air at a 2 metre distance, distribution of Red Cross messages through authorities or detainee leaders; and
- In detention settings, if family visits or visits of humanitarian personnel are suspended to avoid the spread of the virus, finding alternative means of keeping detainees in contact with the outside world, and the ICRC is ready to assist in this.

Technical arrangements to preserve health shall be applied in good faith, taking into account that peace time measures may not be appropriate in situations of armed conflict, where the fate of civilians already in need is aggravated by pandemic.

In order to find adequate technical arrangements, dialogue is critical, and good practices should be sought from experience in health settings on how to preserve medical services while avoiding further contagion. Good practices should also be sought from past experiences of humanitarian organizations accessing areas with widespread disease, such as Ebola outbreaks and cholera pandemics.

The technical arrangements may not, however, be such that, for all practical intents and purposes, they amount to a refusal of consent, unduly delay humanitarian operations, or make their implementation impossible.

More information on humanitarian access in IHL is available in the ICRC's Q&A and Lexicon on Humanitarian Access, available at <https://www.icrc.org/en/doc/assets/files/2014/icrc-q-and-a-lexicon-on-humanitarian-access-06-2014.pdf>.

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