

# The law regulating cross-border relief operations

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## Abstract

*In view of the challenges frequently encountered in providing assistance to civilians in opposition-held territories, consideration is sometimes given to cross-border relief operations. Such operations raise numerous legal questions, including whose consent is required; what constitutes arbitrary withholding of consent; what the consequences of withholding of consent are, both for those wishing to provide assistance and for the parties withholding consent; and what alternatives exist for providing assistance in such circumstances.*

**Keywords:** cross-border relief operations, consent of the affected state and the opposition, arbitrary withholding of consent, medical supplies and relief operations, starvation of the civilian population, unauthorised relief operations, state sovereignty, territorial integrity, non-interference, domestic law, assistance in the wrongful act of another state, circumstances precluding wrongfulness, counter-measures, necessity, indirect provision of assistance, binding Security Council decisions.

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## Introduction

On a number of occasions in recent years, humanitarian actors have struggled to provide assistance to civilians in opposition-held territories because of a reluctance on the part of the affected state to allow their operations. Recent efforts to assist people affected by conflict in Syria and in the Sudanese states of South Kordofan and Blue Nile have raised the problem once again and highlighted the variety of views and practices among humanitarians.<sup>1</sup>

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

## Preliminary remarks

A number of preliminary points are warranted before proceeding to an analysis of the law. First, the present article addresses humanitarian relief operations: the provision of supplies and services that are exclusively humanitarian in nature and essential to the survival of the civilian population, such as food, water, medical supplies, clothing and means of shelter. It does not consider the related question of how to enhance the protection of civilians. It therefore does not touch upon concepts such as ‘humanitarian intervention’ or ‘responsibility to protect’ inasmuch as, in their current articulation, these concepts focus on preventing and putting an end to genocide, crimes against humanity and war crimes.

Second, the term ‘cross-border operations’ is neither used in any treaty, nor defined anywhere. It is commonly employed to refer to the provision of assistance from the territory of third states. This can be done in a number of ways, including by so-called ‘remote management programming’<sup>2</sup> or by the provision of relief supplies from neighbouring states to actors operating in the affected state.

1 On Syria see, for example, *Humanitarian Exchange Magazine*, No. 59: *The Conflict in Syria*, November 2013, published by the Humanitarian Practice Network at the Overseas Development Institute, available at: [www.odihpn.org/humanitarian-exchange-magazine/issue-59](http://www.odihpn.org/humanitarian-exchange-magazine/issue-59). On Blue Nile and South Kordofan see, for example, Irina Mosel and Ashely Jackson, *Talking to the Other Side: Humanitarian Negotiations in Southern Kordofan and Blue Nile, Sudan*, HPG Working Paper, July 2013, available at: [www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8591.pdf](http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8591.pdf). All internet references were checked in July 2014.

2 Remote management programming (or limited access programming) is described as ‘an adaptation to insecurity, the practice of withdrawing international [staff] (or other at-risk staff) while transferring increased programming responsibilities to local staff or local partner organisations’. See Jan Egeland, Adele Harmer and Abby Stoddard, *To Stay and Deliver: Good Practice for Humanitarians in Complex Security Environments*, Office for the Coordination of Humanitarian Affairs (OCHA), Policy Development Studies Branch, 2011, Glossary, xv, available at: [https://docs.unocha.org/sites/dms/Documents/Stay\\_and\\_Deliver.pdf](https://docs.unocha.org/sites/dms/Documents/Stay_and_Deliver.pdf).

There have been a number of instances in the past when assistance was provided in this way.

While past examples provide valuable insight as to how to implement such operations, from a legal point of view what matters is the reason underlying the decision to operate cross-border. In the majority of past cases, this has been due to a security situation in the affected state that prevented international actors from establishing offices and adequate operations in-country, as was the case for example in Iraq for a number of years after 2003, and for the past decade in Somalia.<sup>3</sup> Such situations must be distinguished from those addressed in the present article, where cross-border operations are being considered either because the affected state does not consent to in-country presence, operations or cross-line activities, or because a combination of restrictions due to ongoing combat operations or other security concerns and onerous administrative requirements make cross-border operations the most efficient way of assisting people in opposition-held areas.

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

Fourth, the present article focuses on public international law, while recalling that private humanitarian actors, such as NGOs, must also comply with the domestic law of the states in which they operate. Moreover, the internal legal and policy positions that may be adopted by individual organisations must also be considered.

Finally, at a more factual level, discussions on cross-border operations for civilians in opposition-held areas sometimes appear to proceed on the assumption that the opposition is unified; that it exercises a fairly permanent degree of control over a well-defined territory; and that the civilian population tends to remain in place, either in government- or opposition-held territory. While this is occasionally the case – for example, in the LTTE-held Vanni in Sri Lanka during the 1990s until the end of the conflict in 2009 – the situation on the ground is usually far more fluid and complex.<sup>4</sup> This must be borne in mind when considering the practical feasibility of cross-border operations.

<sup>3</sup> *Ibid.*, p. 14.

<sup>4</sup> On this see, for example, Pierre Krähenbühl, “There Are No ‘Good’ or ‘Bad’ Civilians in Syria – We Must Help all who Need Aid”, in *The Guardian*, 3 March 2013, available at: [www.theguardian.com/commentisfree/2013/mar/03/red-cross-aid-inside-syria](http://www.theguardian.com/commentisfree/2013/mar/03/red-cross-aid-inside-syria).

## Putting the legal analysis on cross-border operations in context

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

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

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

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

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

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

## Basic rules of international humanitarian law regulating relief operations

The conventional rules of international humanitarian law (IHL) regulating the provision of humanitarian assistance are found in different treaties, depending on the nature of the conflict – international or non-international. Those applicable in international armed conflicts, including occupation, are found principally in Articles 23 and 59 of the Fourth Geneva Convention of 1949 (hereinafter GC IV)<sup>5</sup> and Articles 69 to 71 of the First Additional Protocol of 1977 (hereinafter AP I).<sup>6</sup>

5 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (entered into force 21 October 1950).

6 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (entered into force 7 December 1978).

Those applicable in non-international conflicts are Common Article 3(2) to the Geneva Conventions of 1949 (hereinafter GCs) and Article 18 of Additional Protocol II of 1977 (hereinafter AP II).<sup>7</sup> Customary law rules of IHL apply alongside these treaty provisions.

The rules regulating humanitarian assistance are simple and essentially the same in both types of conflict:<sup>8</sup>

- Primary responsibility for meeting the needs of civilians lies with the party to the conflict in whose control they find themselves.
- If this party to the conflict is unable or unwilling to meet these needs, states and humanitarian organisations can offer to carry out relief actions that are humanitarian and impartial in character and conducted without any adverse distinction.
- The consent of affected states is required but may not be arbitrarily withheld.<sup>9</sup>
- Once relief actions have been agreed to, parties to the conflict and other relevant states 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.<sup>10</sup>

7 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (entered into force 7 December 1978).

8 Art. 70(1) of AP I provides that:

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

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

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

Art. 18(2) of AP II provides that:

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

According to the ICRC Customary Law Study, these treaty rules are essentially mirrored in customary law applicable in both types of conflict. See ICRC, *Customary International Humanitarian Law*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Cambridge University Press, Cambridge, 2005 (hereinafter ICRC Customary Law Study), Rule 55.

9 For a discussion of whose consent is required and, in particular, whether it is just that of the affected states or also/only that of the opposition, see below.

10 AP I, Art. 70(3).

## The requirement of consent

### The general rule

The principal element of complexity in these otherwise simple rules is the requirement of consent. While states and impartial humanitarian organisations may offer their services, consent is required before relief operations may be implemented. This requirement – implicit in Common Article 3(2) of the GCs, which states that an impartial humanitarian organisation may ‘offer its services’ – was introduced into Article 70 of AP I and Article 18 of AP II in the final stages of the negotiations of the Additional Protocols out of a concern to protect the sovereignty of the state receiving the relief.<sup>11</sup>

Despite the apparently absolute nature of this requirement, it was already understood during the negotiations that parties did not have ‘absolute and unlimited freedom to refuse their agreement to relief actions’.<sup>12</sup> A party refusing consent had to do so for ‘valid reasons’, not for ‘arbitrary or capricious ones’.<sup>13</sup>

In relation to non-international armed conflicts, Article 18 of AP II was one of the most hotly debated articles during the Diplomatic Conference that led to the adoption of the Protocols. For states opposed to the idea of regulating non-international conflicts, provision of external assistance was particularly problematic, as relief was often equated with foreign intervention and foreign assistance to rebellion.<sup>14</sup> Nonetheless, similar comments were also made in relation to the consent requirement in Article 18 of AP II.<sup>15</sup>

It is now generally accepted that although the consent of the affected state to relief actions is required, it may not be arbitrarily withheld.<sup>16</sup>

This position is also reflected in subsequent formulations of the rules on humanitarian assistance that expressly note that consent may not be arbitrarily withheld, including the Guiding Principles on Internal Displacement;<sup>17</sup>

11 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949*, (1987), (hereinafter ICRC Commentary to the APs), para. 2805.

12 Germany, CDDH/II/SR.87, pp. 336–337.

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

14 Michael Bothe, Karl Josef Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague/Boston, 1982, p. 694.

15 Belgium and Germany, CDDH/SR.53, pp. 156–157.

16 See, for example, ICRC Customary Law Study, above note 8, Rule 55 and commentary thereto.

17 Guiding Principles on Internal Displacement, UN Doc. E/CN/4/1998/Add.2, 11 February 1998, Principle 25:

1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
2. International humanitarian organisations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State’s internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.
3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

the Resolution on Humanitarian Assistance adopted by the Institute of International Law in 2003;<sup>18</sup> Council of Europe Recommendation (2006) 6 on Internally Displaced Persons;<sup>19</sup> and, beyond situations of armed conflict, in the International Law Commission's (ILC) work on the protection of persons in the event of disasters,<sup>20</sup> to mention but a few. United Nations General Assembly Resolution 46/182, on the other hand, only refers to the need for consent of the affected state.<sup>21</sup> It is submitted that it should be read in light of the above-mentioned rules and instruments requiring consent not to be arbitrarily withheld.

## Situations in which consent must be granted

There are three situations in which consent must be granted. In these situations, although parties are required to agree to relief operations, they nonetheless remain entitled to adopt measures of control in respect of the relief consignments.

### *Situations of occupation*

The first are situations of occupation where, if it is not in a position to ensure the adequate provision of supplies essential to the survival of the civilian population,

- 18 Institute of International Law, Bruges Session 2003, Resolution on Humanitarian Assistance, 2 September 2003, Art. VIII:

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

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

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

4. Protecting internally displaced persons and their rights as well as providing humanitarian assistance to them is a primary responsibility of the state concerned;

Such responsibility entails requesting aid from other states or international organisations if the state concerned is not in a position to provide protection and assistance to its internally displaced persons;

This responsibility also entails not to arbitrarily refuse offers from other states or international organisations to provide such aid.

- 20 ILC Report on the work of its 63<sup>rd</sup> session (26 April–3 June and 4 July–12 August 2011), Protection of Persons in the Event of Disaster, provisionally adopted draft Art. 11 – Consent of the affected State to external assistance, UN Doc. A/66/10, 2011, Chapter XI, paras. 264–289:

1. The provision of external assistance requires the consent of the affected State.

2. Consent to external assistance shall not be withheld arbitrarily.

3. When an offer of assistance is extended in accordance with the present draft articles, the affected State shall, whenever possible, make its decision regarding the offer known.

- 21 UNGA Res. A/RES/46/182, 19 December 1991, Guiding Principle 3:

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

the Occupying Power is required to accept relief operations that are humanitarian and impartial in character.<sup>22</sup>

### *Free passage of certain goods pursuant to Article 23 of GC IV*

Second, parties to international armed conflicts and other relevant states must allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended for civilians<sup>23</sup> in the territory of another state, even if the latter is its adversary. Pursuant to Article 23 of GC IV, free passage must also be allowed for all consignments of essential foodstuffs, clothing and tonics for civilians considered the most vulnerable: children under fifteen, expectant mothers and maternity cases.<sup>24</sup>

The impact of the first paragraph of Article 23 of GC IV is considerably reduced by the safeguards for the benefit of the blockading party in the second paragraph that aim to ensure the consignments are only used for the identified humanitarian purposes.<sup>25</sup> States are not required to allow free passage if there are serious reasons for fearing that

a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.<sup>26</sup>

While it is understandable that states may wish to limit the entry of items that could indirectly provide a definite military advantage to the enemy, Article 23 of GC IV lays down an overly broad range of ways in which this advantage could accrue and has rightly been criticised for granting a blockading state too much discretion.<sup>27</sup>

22 AP I, Art. 59.

23 The reference to medical supplies intended for civilians is not to be interpreted *a contrario* as implying that medical supplies intended for wounded and sick combatants should not also be granted free passage. Jean Pictet (ed.), *Commentary – IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1958, (hereinafter ICRC Commentary to GC IV), p. 180.

24 GC IV, Art. 23. Although not expressly stated, it is understood that this provision was intended to address blockades in international armed conflicts. See *ibid.*, pp. 178 ff.

25 Art. 23 of GC IV, para. 2, provides that:

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

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

26 GC IV, Art. 23, para. 2, point c.

27 ICRC Commentary to GC IV, above note 23, pp. 182 ff. According to the Commentary, 'the Diplomatic Conference of 1949 had to bow to the harsh necessities of war; otherwise they would have had to abandon all idea of a general right of free passage. Some delegations had originally intended to accept the principle



Article 23 of GC IV must now be read in the light of Article 70 of AP I, which sets out an absolute obligation to allow and facilitate the passage of relief goods, with the consequence that parties are no longer entitled to rely on the exceptions in Article 23 of GC IV. Article 68 of AP I and Article 1(3) of AP I specifically note that the provisions of that Protocol with regard to humanitarian relief operations are supplementary to Article 23 and other relevant provisions of GC IV.<sup>28</sup> This statement that the provision is ‘supplementary’ to GC IV indicates that the rules contained in AP I on this issue develop the rules in the Geneva Conventions by extending the protections in the latter and removing restrictions on those protections. If the drafters of the Protocol had intended to retain the restrictions set out in Article 23 of GC IV, they could have used the term ‘without prejudice to’ as they did elsewhere in AP I.<sup>29</sup> In view of this, provided the preliminary conditions are met – in other words, that there is a need for medical supplies or the categories of persons referred to in Article 23 of GC IV are in need of essential foodstuffs and clothes, and the party to the conflict in control of the persons in need is unable or unwilling to provide them – offers of medical relief operations must be accepted.

### *Security Council action*

Thirdly, the Security Council may adopt binding decisions requiring parties concerned to consent to humanitarian relief operations or, in the case of states not party to the conflict, to allow their transit through the party’s territory. Relevant past Security Council practice is discussed below.

### **What amounts to arbitrary withholding of consent?**

Two conditions must be met before the issue of consent even arises. First, relief must be necessary: 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. Second, the actor (state, international organisation, NGO) offering its services must provide the assistance in a principled manner: the relief actions must be exclusively humanitarian and impartial in character and carried out without any adverse distinction.<sup>30</sup> If these conditions are met, consent may not be arbitrarily withheld.

of free passage only in the form of an optional clause. It was only after the insertion of the safeguards set out under (a), (b), and (c) above, that it was possible to make the clause mandatory.’

28 This is in addition to Art. 1(3) of AP I, which indicates more generally that the Protocol is supplementary to the Geneva Conventions.

29 See, for example, AP I, Arts. 53 and 85(5).

30 These two conditions are spelled out in AP I, Art. 70. See, M. Bothe, K. J. Partsch and W. Solf, above note 14, p. 435; ICRC Commentary to the APs, above note 11, 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.

Despite its centrality to the rules regulating humanitarian assistance, there is little clarity as to when consent is arbitrarily withheld.<sup>31</sup> There is no definition or guidance on ‘arbitrariness’ of consent in any treaty, and to date, to the author’s knowledge, the issue has not been addressed by any international or national tribunal, human rights mechanism or fact-finding body. It is thus extremely difficult to determine – legally and factually – whether consent to relief operations has been withheld arbitrarily in a particular situation.

According to a leading commentator who participated in the negotiations of the Additional Protocols, an interpretation that does justice to both the requirement that relief actions be undertaken and that of consent is that agreement ‘has to be granted as a matter of principle, but that it can be refused for valid and compelling reasons. Such reasons may include imperative considerations of military necessity. But there is no unfettered discretion to refuse agreement, and it may not be declined for arbitrary or capricious reasons’.<sup>32</sup>

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

Suggested valid reasons include imperative considerations of military necessity – for example, if foreign relief personnel could hamper military operations or can be suspected of un-neutral behaviour in favour of the other party to the conflict<sup>33</sup> – as well as ongoing combat operations.<sup>34</sup>

A number of examples in which consent would be withheld arbitrarily have also been put forward. These include, first and foremost, a withholding of consent that violates the state’s other international obligations.<sup>35</sup> An uncontroversial example is withholding consent in situations where the civilian population is facing starvation. Withholding consent in such situations would amount to a violation of the prohibition of starvation of the civilian population as a method of warfare in Article 54(1) of AP I and Article 14 of AP II.<sup>36</sup>

31 See Dapo Akande and Emanuela-Chiara Gillard, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict*, OCHA Occasional Policy Papers, No. 8, 2014.

32 M. Bothe, K. J. Partsch and W. Solf, above note 14, p. 434.

33 See *ibid.*, p. 434; 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, p. 95.

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

35 See, for example, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, above note 30, para. 82.

36 See, for example, ICRC Commentary to the APs, above note 11, paras. 2808 and 4885. The seriousness of withholding consent in such circumstances is evidenced by the fact that under the Statute of the International Criminal Court, 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’. See Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force

Another example would be withholding consent to medical relief operations on the grounds 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.<sup>37</sup> No distinction may be made on any grounds other than medical ones. Withholding consent to medical relief operations and supplies as they may assist wounded enemy combatants would violate this rule. Moreover, the same equipment and supplies are also likely to be necessary for the civilian population in opposition-held areas, who would be denied the assistance to which they are entitled by law.

A further example of withholding of consent in violation of international law obligations would be selective withholding of consent with the intent or effect of discriminating against a particular group or section of the population; for example, systematically rejecting offers of humanitarian assistance for crisis-affected regions populated by ethnic groups perceived as favouring the opposition.<sup>38</sup>

Withholding of consent that is 'likely to endanger the fundamental human rights' of the affected civilians may also be considered arbitrary.<sup>39</sup> Humanitarian assistance is also often considered from a human rights angle, which requires withholding of consent not to violate particular rights, most notably the right to life, and not to prevent the realisation of economic and social rights, such as the right to an adequate standard of living, the right to food and to be free from hunger, and the right to housing and to health and medical services.<sup>40</sup> Limited guidance exists, however, as to the precise circumstances in which withholding of consent would violate these rights, and as to their application to non-state parties to armed conflicts. One of the most specific indications to date is that provided by the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons:

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,

1 July 2002) (hereinafter ICC Statute), Art. 8(2)(b)(xxv). 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 Dörmann, *Elements of Crime under the Rome Statute of the International Criminal Court: Sources and Commentary*, ICRC/Cambridge University Press, 2003, p. 363.

37 Most notably, AP I, Art. 10, and AP II, Art. 7. See also ICRC Customary Law Study, above note 8, Rule 110.

38 Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, above note 30, para. 83.

39 Institute of International Law resolution, above note 18, Art. VIII(1).

40 See, for example, Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, (revised edition), Studies in Transnational Legal Policy, No. 38, American Society of International Law, 2008, p. 117; Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, above note 30, 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. See also D. Akande and E. C. Gillard, above note 31.

the most basic standards imposed by these rights. State obligations thus include the responsibility to follow up on these situations of concern and assess relevant needs in good faith, and ensure that humanitarian needs are being met, by the State itself or through available assistance by national or international humanitarian agencies and organizations, to the fullest extent possible under the circumstances and with the least possible delay.<sup>41</sup>

Secondly, it has been suggested that guidance in determining what would constitute an arbitrary withholding of consent may be drawn from the principle of proportionality under human rights law: limitations in terms of time and duration, location and affected goods and services may not go beyond what is absolutely necessary to achieve the legitimate aim of the state withholding consent.<sup>42</sup>

Determining whether consent has been withheld for *valid* reasons frequently requires a difficult balancing of legitimate military considerations with competing humanitarian ones, akin to that required by the proportionality test in IHL.<sup>43</sup> It has been suggested that, applied by analogy,<sup>44</sup> this could provide guidance in determining the validity of a withholding of consent. A refusal in a situation where legitimate military considerations are relatively unimportant but the consequent suffering of the civilian population particularly severe could therefore be considered arbitrary.<sup>45</sup> This is the approach adopted in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*<sup>46</sup> and in the *HPCR Manual on International Law Applicable to Air and Missile Warfare*<sup>47</sup> in relation to naval and aerial blockades, respectively.

Finally, rejecting offers of assistance without providing any reasons or if the reasons are based on errors of fact, such as a denial of humanitarian needs without a proper assessment, could also amount to arbitrary withholding of consent.<sup>48</sup>

41 Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, above note 30, para. 69.

42 W. Kälin, above note 34.

43 M. Bothe, above note 33, p. 95.

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

45 M. Bothe, above note 33, p. 95. Of course, there may be instances when the withholding of consent is not based on military considerations.

46 Para. 102(b) of the *San Remo Manual on Armed Conflicts at Sea* 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'. Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Grotius, Cambridge, 1995.

47 Rule 157(b) of the *HPCR 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. *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Bern, 2009.

48 Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, above note 30, para. 82. In relation to humanitarian assistance in natural disasters, the ILC also highlighted the importance of giving reasons when consent to assistance is withheld. It considered this 'fundamental to establishing the good faith of an affected State's decision to withhold consent. The absence of reasons may act to support an inference that the withholding of consent is arbitrary.' ILC Report, UN Doc. A/66/10, 2011, p. 270.

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. These include, first, the needs of the population: what are they in terms of types of supplies, and how acute are they?

Second, who, if anyone, is providing assistance? The starting point of the analysis is the needs of the civilian population, rather than any 'entitlement' of relief organisations or other actors to provide assistance. If the affected state itself or some other actor is providing the necessary assistance in a principled manner, a party is entitled to turn down other offers of relief.

Third, the actor offering the assistance: does it have a record of operating in a principled manner? And can it provide the assistance that is needed?

Fourth, compatibility with other obligations under international law: if withholding of consent amounts to a violation of the concerned party's other international obligations, it would be arbitrary. Examples include the prohibition of starvation of the civilian population as a method of warfare,<sup>49</sup> and the entitlement of the wounded and sick to receive, to the fullest extent possible and with the least possible delay, the medical care required by their condition without discrimination.<sup>50</sup>

Fifth, the location of the proposed relief operations: despite needs, a party may be entitled to withhold consent to offers of assistance on certain grounds; for example, if the location is the theatre of ongoing hostilities. Other grounds would not be acceptable – for example, if consent is withheld because the local population is viewed as being supportive of the enemy.

Sixth, the timeframe: what may constitute valid reasons for withholding consent, such as ongoing 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.

Whose consent is required?<sup>51</sup>

### *International armed conflicts*

In international armed conflicts, Article 70(1) of AP I requires the consent of 'the Parties concerned in such relief actions' in the plural. Most important is that of the state party to the conflict in whose territory the operations are intended to be implemented.

Although treaties do not expressly address this, it is clear that consent is required both for relief actions carried out in-country and for

<sup>49</sup> AP I, Art. 54(1), and AP II, Art. 14.

<sup>50</sup> AP I, Art. 10, and AP II, Art. 7.

<sup>51</sup> For a detailed discussion of this issue, see Ruth Abril Stoeffels, *La Asistencia Humanitaria en los Conflictos Armados: Configuración jurídica, principios rectores y mecanismos de garantía*, Tirant Lo Blanch, Valencia, 2001, Chapter VI.3. See also Emanuela-Chiara Gillard, *Cross-Border Relief Operations: A Legal Perspective*, OCHA Occasional Policy Papers, No. 7, 2014.

cross-border operations. The modalities of the intended operations do not affect the requirement of consent.

Additionally, the consent of states from whose territory a relief action is undertaken, or through whose territory the relief operations must transit, is also required.<sup>52</sup> In situations of occupation, in recognition of the fact that it is exercising effective control over the occupied territory and, consequently, has assumed responsibilities towards the civilian population, it is the Occupying Power that must consent to relief operations.<sup>53</sup>

### *Non-international armed conflicts*

The position in non-international armed conflicts is more complex. A divergence of views exists among commentators as to whether the consent of the state party to the conflict is required for relief operations into territory controlled by the opposition that can be reached without transiting through territory controlled by the state.

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

Some commentators consider that this expression puts the government and the opposition on an equal footing, and implicitly allows relief operations to be carried out if the party to which an offer was made accepts it, regardless of the position adopted by its opponent. Provided relief operations do not have to transit through territory under the control of the other side, its consent is not required.<sup>54</sup>

Others are of the view that there is no basis for interpreting the silence of Common Article 3(2) to the GCs on the question of whose consent is required in this manner, particularly in view of the significant infringement of the affected state’s sovereignty that such an interpretation would entail. They consider that the

52 ICRC Commentary to the APs, paras. 2806–2807. In international armed conflicts, third states through whose territory relief supplies and personnel must pass are covered by Article 70(2) of AP I, which, *once* consent has been granted, requires the parties to the conflict and third states to allow and facilitate the rapid and unimpeded passage of relief supplies, equipment and personnel. In non-international armed conflicts, neither Common Article 3 to the GCs nor Article 18 of AP II expressly addresses the issue, but a state’s entitlement to regulate activities carried out in its territory is a fundamental element of state sovereignty and is of particularly relevance, as in situations where unauthorised cross-border relief operations are carried out from their territory, third states risk being accused by the state in whose territory the assistance is delivered of allowing their territory to be used for unlawful activities. See R. A. Stoffels, above note 51, p. 324.

53 GC IV, Art. 59.

54 See, for example, Yves Sandoz, ‘Le Droit d’initiative du Comité international de la Croix Rouge’, *German Yearbook of International Law*, Vol. 22, 1979, pp. 352, 364–366; implicitly, Dietrich Schindler, ‘Humanitarian Assistance, Humanitarian Interference and International Law’, in Ronald St. John Macdonald, *Essays in Honour of Wang Tieya*, Martinus Nijhoff, Dordrecht/Boston/London, 1993, pp. 689, 700; Maurice Torrelli, ‘From Humanitarian Assistance to “Intervention on Humanitarian Grounds”’, in *International Review of the Red Cross*, No. 288, May–June 1992, p. 234; and, extensively, François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan, Oxford, 2003, pp. 448 ff. See also, most recently, Marco Sassòli, ‘When are States and Armed Groups Obligated to Accept Humanitarian Assistance?’, *Professionals in Humanitarian Assistance and Protection*, 5 November 2013, available at: <http://phap.org/articles/when-are-states-and-armed-groups-obliged-accept-humanitarian-assistance>.

provision allows humanitarian actors to offer their services to all sides, so states are precluded from considering such offers an unfriendly act<sup>55</sup> or from criminalising engagement with the opposition. However, by agreeing to allow offers to be made to the opposition, states did not necessarily also agree that assistance could be provided without their consent.

Article 18(2) of AP II is more explicit on this issue, requiring the consent of 'the High Contracting Party concerned'. An early draft of this provision referred to the consent of 'the party or parties concerned', implicitly also referring to the non-state party to the conflict. However, in the negotiations of the Protocol, language that could be interpreted as recognising insurgent parties or as granting rights to their members was removed, including this reference.<sup>56</sup>

Who is 'the High Contracting Party concerned'? It is hard to see how this expression could refer to any state other than the one involved in the non-international armed conflict. This is the view of a number of commentators and also that expressed by some states when forwarding the Additional Protocols to their parliaments for ratification.<sup>57</sup>

Nonetheless, it has been suggested that in certain circumstances the consent of the opposition may suffice. In particular, one expert considers that the state involved in the non-international conflict is 'concerned' by operations for civilians in opposition-held areas, and consequently its consent is required, only if the relief actions must transit through territory under its effective control. If the territory controlled by the opposition is accessible by sea or can be reached from another country directly, the consent of the government is not required.<sup>58</sup>

55 The ICRC Commentaries focus on this aspect of common Article 3(2) of the GCs. See, for example, Jean Pictet (ed.), *Commentary – I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1958, p. 58. The Commentaries to the other three conventions are essentially identical. See also Heike Spieker, 'The Right to Give and Receive Humanitarian Assistance', in Hans-Joachim Heintze and Andrej Zwitter (eds), *International Law and Humanitarian Assistance*, Springer-Verlag, Berlin/Heidelberg, 2011, p. 15.

56 M. Bothe, K. J. Partsch and W. Solf, above note 14, p. 696; and R. A. Stoffels, above note 51, pp. 301–308.

57 See, for example, Knut Dörmann and Hans-Peter Gasser, 'Protection of the Civilian Population', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3<sup>rd</sup> ed., Oxford University Press, Oxford, 2013, p. 236; Frits Kalshoven and Liesbet Zegveld, *Constraints on the Waging of War – An Introduction to Humanitarian Law*, 3<sup>rd</sup> ed., Cambridge University Press, Cambridge, 2001, p. 139; Denise Plattner, 'Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law', *International Review of the Red Cross*, No. 288, June 1992; H. Spieker, above note 55, p. 16; implicitly, Georges Abi-Saab, 'Non-International Armed Conflicts', in *International Dimensions of Humanitarian Law*, Henry Dunant Institute, 1988, p. 224; and Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, above note 30, para 85. See also ILC, above note 40, para. 65.

The explanatory memoranda prepared by the governments of the Netherlands and Switzerland for transmission of the Additional Protocols to their respective parliaments for ratification expressly note that Article 18(2) of AP II requires the consent of the state in whose territory the conflict is taking place. The Swiss document even specifies that state consent is required even if relief is provided directly from a third country into opposition-held territory: Tweede Kamer, vergaderjaar 1983–1984, 18 277 (R1247), No. 3, p. 52; and Message concernant les Protocoles additionnels aux Conventions de Genève du 18 Février 1981, 81.004, Feuille fédérale, 133 année, Vol. 1, p. 973.

58 This view was put forward as a possible alternative to a literal interpretation of Article 18(2) of AP II in recognition of the fact that, as a matter of practice, the consent of the opposition is required if operations are to be carried out in areas under its control. M. Bothe, J. K. Partsch and W. Solf, above note 14, p. 696.



This position is based *inter alia* on an analogy with the rules applicable in occupation, where it is not the consent of the state with legal title to territory that is required but that of the state with effective control over it – that is, the occupier.<sup>59</sup>

This position is questionable for a number of reasons: first, according to this interpretation, in situations where relief operations can reach the opposition-held territory without transiting through government-controlled territory, there would in fact be *no* ‘High Contracting Party concerned’, a possibility that sits uncomfortably with the clear reference in Article 18(2) of AP II to ‘the’ High Contracting Party concerned. Second, in such circumstances, as Additional Protocol II does not require the consent of the non-state side, as a matter of this instrument *no* consent would be required. This interpretation is unrealistic and inconsistent with the approach in Common Article 3(2) of the GCs, which even under the broadest interpretation requires the consent of the party to whom the offer of services was made.

Moreover, this interpretation is not borne out by the reality that affected states consider themselves extremely concerned by relief operations in opposition-held parts of their territory, nor by actual practice.<sup>60</sup>

A possible compromise position would be to accept that the affected state’s consent is always required, but to argue that where relief actions are intended for

The view has been expressed with increasing conviction, although it has also been admitted that it does not correspond with state practice. See, for example, M. Bothe, above note 33, p. 94; and Michael Bothe, ‘Relief Actions’, in *Encyclopedia of Public International Law*, Vol. 4, North-Holland, Amsterdam, 2000, pp. 168, 171; as well as exchanges with author. Bugnion reaches the same conclusion but for different reasons: first, if Article 18(2) of AP II were interpreted as only referring to the consent of the state party, this would be the only occasion in AP II where the state and opposition are granted different rights and obligations. Second, it would not make sense for Article 18(2) of API II to contradict the position adopted in Common Article 3(2) of the GCs, which, in Bugnion’s view, does not require the consent of the affected state. Third, in view of the frequent difficulties of determining who is the legitimate government in situations of non-international armed conflict, Bugnion does not think the drafters intended to force humanitarian actors to weigh up rival claims. In view of this, while acknowledging that such an interpretation appears contrary to the actual letter of Article 18(2) of AP II, he concludes that each party has the right to grant or withhold consent to relief operations within the territory it effectively controls. He adds that, in view of the risk of protest from the affected state, the International Committee of the Red Cross would resort to such a practice only if the situation of the victims made this imperative. F. Bugnion, above note 54, pp. 451–455.

59 M. Bothe, above note 33, p. 94.

60 For example, during the Nigerian civil war in the late 1960s, a number of humanitarian agencies operated a cross-border air bridge into Biafra from Sao Tome without the consent of the government, whose air force shot down several planes participating in the operations: H. Slim and E. C. Gillard, above note 1, p. 6. Similarly, in 1987 Sri Lanka strongly objected to the airdrop by India of relief supplies for the Tamil population into the besieged city of Jaffna: M. Bothe, above note 33, p. 94. Operation Poomalai was an airdrop of supplies by the Indian air force over Jaffna on 4 June 1987, when the city was under siege by Sri Lankan troops as part of the offensive against the Tamil Tigers. A first attempt by India to deliver assistance by sea was intercepted by Sri Lankan forces; two days later, India carried out the airdrop. In the wake of Operation Poomalai, Sri Lanka accused India of violating its sovereignty and territorial integrity. Pakistan, Bangladesh, Nepal and the Maldives also protested the action. India defended its actions as a ‘mercy mission’. Outside the region, the reaction was muted – the United States expressed regret but refused to comment further on the incident. The United Nations Secretary-General issued a statement appealing to both states to act with restraint. Asoka Bandarage, *The Separatist Conflict in Sri Lanka: Terrorism, Ethnicity and Political Economy*, Routledge, London/New York, 2009; and Steven R. Weisman, ‘India Airlifts and Tamil Rebels’, in *New York Times*, 5 June 1987, available at: [www.nytimes.com/1987/06/05/world/india-airlifts-aid-to-tamil-rebels.html](http://www.nytimes.com/1987/06/05/world/india-airlifts-aid-to-tamil-rebels.html).



civilians in opposition-held areas, that state would have a more limited range of grounds for withholding consent.<sup>61</sup> For example, it would have to show that the intended assistance was not in fact humanitarian but of benefit to the opposition's military efforts or, related to this, that the actors providing it were not acting in a principled manner. Grounds based on military necessity would be limited to considerations of military necessity in the opposition-held territory or where military activity outside that territory could affect the safe passage of relief operations to it. Withholding consent out of concerns that the relief operations could legitimise the opposition or cement its control as well as prohibitions on humanitarian actors engaging with the opposition for purely humanitarian purposes would be arbitrary.<sup>62</sup>

An alternative suggestion is that in circumstances where the opposition effectively controls territory and exercises state-like functions to the exclusion of the government, its consent may be both necessary and sufficient. No legal basis has been provided for this suggestion, other than equating the circumstances with those in which, exceptionally, non-state actors have, on occasion, been imputed with responsibilities under human rights law.<sup>63</sup>

Whatever the legal position, as a matter of practice the agreement or acquiescence of the opposition to relief operations for civilians in territory under its control, or transiting through such territory, will be required to implement the operations in a safe and unimpeded way.

## Who represents the government whose consent is required?

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

Recognition of the opposition as the 'sole legitimate representative of the people' of the state in question must be distinguished from its recognition as the government of that state.<sup>64</sup> The former type of recognition is an expression

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

62 Consultations with legal experts carried out by author; and S. Sivakumaran, above note 61.

63 Consultations with legal experts carried out by author. On the emerging practice of imputing non-state actors with human rights obligations, see, for example, Yael Ronen, 'Human Rights Obligations of Territorial Non-State Actors', in *Cornell International Law Journal*, No. 46, 2013, p. 21.

64 See Dapo Akande, 'Self Determination and the Syrian Conflict – Recognition of the Syrian Opposition as the Sole Legitimate Representative of the Syrian People: What Does this Mean and What Implications Does it Have?', in *EJILTalk!*, 6 December 2012, available at: [www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/](http://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/); Stefan Talmon, 'Recognition of the Libyan National Transitional Council', in *American Society of International Law Insights*, Vol. 15, No. 16,

of political support and approval for the group, bolstering its position, including internally, by encouraging factions to coalesce under its umbrella. However, it does not have legal consequences. Recognition of an entity as the government usually occurs after an unconstitutional change in regime. Although there is an important political dimension to recognition, states do not have unfettered discretion. Two conditions must be met, with a degree of flexibility. First, the entity in question must exercise effective control over the state's territory. Second, and albeit to a lesser degree in the case of revolutionary change, it must do so with the support or acquiescence of the mass of the population.<sup>65</sup>

As a state cannot have two governments simultaneously, recognition of a group as the government entails 'de-recognition' of the incumbent authorities. The newly recognised government becomes the recognising state's counterpart in diplomatic relations. It will take over the embassy and other state assets in the recognising state's territory and appoint diplomats who will be entitled to diplomatic privileges and immunities, while those of the representatives of the previous government will cease. States can recognise governments expressly or implicitly, in which case recognition can be inferred from the nature of the relations between representatives of the two states.

International organisations also implicitly recognise governments by virtue of whom they accept as representing states. Within the United Nations, the General Assembly Credentials Committee is responsible for checking that credentials are in the appropriate form. In case of competing claims of representation, it effectively makes a recommendation to the General Assembly as to which party is to be considered as representing the government of the state in question.<sup>66</sup>

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

## How can consent be given?

The law does not stipulate how consent to relief operations is to be given. Although some suggest that the requirement of 'consent' in Article 18 of AP II 'implies less formality' than the word 'agreement' in Article 70 of AP I,<sup>67</sup> too much weight should probably not be given to this difference in terminology.

More significantly, it is suggested that consent need not be expressed or public: 'private assurances or an attitude which can in good faith be construed

16 June 2011; and Stefan Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People', in *Chinese Journal of International Law*, Vol. 12, No. 2, 2013, pp. 219–253. See also, more generally, Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, Vol. 1: *Peace*, 9<sup>th</sup> ed., Longman, London/New York, 1992, paras. 42–54.

65 *Ibid.*, para. 45.

66 *Ibid.*, para. 53.

67 M. Bothe, K. J. Partsch and W. Solf, above note 14, p. 697.

as acquiescence are sufficient'.<sup>68</sup> Such an attitude could include a failure by the authorities to respond to repeated requests for authorisation to operate or their failure to react despite being aware of unauthorised operations. The less overt the relief operations, the less justified it is to infer acquiescence, as the authorities could be merely unaware of them.

## Consequences of withholding consent to relief operations

### Consequences for those seeking to provide assistance

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 of public international law safeguarding state sovereignty and territorial integrity and the prohibition on interference in states' internal affairs.

A further element of complexity is the fact 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 NGOs – must comply with the relevant rules of IHL if they want their operations and staff to benefit from its protections and safeguards, the rules 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 in which they operate.

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 extremely limited circumstances.

### *Unauthorised operations where consent is validly withheld*

As outlined above, a state is entitled to withhold consent to relief operations on valid grounds. Unauthorised relief operations in such circumstances violate a number of rules of international law.

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 the rules of IHL on relief operations. This does not mean that humanitarian staff, supplies and equipment lose their civilian status and consequent protection from attack.<sup>69</sup> However, the duty to facilitate rapid and unimpeded passage of relief supplies and personnel does not arise for unauthorised operations. They may be turned back at the border or, if already in-country, goods and equipment may be confiscated and staff, if not entitled to

<sup>68</sup> *Ibid.*

<sup>69</sup> R. A. Stoeffels, above note 51, pp. 314–316.

privileges and immunities, may face proceedings before the courts of the state where they carried out the unauthorised operations.

Unauthorised relief operations carried out by a state or by an international organisation are a violation of the affected state's sovereignty and territorial integrity.<sup>70</sup>

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

There 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 . . .<sup>71</sup>

Caution should be exercised before drawing general conclusions from this statement. It appears in a part of the decision in which the ICJ was contrasting humanitarian assistance with military and paramilitary activities and, in this context, concluded that the former, unlike the latter, did not amount to intervention. In its brief consideration of humanitarian assistance, the ICJ focused on the need for it to be delivered in a principled manner.<sup>72</sup> 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 it had been withheld for valid reasons.<sup>73</sup>

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

Commentators differ in their interpretation of this aspect of the judgment.<sup>74</sup> In any event, even if it were to apply to all situations, the fact that humanitarian assistance does not amount to intervention does not affect the need for relief operations to comply with other rules of international law. Unauthorised assistance provided in situations where consent has been validly withheld would still not comply with IHL and would violate the rules on state sovereignty and territorial integrity.

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

70 *Ibid.*, p. 314. In response to India's unauthorised airdrop, Sri Lanka complained of violations of its sovereignty and territorial integrity. See the discussion of India's Operation Poomalai in note 60 above.

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

72 *Ibid.*, paras. 242, 243.

73 Although the ICJ does 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.

74 See R. A. Stoffels, above note 51, p. 309, and references therein. See also Schindler, who suggests that the ICJ'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 [did] not imply a right to penetrate into the territory of another State' to deliver the supplies. D. Schindler, above note 54, pp. 698–699.

privileges and immunity, so they could face proceedings in 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.<sup>75</sup>

Ordinarily, the staff of international organisations are entitled to privileges and immunities either on the basis of multilateral treaties like the 1946 Convention on the Privileges and Immunities of the United Nations,<sup>76</sup> or of bilateral agreements concluded with host states that *inter alia* grant immunity from legal processes before domestic courts.

### *Unauthorised operations where consent is arbitrarily withheld*

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

It has been suggested that unauthorised relief operations, where consent is arbitrarily withheld, are permissible.<sup>77</sup> According to this line of reasoning, if consent is arbitrarily withheld, the violation of the affected state's territorial integrity would be justified as an implementation of states' undertaking under Common Article 1 to the GCs and AP I to 'ensure respect' for IHL.<sup>78</sup>

This argument is problematic. First, Common Article 1 is addressed to 'High Contracting Parties' – in other words, to states. Consequently, only states could, arguably, rely on this provision to justify their actions. However, it is suggested that this provision could justify the unauthorised operations of states, international organisations and the ICRC.<sup>79</sup>

Second, and 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, as it is generally agreed that this provision may not be relied upon as a basis for violating other rules of international law.<sup>80</sup>

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

75 Art. 16 of AP I and Art. 10 of AP II provide that under no circumstances may people 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. See ICRC Customary Law Study, above note 8, Rule 26.

76 See also the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, New York, 21 November 1947 (entered into force 2 December 1948), UNTS Vol. 33, p. 261.

77 M. Bothe, above note 33, p. 96.

78 *Ibid.*, p. 95.

79 *Ibid.*, pp. 95–96.

80 ICRC Commentary to the APs, above note 11, para. 46.

wrongfulness is precluded on accepted grounds.<sup>81</sup> Two possible grounds could be relied upon: counter-measures and necessity.

To be lawful, counter-measures must meet a number of conditions, only some of which warrant highlighting here.<sup>82</sup> First, they may only be brought by a state or international organisation directly affected by a violation – for present purposes, one whose offer of assistance was arbitrarily rejected or, possibly, a state whose nationals were denied assistance. Second, the purpose of the counter-measure must be to induce the wrong-doing state to comply with its obligations. It is questionable whether unauthorised relief operations do this. Rather, they are a performance of the responsibilities not discharged by the recipient state. They aim to remedy the violation of the obligation. Third, counter-measures must be proportionate to the harm suffered by the actor having recourse to them. In this case, the harm suffered by the state or international organisation is minimal. It is the civilian population that suffers. Finally, in no circumstance may counter-measures violate the prohibition on the threat or use of force. In view of these requirements, it appears unlikely that counter-measures could be a basis for precluding the wrongfulness of an unauthorised relief operation.

One possible way of side-stepping some of these conditions – notably the requirements that counter-measures be brought by a state affected by the violation and that they be proportionate to the harm suffered by such a state – would be to argue that IHL lays down *erga omnes* obligations; that is, obligations owed to the international community as a whole.<sup>83</sup> In such circumstances states not directly affected by the violation might be entitled to take counter-measures. However, it is doubtful whether all the rules in the Geneva Conventions and Additional Protocols are *erga omnes* obligations. Even if they were, although there have been some instances of states taking counter-measures in response to violations of *erga omnes* obligations, it is not yet clear that international law provides a right for states to do this. In view of this, ILC Article 54 on State Responsibility leaves open the possibility for any state to take ‘lawful measures’ rather than counter-measures against the responsible state in order to ensure cessation of the breach and reparation in the interest of the injured state or the beneficiaries of the obligation that has been breached.<sup>84</sup>

The second possible grounds 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

81 Chapter V of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, 2001 (hereinafter ILC Articles on State Responsibility), identify six circumstances precluding wrongfulness: consent, self-defence, counter-measures, *force majeure*, distress and necessity.

82 ILC Arts 22 and 49–54 on State Responsibility and Commentaries thereto. ILC Arts 22 and 51–57 on the Responsibility of International Organisations set out largely identical rules. See ILC Report, UN Doc. A/66/10, 2011. On the possibility of invoking counter-measures to justify unauthorised relief operations, see Oliver Courten and Pierre Klein, ‘L’Assistance Humanitaire Face à la Souveraineté des Etats’, in *Revue Trimestrielle des Droits de l’Homme*, 1992, pp. 343–364; and D. Schindler, above note 54, pp. 698–699.

83 The ICRC Commentaries would seem to suggest this. See, for example, ICRC Commentary to the APs, above note 11, para. 45.

84 See ILC Art. 54 and para. 6 of the Commentary thereto.

and imminent peril and it does not seriously impair an essential interest of the injured state or of the international community.<sup>85</sup>

The essential interest to safeguard can be that of the state or international organisation taking the unauthorised measure, or of the international community.<sup>86</sup> 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.<sup>87</sup> In the case of relief operations, 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 a one-off relief operation by a state or international organisation to bring life-saving supplies to a population in a specific location in extreme need, when no alternatives exist. Such a scenario would meet the requirements of grave and imminent danger but not seriously impair the injured state's essential interest.<sup>88</sup>

### *When are unauthorised operations lawful?*

The following conclusions can be drawn on the basis of the analysis above. In situations where consent is validly withheld, unauthorised relief operations are unlawful.

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

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

85 ILC Art. 25 on State Responsibility; see also ILC Art. 25 on the Responsibility of International Organisations. 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.

86 Commentary to ILC Art. 25 on State Responsibility.

87 *Ibid.*

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



after balancing a number of sometimes competing considerations, including the urgency of providing assistance to civilians; the possibility of actually implementing unauthorised operations and doing so in safety; the likely impact of unauthorised operations in opposition-held areas on their activities in the rest of the affected state and on those of other actors; and the likely impact of carrying out unauthorised operations on their activities in other contexts and on those of other actors.

## Consequences for the party arbitrarily withholding consent and persons involved in the decision

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 the party's obligations under 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 has just been 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. To the author's best knowledge, this justification has never been invoked.<sup>89</sup>

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

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

Although the ICC Statute includes the war crime of 'intentionally 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', this provision is fairly limited in scope, only covering the extreme situation where civilians are being intentionally deprived of objects indispensable to their survival – and it only applies in international armed conflicts.<sup>90</sup> To date, allegations of this crime have not been included in any investigation.

While a number of possible avenues thus exist for holding responsible parties and persons who have arbitrarily withheld consent to relief operations, there has only been limited recourse to them and, consequently, limited accountability for

<sup>89</sup> India justified its airdrop of supplies to the besieged city of Jaffna in Operation Poomalai as a 'mercy mission', rather than as a counter-measure.

<sup>90</sup> ICC Statute, Art. 8(2)(b)(xxv).



violations. This should not be taken as implying that the rules on relief operations are not respected: parties initially withholding consent may have eventually granted it following negotiations and/or other diplomatic ways of encouraging them to comply with their obligations.

## **Alternatives – indirect provision of assistance**

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

### **Support to authorised operations**

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

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

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

### **Support to unauthorised operations**

More complex is the question of support provided to humanitarian actors carrying out unauthorised operations. Its legality must be assessed under the different areas of law discussed earlier: territorial integrity and non-interference, as well as the rules on assistance in the commission of an internationally wrongful act.

#### *Territorial integrity*

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

#### *Prohibition of interference*

With regard to the principle of non-interference, whatever view is adopted as to the application of the ICJ decision in *Military and Paramilitary Activities* to ‘direct’ relief operations, it is clear that the Court was addressing ‘indirect’ assistance by the

provision of relief items from outside the territory of the affected state. The ICJ concluded that such assistance did not amount to interference provided it complied with humanitarian principles:

An essential feature of truly humanitarian aid is that it is given ‘without discrimination’ of any kind. In the view of the Court, if the provision of ‘humanitarian assistance’ is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely ‘to prevent and alleviate human suffering’ and ‘to protect life and health and to ensure respect for the human being’; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents.<sup>91</sup>

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

### *Assistance in the commission of an internationally wrongful act*

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

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

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

Article 16 is essentially mirrored in ILC Article 14 on the Responsibility of International Organizations.<sup>92</sup>

Whether the provision of relief goods or funds raises this secondary responsibility depends on whether the assisted actor carrying out the relief operations is acting in violation of international law. If states or international

<sup>91</sup> *Ibid.*, para. 243.

<sup>92</sup> ILC Art. 14 on the Responsibility of International Organisations provides that:

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

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

organisations carry out unauthorised relief operations where consent has been validly withheld, this is the case. However, it is unlikely that states and international organisations trying to provide humanitarian assistance in good faith would be providing support in such circumstances.

They are more likely to be doing so in situations where consent has been withheld for arbitrary reasons. As discussed above, it is precisely in such situations that opinions are divided as to the lawfulness of unauthorised operations. The same uncertainty is carried on to the actor providing indirect support. If the unauthorised operations are considered lawful, then assisting them also is; but if they are considered unlawful, then a state or international organisation that provides assistance to such operations would also violate international law.<sup>93</sup>

This being said, this secondary responsibility has rarely been invoked – never in relation to indirect support to relief operations, and rarely even in instances where the underlying violation was much more serious, like the provision of weapons in situations where a substantial risk exists that they will be used to commit violations of IHL.<sup>94</sup>

Moreover, secondary responsibility only arises in relation to assistance to activities that are a violation of international law by states and international organisations. Relief operations carried out by NGOs simply do not fall within the scope of this provision – and in any event, they may violate domestic law but not international law. Accordingly, the provision of support to such operations does not give rise to secondary responsibility.

As indirect support would not violate the territorial integrity of the affected state, nor amount to interference or, if provided to NGOs, assistance in the commission of an internationally wrongful act, such indirect provision of assistance is probably the approach least likely to raise legal concerns, particularly if extreme care is taken to ensure that the supported operations are exclusively humanitarian in nature and carried out in a principled manner.

Finally, any third state whose territory is used for these indirect operations – usually neighbouring states – may also face claims of assisting in the commission of a wrongful act and of allowing its territory to be used for unlawful activities.<sup>95</sup> Obviously, the organisation of unauthorised, but nonetheless principled, relief operations is a far less injurious activity than allowing territory to be used for ‘organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State’, referred to in the Declaration on Friendly Relations.<sup>96</sup> Nonetheless, the potential liability exists and practice shows that affected states

93 It can safely be assumed that a state or international organisation funding or providing material support to an unauthorised relief operation would meet the knowledge condition in ILC Arts. 16 on State Responsibility and ILC Art. 14 on the Responsibility of International Organisations respectively.

94 Commentary to ILC Art. 16 on State Responsibility, paras. 7–9.

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

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

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

## Overriding the requirement of consent – binding Security Council decisions

The requirement of consent under IHL may be circumvented by Security Council 'imposition' of relief operations by a binding decision.

Decisions adopted under Chapter VII of the United Nations Charter are binding on all states and override their rights and duties under other bodies of law, including IHL. Thus, if the Security Council, acting under Chapter VII, demanded that humanitarian relief actions be allowed into the country, the affected state would be required to comply.<sup>97</sup>

While the binding nature of decisions adopted under Chapter VII is uncontroversial, it has been recognised that Council decisions not adopted under this Chapter may also be binding within the meaning of Article 25 of the Charter if they employ a language of obligation.<sup>98</sup>

The Security Council frequently calls upon parties to conflict to grant humanitarian access.<sup>99</sup> However, the majority of these calls are in fact an exhortation to allow relief actions and are, in fact, a recognition that the affected state must agree thereto, rather than a Security Council authorisation thereof.<sup>100</sup>

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

Resolution 2139 (2014) on Syria marked an important departure from previous practice, with the Security Council for the first time demanding that all parties promptly allow rapid, safe and unhindered humanitarian access, including across conflict lines and across borders.<sup>101</sup>

97 On this issue, see Yoram Dinstei, 'The Right to Humanitarian Assistance', in *Naval War College Review*, Vol. 54, No. 4, 2000, p. 77.

98 See, for example, Rosalyn Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Art. 25 of the Charter?', in *International and Comparative Law Quarterly*, No. 21, 1972, p. 270; and Marko Divac Oberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ', in *European Journal of International Law*, No. 16, 2005, p. 879.

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

100 See, for example, R. A. Stoeffels, above note 52, p. 289.

101 UNSC Res. S/RES/ 2139, 22 February 2014, op. para. 6.

## Bosnia and Herzegovina

In 1992, the Security Council adopted Resolution 752 calling upon parties to ensure that conditions be established for the effective and unhindered delivery of humanitarian assistance to Bosnia and Herzegovina.<sup>102</sup> Two weeks later, in Resolution 757, acting under Chapter VII, the Council demanded that the parties immediately create these conditions, including by establishing a security zone around Sarajevo.<sup>103</sup> In Resolution 770, again acting under Chapter VII, the Council called on all states – not just the parties to the conflict – to take all measures necessary to facilitate the delivery by humanitarian organisations of humanitarian assistance.<sup>104</sup> Finally, as its demands remained unheeded, in Resolution 781 the Security Council imposed a ban on military flights in the airspace of Bosnia and Herzegovina,<sup>105</sup> considering the measure to constitute ‘an essential element for the safety of the delivery of humanitarian assistance’.<sup>106</sup>

This example relates to a situation in which the affected state, Bosnia and Herzegovina,<sup>107</sup> consented to the relief, which was being impeded by its opponent.

## Somalia

In 1992, following a similar series of resolutions in which its call to parties to facilitate the delivery of humanitarian assistance and to take measures to ensure the safety of humanitarian personnel remained unheeded,<sup>108</sup> the Security Council adopted Resolution 794, in which, acting under Chapter VII, it authorised member states to establish an operation ‘to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia’.<sup>109</sup>

This resolution led to the establishment of a US-led multinational force, which operated in Somalia between December 1992 and May 1993, to establish a secure environment for humanitarian operations in the southern half of Somalia.

According to the then Secretary-General, at the time of the adoption of Security Council Resolution 794, Somalia was considered as not having a government. Numerous factions were operating in the country that interfered with and attacked UN and other relief agencies.<sup>110</sup>

102 UNSC Res. S/RES/752, 15 May 1992, op. para. 8.

103 UNSC Res. S/RES/757, 30 May 1992, op. para. 17.

104 UNSC Res. S/RES/770, 13 August 1992, op. para. 2.

105 UNSC Res. S/RES/781, 9 October 1992, op. para. 1.

106 *Ibid.*, op. para. 8.

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

108 UNSC Res. S/RES/733, 23 January 1992; UNSC Res. S/RES/746, 17 March 1992; UNSC Res. S/RES/751, 24 April 1992; UNSC Res. S/RES/767, 27 July 1992; and UNSC Res. S/RES/775, 28 August 1992. None of the parts of these resolutions relating to relief operations were adopted under Chapter VII.

109 UNSC Res. S/RES/794, 3 December 1992, op. para. 10.

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

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

## Northern Iraq

In response to Iraq's repression of the civilian population in the Kurdish-populated areas of the country, in April 1991 the Security Council adopted Resolution 668, in which it insisted that Iraq allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and appealed to all member states and all humanitarian organisations to contribute to humanitarian relief efforts.<sup>111</sup>

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

The resolution was nonetheless the basis for a US-led multinational operation. Starting with airdrops, the coalition proceeded to put ground forces into Iraqi territory to protect the displaced persons and build camps. It also established a safe zone in northern Iraq using ground and air forces to allow civilians to return to their homes.<sup>112</sup>

Although Iraq and the UN eventually signed a Memorandum of Understanding on the UN's activities in northern Iraq, the measures adopted pursuant to Resolution 688 were initially without Iraq's consent.<sup>113</sup>

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

## Syria

In October 2013 the Security Council adopted a Presidential Statement on the situation in Syria that addressed humanitarian relief operations in unprecedented detail. It urged all parties to promptly facilitate safe and unhindered humanitarian access to populations in need in all areas under their control and across conflict

111 UNSC Res. S/RES/688, 5 April 1991, op. paras. 3 and 6.

112 Air Force Historical Studies Office, *Operation Provide Comfort and Northern Watch*, fact sheet, 9 September 2012, available at: [www.afhso.af.mil/topics/factsheets/factsheet.asp?id=19873](http://www.afhso.af.mil/topics/factsheets/factsheet.asp?id=19873); and GlobalSecurity.org, *Operation Provide Comfort*, available at: [www.globalsecurity.org/military/ops/provide\\_comfort.htm](http://www.globalsecurity.org/military/ops/provide_comfort.htm).

113 Karin Landgren, 'Safety Zones and International Protection: A Dark Grey Area', in *International Journal of Refugee Law*, Vol. 7, 1995, p. 443; D. Schindler, above note 54, p. 699.

lines and urged the Syrian authorities to take a number of specific steps to facilitate the expansion of humanitarian relief operations, and lift bureaucratic impediments and other obstacles.<sup>114</sup>

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

‘[d]emand[ed] that all parties, in particular the Syrian authorities, promptly allow rapid, safe and unhindered humanitarian access for UN humanitarian agencies and their implementing partners, including across conflict lines and across borders, in order to ensure that humanitarian assistance reaches people in need through the most direct routes’.<sup>115</sup>

Although the resolution does not state that it is adopted under Chapter VII of the Charter, it seems clear that certain of its provisions impose binding obligations on the parties to the conflict in Syria and other relevant states. In particular, operative paragraphs 5 and 6 go beyond hortatory language and ‘demand’ compliance from those to whom they are addressed. A distinction is made in the resolution between those provisions where the Council merely ‘urges’ particular action and those where it ‘demands’ action.

The effect of these binding provisions is that the Council *requires* consent to be given. It is not open to Syria, or to other relevant parties, to withhold consent to humanitarian relief operations, within the terms of the resolution. While IHL would allow consent to be withheld for valid reasons, Resolution 2139 does not. It is the first time that the Security Council has demanded that parties to a conflict allow relief operations, laying down an unqualified obligation to allow rapid, safe and unhindered access to UN humanitarian agencies and implementing partners.

Resolution 2139 expressly covers both cross-line and cross-border relief operations. Moreover, the term ‘all parties’ in operative paragraph 6 is sufficiently broad to also require other relevant states, most notably those from whose territory cross-border relief operations are initiated or through whose territory they must transit and whose consent is also required by IHL, to also allow such operations.

## Conclusion

Efforts to provide humanitarian assistance in situations where the state in whose territory the relief operations are to be implemented withholds its consent raise complex legal, operational and policy questions, rarely resolved by cross-border relief operations.

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

115 UNSC Res. S/RES/2139, 22 February 2014, op. para. 6. Also of relevance is op. para. 5, where the Council, having called upon all parties to immediately lift the sieges of populated areas, demanded that all parties allow the delivery of humanitarian assistance (including medical assistance), cease depriving civilians of food and medicine indispensable to their survival, and enable the rapid, safe and unhindered evacuation of all civilians who wished to leave.

As a matter of law, it seems safe to conclude that if there are civilians in need and actors capable of providing the assistance in a principled manner, the affected state may not withhold consent to relief operations in a number of specific circumstances. As a minimum these include situations of occupation, situations where the civilian population is facing starvation, and medical relief operations. In all such cases the affected state retains a right of control over the relief operations, including the entitlement to prescribe technical arrangements under which the passage of relief goods is permitted.

Determining whether consent has been withheld arbitrarily and, therefore, unlawfully in other situations is more complex as a matter of law and fact.

Also unsettled is the lawfulness of unauthorised operations. Private actors that carry out unauthorised relief operations expose their staff to the risk of proceedings in the affected state. The wrongfulness of unauthorised operations carried out by states or international organisations may be precluded in exceptional circumstances under the principle of necessity or, possibly, as a counter-measure in response to a violation of an *erga omnes* rule. Even in such circumstances, however, it is unclear how the operations would actually be implemented in practice.

Cross-border relief operations raise possibly even more complex operational questions. Whatever the legal position, operations are unlikely to be implemented in safety unless all parties concerned – the affected state, and opposition groups that control territory where the assistance is to be delivered or through which it must transit – agree or, at least, acquiesce thereto. It is also essential to consider the likely adverse impact of unauthorised operations on existing operations in-country and beyond.

The Security Council may ‘impose’ relief operations by means of a binding decision, obviating the requirement of consent. As a matter of operational practice, such an imposition has significant potential downsides, by associating what should be an exclusively humanitarian and impartial operation with political decisions. Moreover, past practice would indicate that by the time the Council adopts such a measure, armed force is likely to be necessary to establish security conditions to enable relief operations to be carried out.

At a policy level, guidance on some of the key questions raised by relief operations would be welcome, including whose consent is required; what constitutes arbitrary withholding of consent; and the precise nature of the obligations to allow and facilitate relief operations that have been agreed to – a central legal and practical issue only touched upon in the present article.

In practice, obtaining consent to relief operations and overcoming the ongoing challenges of actually delivering assistance once consent has been granted is fundamentally a matter of negotiation between those wishing to provide assistance and affected states, where the law provides the background, but is only one among many elements that will affect the outcome. Such negotiations are frequently best pursued in a progressive manner to build mutual confidence – actor by actor, specific need by specific need, location by location – rather than in a binary, ‘all or nothing’ manner.