

Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict

Commissioned by the United Nations Office for the Coordination of Humanitarian Affairs



OXFORD INSTITUTE FOR
ETHICS, LAW AND
ARMED CONFLICT



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Foreword

In armed conflicts across the world, millions of civilians require emergency assistance to survive. Despite the challenges and dangers of operating in armed conflict, humanitarian organizations respond with life-saving assistance by distributing food and life-saving medical supplies, and by providing access to shelter, water and sanitation. Tragically, civilians continue to live in areas where parties to armed conflict withhold consent to humanitarian relief operations or impose onerous and time-consuming bureaucratic restrictions on assistance, such that humanitarian organizations can only reach a small fraction of those in need. Such impediments and delays of humanitarian relief operations further compound civilian suffering.

A firm understanding of the legal framework regulating humanitarian relief operations in situations of armed conflict is essential for all those with a role to play in ensuring that people in need have the best chance of accessing and receiving life-saving assistance. While the parties have clear legal obligations, the day-to-day reality is that humanitarian access is a matter for negotiation between parties to an armed conflict and those seeking to conduct humanitarian relief operations, and is not achieved simply by making demands.

The present Guidance will assist a variety of actors concerned with humanitarian relief operations, including parties to armed conflict, other states, international and non-governmental organisations seeking to provide humanitarian assistance, the United Nations Security Council and General Assembly and other relevant bodies, legal practitioners, scholars and the media. The document will enhance understanding of the rules of international law that are relevant to this area, promote further discussion, and inform policies and advocacy strategies for improving humanitarian access to conflict-affected populations.

In his 2013 report on the protection of civilians in armed conflict, the United Nations Secretary-General noted that further analysis of one dimension of this legal framework was required: the issue of arbitrary withholding of consent to humanitarian relief operations and the consequences thereof. He instructed the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) to engage with a range of actors to examine the relevant rules, and consider options for providing guidance.¹

In response, OCHA commissioned the Institute for Ethics, Law and Armed Conflict and the Oxford Martin Programme on Human Rights for Future Generations at the University of Oxford to convene a meeting of experts to discuss the options for providing guidance

1. *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN doc S/2013/689, 22 Nov 2013, para 80.

on this topic. As the experts expressed the view that it was not possible to consider the question of arbitrary withholding of consent in isolation from the rest of the rules regulating humanitarian relief operations in situations of armed conflict, the scope of the consultations was broadened accordingly. It was also indicated that the most useful format for providing guidance was a non-binding restatement of applicable rules. On the basis of this feedback, OCHA commissioned the University of Oxford to convene a series of consultations of eminent experts in international law that led to the elaboration of the present Guidance document. In the course of the consultations, OCHA also commissioned the University of Oxford to produce two background research papers addressing some of the issues that are examined in the Guidance document. These papers² provided an initial step in the analysis of the relevant legal issues and a basis for discussion and further exploration.

The Guidance document seeks to reflect existing law, and to clarify areas of uncertainty. Where the law is unclear, it presents possible different interpretations. Each section is presented in the form of a narrative commentary outlining the legal framework regulating a specific aspect of humanitarian relief operations and ends with italicised Conclusions summarising the key elements. The Guidance document does not represent the official position of OCHA or of the United Nations, and each Conclusion does not necessarily reflect the unanimous view of the experts consulted.

OCHA, the Oxford Institute for Ethics, Law and Armed Conflict, and the Oxford Martin Programme on Human Rights for Future Generations would like to express their gratitude to the experts who participated in the consultations. Without their expertise, experience, commitment and goodwill, the elaboration of the Guidance document would not have been possible.



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October 2016

2. Dapo Akande and Emanuela-Chiara Gillard, *Cross-Border Relief Operations: The Legal Framework* (2016), and Dapo Akande and Emanuela-Chiara Gillard, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict* (2016).

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Acknowledgements

This document has been prepared on the basis of consultations with experts who met in Oxford for a number of sessions held in 2013 and 2014. At these sessions, the experts provided valuable advice on the law and practice related to the topic, and reviewed drafts of the Guidance document. In between and after these sessions, electronic consultations were also held with the experts.

The list of experts who participated in the consultations is to be found below. The authors would like to express their sincere gratitude to them for their wisdom and for their dedication to the process. They have played an indispensable role in the elaboration of the Guidance document.

The authors benefited from the invaluable support and collaboration of the Policy, Studies and Development Branch of United Nations Office for the Coordination of Humanitarian Affairs (OCHA). The authors would like to put on record their gratitude to Hansjoerg Strohmeyer, Chief of that Branch, for his astute leadership and encouragement throughout the process. They would also like to thank the current and former members of the Policy Advice and Planning Section of the Branch for their extensive support and valuable advice including Aurelien Buffler, Karen Perrin, Julien Piacibello, Greg Puley, Hannah Tonkin and Nathalie Weizmann.

The authors would also like to thank colleagues and staff at the University of Oxford who provided assistance throughout the process of elaborating this Guidance document. In particular, they are indebted to Zoe Davis-Heaney and Anais Resseguier for outstanding administrative support in organizing the expert meetings and to Gilles Giacca and Martin Dawidowicz for very helpful research, advice and feedback. Many thanks are also due to Adam Broza and Nimrod Karin for research assistance and help in editing the document.

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A. Introduction

1. This Guidance document sets out the basic rules of international law regulating humanitarian relief operations in situations of armed conflict. It focuses primarily on international humanitarian law, but also considers other areas of public international law that may be relevant to such operations, particularly international human rights law and the rules on state sovereignty, territorial integrity, and the responsibility of states and international organisations for internationally wrongful acts. This is without prejudice to rights and obligations that may arise from other applicable rules of public international law.
2. The Guidance document seeks to reflect existing law, and to clarify areas of uncertainty. Where the law is unclear, it presents possible different interpretations. In cases where the law does not specify how obligations are to be discharged, the Guidance document suggests possible ways of doing so.
3. The Guidance document consists of eight Sections (B to I) presenting the rules regulating a particular aspect of humanitarian relief operations, followed by italicised Conclusions summarising their principal elements.
4. The Guidance document focuses on the rules regulating collective relief for the civilian population in international armed conflicts, including situations of occupation, and non-international armed conflicts. It does not consider the rules on relief for particular individuals nor those on humanitarian assistance for people deprived of their liberty in connection to an armed conflict. It also does not address the modalities for the distribution of assistance.
5. For the purposes of the Guidance document, “humanitarian relief operations” include, but are not limited to, operations to provide food, water, medical supplies, clothing, bedding, means of shelter, heating fuel, and other supplies and related services essential for the survival of a civilian population, as well as objects necessary for religious worship.³

3. Various provisions of international humanitarian law treaties set out indicative lists of relief items. See, for example, Article 59 of the Geneva Convention Relative to the Protection of Civilian Persons in Times of War of 12 August 1949 (GC IV): “... foodstuffs, medical supplies and clothing ...”; Article 69 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict of 8 June 1977 (AP I): “... clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship ...”; and Article 18 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict of 8 June 1977 (AP II): “... Supplies essential for its survival, such as foodstuffs and medical supplies ...”.

6. The conventional rules of international humanitarian law regulating humanitarian relief operations are found in different treaties, depending on whether the conflict is international or non-international in character. The rules applicable in international armed conflicts, including situations of occupation, are found principally in Articles 23 and 59 GC IV, and Articles 69-71 AP I.⁴ The rules applicable in non-international conflicts are Common Article 3(2) of the four Geneva Conventions (GCs) and Article 18 AP II. Customary international law rules apply alongside these treaty provisions. According to the International Committee of the Red Cross' study of customary rules of international humanitarian law, these treaty provisions are mirrored in customary law and the rules regulating humanitarian relief operations are essentially the same in both types of conflict.⁵ The Guidance document expressly notes when the rules applicable in international and non-international armed conflict differ.
7. It is generally accepted that international human rights law also provides protection in times of armed conflict.⁶ Of particular relevance to humanitarian relief operations are the human rights relating to bodily integrity as well as economic, social, and cultural rights, enshrined, for example, in the International Covenant on Civil and Political Rights of 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) respectively, as well as in a number of regional instruments.
8. The rules of international humanitarian law on humanitarian relief operations apply to operations that meet certain conditions, aimed at guaranteeing that their sole purpose is the delivery of humanitarian relief and that they do not constitute interference in the armed conflict or the internal affairs of the parties to the conflict. Relief operations must be exclusively humanitarian in character: their purpose must be solely to assist civilians in need. They must also be impartial: they must be conducted without adverse distinction on any ground, priority being given to those in greatest need. This does not preclude particularly vulnerable categories of people from receiving preferential treatment, including for example, children and expectant or nursing mothers.⁷

4. See also Article 9 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (GC I); Article 9 of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949 (GC II); and Article 10 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (GC III); and Article 10 GC IV.

5. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (2005) (ICRC CIHL Study), Rule 55.

6. See, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep 2004, 136 (Wall Advisory Opinion), para 106.

7. Article 23 GC IV and Article 70(1) AP I.

9. A variety of actors may offer to conduct humanitarian relief operations: states, international organisations, and private actors such as non-governmental organisations. While all will have to meet the abovementioned conditions to benefit from the rules of international humanitarian law on relief operations, other rules of public international law, most notably those on state sovereignty, territorial integrity, and responsibility for internationally wrongful acts, are only directly binding on states and international organisations. Furthermore, in addition to the rules of international law outlined in this Guidance document, international humanitarian organisations must also comply with any relevant internal rules of the organisation. Consequently, some of the rights and obligations of actors seeking to conduct humanitarian relief operations vary according to their status. The Guidance document expressly notes whenever the rules differ.

A(i) For the purposes of this Guidance document, “humanitarian relief operations” include, but are not limited to, operations to provide food, water, medical supplies, clothing, bedding, means of shelter, heating fuel, and other supplies and related services essential for the survival of a civilian population, as well as objects necessary for religious worship.

A(ii) The rules of international humanitarian law on humanitarian relief operations apply to relief operations that are exclusively humanitarian and impartial in character, and that are conducted without adverse distinction.

B. Responsibility for Meeting the Needs of the Civilian Population

10. A state's responsibility to meet the needs of persons within its territory or under its effective control is an essential element of state sovereignty, expressly recognised in a number of international law documents such as the Guiding Principles on Internal Displacement⁸ and United Nations General Assembly Resolution 46/182.⁹
11. This notion also lies at the heart of international human rights law. For example, the ICESCR provides for the right to food and water, and the Committee on Economic, Cultural and Social Rights has noted that whenever an individual or group are unable, for reasons beyond their control, for example in situations of natural or other disasters, to enjoy the rights to adequate food and water by the means at their disposal, states must provide those rights directly.¹⁰ Similar positive obligations form part of states' duty to protect the rights to life and to security of the person.¹¹
12. In situations of occupation, the Fourth Geneva Convention and Additional Protocol I expressly spell out the responsibility of an occupying power, which, to the fullest extent of the means available to it, must ensure the food and medical supplies of the civilian population of the occupied territory, as well as clothing, bedding, means of shelter, other supplies essential to its survival, and objects necessary for religious worship.¹²

8. *Guiding Principles on Internal Displacement*, UN doc E/CN.4/1998/53/Add.2, 11 Feb 1998, Principles 3(1) ("National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction"); and 25(1) ("The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities").

9. UNGA res 46/182, 19 Dec 1991, Principle 4 ("Each state has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory"). In relation to natural disasters see also Article 12(1) of the ILC draft articles on the protection of persons in the event of disasters adopted by the International Law Commission on first reading (*Report of the ILC, Sixty-sixth session (5 May–6 June and 7 July–8 August 2014)*, UN doc A/69/10, para 55).

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

11. For examples of positive obligations derived by the Human Rights Committee from the right to life, see HRC *Concluding Observations on the Democratic People's Republic of Korea's second periodic report*, UN doc CCPR/CO/72/PRK, 27 Aug 2001, para 12; HRC *Concluding Observations on Uganda's initial report*, UN doc CCPR/CO/80/UGA, 4 May 2004, para 14; and HRC *General Comment No. 6: Right to Life (Art. 6)*, UN doc HRI/GEN/1/rev.9 (Vol.1), 30 Apr 1982, para 5.

12. Article 55 GC IV and Article 69 AP I.

13. The Additional Protocols do not include a similar provision highlighting this responsibility in situations other than occupation. A draft article to this effect was not retained during their negotiation as some states objected to reminding a party to an armed conflict of its obligations to secure supplies for its own civilian population. This objection is of itself an acknowledgement of the existence of such an obligation. Moreover, some states considered that parties to an armed conflict could not be prevented from according priority, in this area, on the basis of military necessity rather than humanitarian criteria – for example, to ensure the health of members of their armed forces. Consequently, they could not be required to meet this obligation without adverse distinction.¹³
14. This being said, in international armed conflicts Article 27 GC IV requires protected persons to be treated humanely,¹⁴ and Common Article 3 GCs and Article 4 AP II require parties to non-international armed conflicts to treat persons taking no active part in hostilities humanely. “Humane treatment” is an extremely broad concept. It has been interpreted inter alia as requiring parties to an armed conflict to provide persons deprived of their liberty with food and other essential items such as drinking water and medical supplies.¹⁵ A similar obligation may also be inferred in relation to persons who are under the effective control of a party to an armed conflict in other circumstances, for example those who find themselves in territory under its control and are unable to secure supplies, as a result of events beyond their control.¹⁶ This line of reasoning is particularly important for organised armed groups who are clearly bound by Common Article 3, and by Article 4 AP II, where applicable.¹⁷

13. Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949* (1987) (ICRC Commentary to the APs), paras 2769-2770 and 4878.

14. Protected persons are defined in Article 4 GC IV.

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

16. See also, more generally, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, 2016, (ICRC Commentary to GC I, 2nd ed), paras 782 and 826.

17. In addition to their obligations under international humanitarian law, there has, in recent years, been a shift towards imputing obligations to comply with international human rights law to organised armed groups in situations where they exercise effective control over territory and populations and discharge a degree of public and administrative functions. See, for example, S/RES/1574 (2004) preambular para 11; S/RES/1376 (2001), operative para 5; and S/RES/1417 (2002), operative para 4. See also the *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons (Addendum: Mission to Georgia)*, UN doc E/CN.4/2006/71/Add.7, 24 Mar 2006, para 5.

15. In non-international armed conflicts, in situations where organised armed groups exercise effective control over territory, they also have a responsibility to meet the needs of civilians under their effective control if the state party to the conflict is unable to or otherwise does not discharge its obligations in this regard.

***B(i)** States have the primary responsibility to meet the needs of civilians in their territory or under their effective control.*

***B(ii)** In non-international armed conflicts, in situations where organised armed groups exercise effective control over territory, they also have a responsibility to meet the needs of civilians under their effective control if the state party to the conflict is unable to or otherwise does not discharge its obligations in this regard.*

C. Offers of Services

16. Where a party to an armed conflict responsible for meeting the needs of a civilian population fails to do so, and, consequently a civilian population remains inadequately supplied with food, water, medical supplies, clothing, bedding, means of shelter, and other supplies essential for its survival, as well as objects necessary for religious worship, offers may be made to conduct humanitarian relief operations.¹⁸
17. A range of actors may offer to conduct humanitarian relief operations: states, inter-governmental organisations, non-governmental organisations, and other private actors.¹⁹ Rather than their status, what matters is their capacity to conduct relief operations that are exclusively humanitarian and impartial in character and conducted without adverse distinction. Operating in this principled manner provides parties to an armed conflict assurance that the humanitarian relief operations will not assist their opponent.
18. Article 70(1) AP I refers to situations where the civilian population is “not adequately provided” with the goods in question.²⁰ The need for humanitarian relief and the extent of its urgency must be assessed in every case individually, depending on the real requirements. It is the essential character of such requirements that must be the determining factor.²¹
19. In assessing whether there are unmet needs, reference may be made to well-established indicators, bearing in mind that these provide general guidance and that a determination of whether the civilian population is inadequately supplied with items necessary for its survival needs to be made on a case-by-case basis.²²

18. Common Article 3(2) GCs, Article 70(1) AP I, and Article 18(2) AP II.

19. Common Article 3 GCs specifically mentions that “[a]n impartial humanitarian body, such as the International Committee of the Red Cross” may offer its services to the parties to an armed conflict. Article 70 AP I and Article 18 AP II do not refer to specific actors but, instead, focus on the nature of the operations, speaking of “relief operations which are humanitarian and impartial in character and conducted without adverse distinction”; and “relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without adverse distinction” respectively.

20. Article 59 GC IV uses the expression “inadequately supplied”.

21. ICRC Commentary to the APs, *supra*, para 2794.

22. See, for example, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response* (revised edition, 2011).

20. Offers to conduct humanitarian relief operations may be made to any party to an armed conflict and must not be considered as interference in the armed conflict or unfriendly acts.²³ Such offers do not affect the legal status of parties to an armed conflict.²⁴
21. Offers to provide assistance or to conduct other humanitarian activities may also be made in other situations, including where the civilian population is not inadequately provided with supplies essential to its survival.²⁵ Likewise, parties to an armed conflict may also ask for assistance in such situations.

C(i) In situations where a civilian population remains inadequately provided with food, water, medical supplies, clothing, bedding, means of shelter, heating fuel, and other supplies essential for its survival, as well as objects necessary for religious worship, offers may be made to conduct relief operations that are exclusively humanitarian and impartial in character and conducted without adverse distinction.

C(ii) Offers to conduct humanitarian relief operations do not constitute interference in the armed conflict or unfriendly acts.

23. This is specifically noted in Article 70(1) AP I and implicit in common Article 3 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) (ICRC Commentary to GC I), 58, and also ICRC Commentary to GC I, 2nd ed, *supra*, para 804.

24. Common Article 3 GCs and ICRC Commentary to GC I, 2nd ed, *supra*, para 805.

25. In relation to impartial humanitarian actors see Common Article 3(2) GCs; Article 9 GC I; Article 9 GC II; Article 9 GC III; and Article 10 GC IV. See also ICRC Commentary to GC I, 2nd ed, *supra*, para 1132.

D. Consent to Humanitarian Relief Operations

1. The general rule

22. The consent of concerned states is required before offers to conduct humanitarian relief operations may be implemented. This requirement of consent – implicit in Common Article 3(2) GCs, which provides that an impartial humanitarian body may “offer its services”²⁶ – appears expressly in Article 70 AP I and in Article 18(2) AP II.²⁷ As discussed in Section E, while required, such consent may not be arbitrarily withheld.

a. International armed conflicts

23. In international armed conflicts, Article 70 AP I requires the consent of “the Parties concerned” in the relief actions, in the plural. This expression refers to, most notably, the state party to an armed conflict in whose territory the humanitarian relief operations are intended to be conducted. The consent of enemy states, or of other states party to the conflict, is only required if the humanitarian relief operations must transit through territory under their effective control.²⁸

b. Non-International armed conflicts

24. The position in non-international armed conflicts is more complex. In particular, there is a divergence of views as to whether the consent of the state party to an armed conflict is required for humanitarian relief operations intended for civilians in areas under the effective control of organised armed groups that can be reached without passing through territory under the state’s effective control.

25. Common Article 3(2) GCs provides that an “impartial humanitarian body ... may offer its services to the Parties to the conflict”. The provision is silent, however, as to whose consent is required. Some interpret Common Article 3(2) GCs as implicitly allowing humanitarian relief operations to be conducted if the party to the conflict to which an offer is made, be it a state or an organised armed group, accepts it, regardless of the position adopted by its opponent. On this view, provided the humanitarian relief operations do not have to transit through territory under the state’s effective control, its consent is not required.

26. See, for example, ICRC Commentary to GC I, 2nd ed, *supra*, paras 730 and 828.

27. Article 23 GC IV is discussed in Subsections G.2.b and G.3.a.

28. ICRC Commentary to the APs, *supra*, para 2806. The position of non-belligerent states in whose territory humanitarian relief operations are initiated or through whose territory they must transit is discussed in Section H.

26. It is difficult to interpret the silence of Common Article 3(2) GCs in this manner, particularly in view of the significant infringement of territorial sovereignty of the state party to a non-international armed conflict that humanitarian relief operations conducted in its territory without its consent would entail. In any event, at best this approach would only be applicable to the impartial humanitarian bodies referred to in Common Article 3(2) GCs. Other actors offering their services, such as states, would have to meet the more onerous requirements of Article 18(2) AP II, discussed below.
27. Article 18(2) AP II is more explicit on this issue, requiring the consent of “the High Contracting Party concerned”. This appears to be a clear reference to the state party to a non-international armed conflict.
28. However, it has been suggested that the state party to a non-international armed conflict is “concerned” by humanitarian relief operations intended for civilians in territory under the effective control of an organised armed group, and consequently, that its consent is required, only if the relief operations must transit through territory under its effective control. If the territory under the effective control of an organised armed group can be reached from another country directly, the consent of the state party to the conflict is not required.
29. This interpretation of Article 18(2) AP II is questionable for a number of reasons. In the first place, the suggestion that a state is not “concerned” by humanitarian relief operations taking place on its territory, even if it is in areas beyond its effective control, appears contrary to basic considerations of territorial sovereignty.²⁹ Second, this interpretation would suggest that there may be circumstances where no High Contracting Party is concerned by a humanitarian relief operation, making the express reference to the consent of “the” High Contracting Party in Article 18(2) AP II redundant.
30. In light of the silence of Common Article 3(2) GCs and of the specific reference to “the High Contracting Party” in Article 18(2) AP II, a view that would give due weight to general principles of international law relating to a state’s territorial sovereignty and also to its responsibility towards the civilian population is to always require the consent of the state in whose territory the humanitarian relief operations are intended to be conducted. This state will, however, have a more limited range of grounds for withholding consent where relief is intended for civilians in territory under the effective control of armed opposition groups.
31. Whatever the legal position, as a matter of operational practice, the agreement or acquiescence of all parties to an armed conflict to humanitarian relief operations

29. On the interplay between state sovereignty and other provisions of Additional Protocol II see Article 3 AP II.

intended for civilians in territory under their effective control or transiting through such territory will be required to conduct the operations in a safe and unimpeded manner.

2. Exceptions to the general rule

32. There are two situations in which states have no latitude to withhold consent to humanitarian relief operations: first, in situations of occupation; and, second, where the United Nations Security Council has adopted a binding decision.

a. Situations of occupation

33. If, despite an occupying power's obligations in this regard, whole or part of the civilian population is inadequately provided with supplies essential to its survival, the occupying power may not withhold consent to relief operations that are humanitarian and impartial in character. It is, however, entitled to prescribe technical arrangements as discussed in Section F,³⁰ and to decide which actors may conduct the humanitarian relief operations, provided the needs of the civilian population are met in a principled manner.

b. Binding United Nations Security Council decisions

34. The United Nations Security Council may adopt binding measures requiring parties to an armed conflict, and other relevant states, to consent to humanitarian relief operations or impose such operations on parties.
35. The Security Council frequently calls upon parties to an armed conflict to grant humanitarian access. However, the vast majority of these calls are an exhortation to allow humanitarian relief operations and, in fact, a recognition of the need for the consent of the state in whose territory the operations are intended to be conducted, rather than a Security Council imposition of such operations.³¹
36. On a small number of occasions the Security Council has adopted binding measures in relation to humanitarian relief operations.³² Although it frequently addressed impeded humanitarian relief operations, until recently the Council had never actually required the affected state to consent to such operations. Instead, the focus was on

30. Article 59 GC IV.

31. See *Aide-Memoire for the Consideration of Issues Pertaining to the Protection of Civilians in Armed Conflict*, UN doc S/PRST/2014/3, 12 Feb 2014, Addendum, Part I.C.

32. In relation to northern Iraq, by S/RES/688 (1991); in relation to Bosnia-Herzegovina, by S/RES/770 (1992) and S/RES/781 (1992); and in relation to Somalia, by S/RES/794 (1992).

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. More recently, in response to the humanitarian crisis caused by the conflict in Syria, the Security Council has adopted a more proactive approach. In Resolution 2139 (2014) the Council made a binding demand to parties to the conflict in Syria and other relevant parties to allow humanitarian relief operations, effectively requiring them to consent to them.³³ In Resolution 2165 (2014) the Council went further, adopting a binding decision that United Nations humanitarian agencies and their implementing partners were authorised to use routes across conflict lines and specified border crossings to provide humanitarian assistance to people in need. In this case, and for the first time, consent was not required.³⁴

3. By whom is consent to be given and in what manner

37. International humanitarian law does not specify which entity or persons, within a state, are responsible for providing consent to offers to conduct humanitarian relief operations.
38. It is a state's domestic law that establishes which organ within that state is responsible for providing consent to offers to conduct humanitarian relief operations. Frequently, humanitarian actors initially negotiate authorisation to operate with ministries of foreign affairs, but this is not necessarily the case. It is normally some organ of the state's central government, rather than regional administration.
39. International humanitarian law also does not prescribe the manner in which consent is to be granted, for example whether in writing or orally. What matters is that there be a freely given statement evidencing a binding intention to consent made by a person entitled to represent the state. The procedures for requesting and obtaining consent may differ depending on whether the offer is made by a local actor or one based outside the state in question.
40. Silence in response to an offer to conduct humanitarian relief operations may be construed as consent thereto only in exceptional circumstances, for example where it is impossible to determine who represents the government of the state.³⁵

33. S/RES/2139 (2014), operative para 6.

34. S/RES/2165 (2014), operative para 2.

35. ICRC Commentary to APs, *supra*, para 4884.

41. It is unsettled whether a state may by its actions or omissions be considered to have acquiesced to humanitarian relief operations without its express consent. This possibility could only arise in situations where the state is aware that the humanitarian relief operations are being conducted and has failed to react to them for a period of time.³⁶
42. Once initial consent to operate has been obtained, the modalities for the passage of humanitarian relief supplies, equipment, and personnel are frequently negotiated with authorised representatives of the relevant party to the armed conflict at regional or local level. At this stage, those conducting humanitarian relief operations frequently merely notify relevant authorities of their intended movements and activities.

D(i) If civilians are inadequately provided with essential supplies and offers have been made to conduct relief operations that are exclusively humanitarian and impartial in character and conducted without adverse distinction, such operations must be carried out subject to the consent of the state in whose territory the operations will be carried out. Such consent must not be arbitrarily withheld.

D(ii) In situations of non-international armed conflict, where a humanitarian relief operation is intended for civilians in territory under the effective control of an organised armed group, and this territory can be reached without transiting through territory under the effective control of the state party to the conflict, the consent of the state is nonetheless required, but it has a narrower range of grounds for withholding consent.

D(iii) If the whole or part of the civilian population of an occupied territory is inadequately supplied, the occupying power may not withhold consent to offers to conduct humanitarian relief operations that are exclusively humanitarian and impartial in character.

D(iv) The United Nations Security Council may adopt binding decisions requiring parties to an armed conflict and other relevant states to consent to offers to conduct humanitarian relief operations, or may impose such operations, thereby dispensing with the requirement of consent.

36. On the role of acquiescence as consent see *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, ICJ Rep 2005, 168, paras 46-54.

E. Arbitrary Withholding of Consent

43. Two conditions must be met before the issue of consent to humanitarian relief operations arises. First, civilians must be inadequately provided with essential supplies and the party to the conflict responsible for meeting their needs must not be providing the requisite assistance. Second, offers of services must have been made by actors capable of carrying out relief operations that are exclusively humanitarian and impartial in character and conducted without any adverse distinction.³⁷
44. If these conditions are met, consent to humanitarian relief operations may not be arbitrarily withheld. This principle, that the state whose consent is required may not withhold it arbitrarily, is derived from (i) the need to provide an interpretation of the relevant treaty texts, which gives effect to all aspects of those provisions; (ii) the drafting history of those provisions; and (iii) practice subsequent to the adoption of the treaties.
45. The texts of Article 70 of AP I and Article 18(2) of AP II provide that, as long as the two preliminary conditions mentioned in the previous paragraph are met, humanitarian relief operations “shall be undertaken”, but that this is “subject to the agreement” of the state concerned in such relief actions. As already discussed, the last phrase makes it clear that consent is required. However, the use of the word “shall” also suggests that acceptance of humanitarian relief is not entirely discretionary. Interpreting the texts in a manner which insists on the requirement of consent, but which subjects such consent to some limits, gives effect to both aspects of the provision. Such an interpretation is in line with the principle that a treaty must not be interpreted in such a way as to render parts of the text redundant or meaningless.³⁸
46. The requirement that consent must not be arbitrarily withheld finds support in the negotiating history of the Additional Protocols. It was understood during those negotiations that states did not have “absolute and unlimited freedom to refuse their agreement to relief actions”. A state refusing consent had to do so for “valid reasons”, not for “arbitrary or capricious ones”.³⁹

37. Article 70 AP I. See also ICRC Commentary to the APs, *supra*, 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 Aug 2010, para 81.

38. This is the principle of effectiveness (*ut res magis valeat quam pereat*) on which see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) (Preliminary Objections)*, ICJ Rep 2011, 70, paras 133-134. See also *Korea-Definitive Safeguard Measure on Import of Certain Dairy Products*, AB-1999-8, WT/DS98/AB/R, 24, paras 80-81 (1999): “[i]n the light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to ‘read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously’” (emphasis in original).

39. In relation to international armed conflicts see ICRC Commentary to the APs, *supra*, para 2805; and CDDH/II/SR 87, paras 27-31. In relation to non-international armed conflicts see ICRC Commentary to the APs, *supra*, para 4885; and CDDH/SR 53, 156-157. See also, ICRC Commentary to GC I, 2nd ed, *supra*, paras 832-834.

47. This position has since been reflected in subsequent formulations of the rules on humanitarian assistance, which expressly note that consent may not be arbitrarily withheld. The principle is to be found, for example, in the Guiding Principles on Internal Displacement;⁴⁰ the Resolution on Humanitarian Assistance adopted by the Institute of International Law in 2003;⁴¹ and, beyond situations of armed conflict, in the work of the International Law Commission (ILC) on the protection of persons in the event of disasters.⁴² In addition, the UN Security Council, the UN General Assembly, the UN Human Rights Council, and the UN Human Rights Committee have all addressed the issue of the legality of obstructions to humanitarian access from the perspective of “arbitrary denial” of access.⁴³
48. Under international law the notion of arbitrariness has a broad meaning. While there is no single or all-encompassing definition, international humanitarian law, international human rights law, and general principles of public international law provide guidance on the type of conduct that would justify the conclusion that a state is acting arbitrarily in withholding consent to humanitarian relief operations.
49. Essentially, consent is withheld arbitrarily if (i) it is withheld in circumstances that result in the violation by a state of its obligations under international law with respect to the civilian population in question; or (ii) the withholding of consent violates the principles of necessity and proportionality; or (iii) consent is withheld in a manner that is unreasonable, unjust, lacking in predictability or that is otherwise inappropriate.⁴⁴

40. Principle 25(2) of the *Guiding Principles on Internal Displacement*, *supra* (“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.”).

41. Institute of International Law, Bruges Session 2003, Resolution on Humanitarian Assistance, 2 Sep 2003, Article VIII (duty of affected states not arbitrarily to reject bona fide offer of humanitarian assistance).

42. Article 14 of the ILC draft articles on the protection of persons in the event of disasters, *supra*, dealing with “Consent of the affected state to external assistance”.

43. With respect to the Security Council, see S/RES/2139 (2014), preambular para 5; S/RES/2165 (2014), preambular para 15; S/RES/2216 (2015), preambular para 10. With respect to the General Assembly, see UNGA res 68/182, 18 Dec 2013, operative para 14. With respect to the Human Rights Council, see A/HRC/Res/29/13 (2015), operative para 1. See also the Human Rights Committee’s *Concluding Observations on the fourth periodic report of the Sudan*, UN doc CCPR/C/SDN/CO/4 (2014), para 8(f).

44. HRC *General Comment No. 35, Liberty and Security of Person (Art. 9)*, UN doc CCPR/C/GC/35, 28 Oct 2014, paras 11 and 12.

1. Withholding of consent that violates a state's obligations under international law with respect to the civilian population in question

50. Where international law prohibits arbitrary action, conduct that would violate a state's other obligations under international law is regarded as arbitrary. In particular, withholding consent to humanitarian relief operations in circumstances that would result in the violation by a state of its obligations under international law with respect to the civilian population in question would be arbitrary. This follows from the general principle according to which the interpretation of a treaty must be carried out taking into account any relevant rules of international law applicable in the relations between the parties.⁴⁵
51. A non-exhaustive list of circumstances where withholding consent to humanitarian relief operations would violate a state's obligations, and thus be arbitrary, includes:
- Withholding consent to humanitarian relief operations in situations where the civilian population is inadequately supplied and the state intends to cause, contribute to, or perpetuate starvation. This would violate the prohibition on starvation of the civilian population as a method of warfare.⁴⁶
 - Withholding consent to medical relief operations, including on the ground that medical supplies, equipment, and personnel could treat wounded enemy combatants. 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. No distinction may be made on any grounds other than medical ones.⁴⁷ Withholding consent to medical relief operations as they might assist wounded and sick enemy combatants would violate this rule. Moreover, the same medical supplies, equipment, and personnel are also likely to be necessary for the civilian population, which would also be denied the medical relief to which it is entitled.
 - Withholding consent to humanitarian relief operations in order to punish the civilian population for acts for which it is not responsible, such as acts committed

45. Article 31(3)(c) of the Vienna Convention on the Law of Treaties of 1969. See also the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep 1996, 226, para 25 (where the ICJ interpreted the expression "arbitrary" by reference to other applicable obligations under international law). The Human Rights Committee has stated that the concept of arbitrary conduct includes unlawful conduct but is broader. See HRC *General Comment No. 35: Liberty and Security of Person (Art. 9)*, *supra*, paras 11 and 12. See also *Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality*, UN doc A/HRC/13/34, 14 Dec 2009, para 25. See also, ICRC *Commentary to GC I*, 2nd ed, *supra*, paras 835-837.

46. Article 54(1) AP I and Article 14 AP II.

47. Article 10 AP I and Article 7 AP II.

by the party to the conflict with effective control over it. This would violate the prohibition on collective punishment.⁴⁸

- Selective withholding of consent to humanitarian relief operations with the intent or effect of discriminating against a particular group or section of the civilian population. For example, systematically rejecting offers to conduct humanitarian relief operations in areas populated by ethnic groups perceived as favouring the enemy. This would violate the prohibition on discrimination.⁴⁹
- Withholding of consent to humanitarian relief operations that violates fundamental human rights as applicable in situations of armed conflict. This includes withholding consent in circumstances where doing so would violate the rights to bodily integrity,⁵⁰ or prevent the satisfaction of the minimum core of relevant economic, cultural, and social rights, such as the rights to an adequate standard of living, and to essential health and medical services.⁵¹

2. Withholding of consent in violation of the principles of necessity and proportionality

52. International tribunals and other bodies that have interpreted the concept of arbitrariness have consistently held that in order not to be arbitrary, a measure must be necessary, no more than necessary, and proportionate to the end sought to be achieved.⁵² Where consent to relief operations is withheld for a valid reason, it will nonetheless be arbitrary if it exceeds what is necessary in the circumstances, and thus is disproportionate. Limitations in terms of time, duration, location, and affected goods and services must not go beyond what is absolutely necessary to achieve the legitimate aim.

48. Article 33 GC IV and Article 4(2)(b) AP II.

49. Common Article 3 GCs; Article 16 GC III; Article 13 GC IV; Article 75(1) AP I; Article 4(2) AP II; Articles 2(1) and 26 ICCPR and Article 2(2) ICESCR.

50. Articles 6 and 7 ICCPR.

51. Articles 11 and 12 ICESCR. These provisions were deemed applicable in situations of armed conflict alongside relevant rules of international humanitarian law by the International Court of Justice in the Wall Advisory Opinion, *supra*, paras 130 and 134. On what constitute the core obligations of various rights see CESCR *General Comment No. 12: The Right to Adequate Food (Art. 11)*, *supra*, para 8; CESCR *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, UN doc E/C.12/2000/4, 11 Aug 2000, paras 43 and 44; and CESCR *General Comment No. 15: The Right to Water (Arts. 11 and 12)*, *supra*, para 37.

52. See *A v Australia*, HRC Communication No. 560/1993, UN doc CCPR/C/59/D/560/1993, 30 Apr 1997, para 9.2; and HRC General Comment No. 35, para 12. See also *Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality*, UN doc A/HRC/25/28, 19 Dec 2013, para 4.

3. Withholding of consent in a manner that is unreasonable, that may lead to injustice or to lack of predictability, or that is otherwise inappropriate

53. Consent is also withheld arbitrarily if it is withheld in a manner that is unreasonable, or that may lead to injustice or to lack of predictability, or that is otherwise inappropriate.⁵³
54. A possible example of this would be a total failure to provide reasons for withholding consent. Such a failure to provide reasons would give rise to a lack of predictability and would make it impossible to assess whether there are valid reasons underlying the withholding of consent. The provision of reasons allows compliance with the substantive obligations relating to humanitarian relief operations to be assessed. As the ILC has noted in relation to assistance in natural disasters, “[t]he provision of reasons is fundamental to establishing the good faith of the affected state’s decision to withhold consent. The absence of reasons may act to support an inference that the withholding of consent is arbitrary.”⁵⁴ Withholding consent without providing any reasons gives rise to a rebuttable presumption of arbitrariness.

E(i) Consent to humanitarian relief operations must not be withheld arbitrarily if:

- *civilians are inadequately provided with essential supplies; and*
- *the party responsible for meeting their needs does not provide the necessary assistance; and*
- *offers of services have been made by actors capable of carrying out relief operations that are exclusively humanitarian and impartial in character, and conducted without any adverse distinction.*

E(ii) Consent is withheld arbitrarily if it is withheld:

- *in circumstances that result in a violation of obligations under international law with respect to the civilian population in question, including, in particular, obligations under international humanitarian law and international human rights law; or*
- *in violation of the principles of necessity and proportionality; or*
- *in a manner that is unreasonable, or that may lead to injustice or lack of predictability, or that is otherwise inappropriate.*

53. HRC General Comment No. 35: *Liberty and Security of Person (Art. 9)*, *supra*, para 12.

54. ILC commentary to Article 11 of the draft articles on the protection of persons in the event of disasters (*Report of the ILC, Sixty-third session (26 April–3 June and 4 July–12 August 2011)*, UN doc A/66/10, 270, para 8).

F. Implementation of Humanitarian Relief Operations

55. This Section sets out the obligations of parties to an armed conflict with respect to the implementation of humanitarian relief operations in their territory or in territory under their effective control, as well as operations that are initiated in or transit through such territory. The obligations of non-belligerent states are set out in Section H.
56. Once consent has been granted, parties to an armed conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel throughout the territory under their effective control. They are, however, entitled to prescribe technical arrangements for such passage.⁵⁵ Administrative procedures and formalities and other technical arrangements must be applied in good faith and their nature, extent, and impact must not prevent the rapid delivery of humanitarian relief in a principled manner.
57. Apart from circumstances where specific conduct is required, the obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel may be discharged in a variety of ways, leaving parties discretion in its implementation. The subsections below set out both required conduct and examples of how the obligation may be implemented where specific conduct is not required.
58. While it is states party to an armed conflict that are most likely to be in a position to take the more formal measures set out below, organised armed groups are under the same obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel by taking all appropriate measures.⁵⁶

1. Obligation to allow and facilitate

59. Once consent has been granted, parties to an armed conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel.⁵⁷ The obligation covers initial entry into the country as well as movement within it.

55. In relation to occupying powers see Articles 59 and 61 GC IV, and in relation to other situations of international armed conflict, see Articles 70(2) and 70(3) AP I. Neither Common Article 3(2) GCs nor Article 18(2) AP II address this aspect of humanitarian relief operations, but the rules in Additional Protocol I on this issue are considered customary and applicable in both international and non-international armed conflicts (See ICRC CIHL Study, *supra*, Rules 55 and 56).

56. ICRC CIHL Study, *supra*, Rule 55.

57. Articles 59 and 61 GC IV and Article 70(2) AP I.

60. Passage must be as rapid as possible in the circumstances, taking into account, for example, the state of roads and other necessary infrastructure and the location of active hostilities.
61. The requirement that passage be unimpeded means that parties to an armed conflict must refrain from harassment and should reduce administrative procedures and other formalities as far as possible, dispensing with any that are superfluous. Instructions to this effect should be provided to all persons acting on behalf of the parties to the conflict to ensure that different, additional or more onerous requirements are not imposed at local level.
62. Restrictions may be imposed on the activities and the freedom of movement of humanitarian relief personnel only in case of imperative military necessity, for example in the case of a military operation in a particular location, and even then only temporarily.⁵⁸
63. In situations of occupation, humanitarian relief consignments must be exempt from all charges, taxes or customs unless these are necessary in the interests of the economy of the occupied territory.⁵⁹ Parties to an armed conflict should consider granting similar exemptions in other situations.
64. Measures that may be taken to facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel into and within a country include:
 - Simplifying and expediting entry-visa procedures for personnel participating in humanitarian relief operations, or temporarily waiving the requirement for visas altogether.
 - Waiving or reducing customs inspection requirements. If this is not possible, expedited procedures should be established for the customs clearance of humanitarian relief supplies and equipment, which should be granted priority treatment in handling. Arrangements could be made for inspection of such items and their release outside ordinary business hours and at locations other than customs offices to further accelerate delivery of humanitarian relief.
 - Granting permits for the passage of humanitarian relief supplies, equipment, and personnel.⁶⁰ Instructions to this effect should be provided to customs⁶¹ and other

58. Article 71(3) API.

59. Article 61 GC IV.

60. ICRC Commentary to the APs, *supra*, para 3331.

61. ICRC Commentary to the APs, *supra*, para 2829.

relevant officials, such as those staffing checkpoints, to ensure that different or additional requirements on passage are not imposed.

- Ensuring offices responsible for issuing the necessary authorisations are adequately staffed, and operate on a schedule that enables the necessary formalities to be completed as efficiently and expeditiously as possible.
- Allowing the import of telecommunications equipment for the exclusive use in humanitarian relief operations without restrictions, except as required for imperative reasons of security.

2. Technical arrangements

65. While parties to an armed conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel, they may prescribe technical arrangements for such passage.⁶² Frequently, reservations that states may have about agreeing to humanitarian relief operations could be addressed by appropriate measures of control.
66. Technical arrangements may serve a number of purposes: they may allow parties to an armed conflict to assure themselves that relief consignments are exclusively humanitarian; they may prevent humanitarian relief convoys from being endangered or from hampering military operations; and they may ensure that humanitarian relief supplies and equipment meet minimum health and safety standards.
67. Technical arrangements may include the search of consignments to check they do not contain weapons, other military equipment or items that may be used for military purposes; and the requirement that relief convoys use prescribed routes at specific times to ensure that they do not hamper and are not endangered by military operations. The practical arrangements for passage will usually be the subject of special agreements between the parties to an armed conflict and the actors conducting the humanitarian relief operations.
68. Parties to an armed conflict may also impose measures to ensure humanitarian relief supplies and equipment meet health and safety standards. These are particularly relevant for medical supplies and equipment. For example, medications may have to be approved for use in both the originating and receiving state, or be prequalified by the World Health Organization; and be transported and maintained in appropriate conditions to ensure their quality. Personnel participating in humanitarian relief operations may be required to be immunised.

62. Article 59 GC IV and Article 70(3) AP I.

69. Technical arrangements addressing health and safety concerns should be applied in good faith, bearing in mind that what may be reasonable measures in peacetime may not be appropriate in situations of armed conflict where civilians may be in extreme need.
70. Parties to an armed conflict may make passage of humanitarian relief consignments conditional on their distribution under the local supervision of an impartial organisation or on other measures to guarantee that the supplies will reach their intended beneficiaries.⁶³
71. Technical arrangements must be applied in good faith. Their imposition or effect must not be arbitrary within the meaning of the term set out in Section E above: they must not violate the relevant party's obligations under international law with respect to the civilian population in question, including, in particular, its obligations under international humanitarian law and international human rights law; they must be necessary and proportionate; and must not be imposed in a manner that is unreasonable, that may lead to injustice or lack of predictability, or that is otherwise inappropriate.
72. In analysing whether impediments to humanitarian relief operations, including the imposition or effect of technical arrangements, are such as to amount to a violation of the obligation to allow and facilitate the rapid and unimpeded passage of relief supplies, equipment and personnel, the focus should not be on the bilateral relationship between the party seeking to conduct relief operations and the party impeding such passage. Rather, the key consideration should be the outstanding needs of the civilian population. In other words, it is insufficient that the activities of a particular actor have been impeded. Instead, it is the impact on the civilian population, or segments thereof, of the impediments on all those authorised to operate that must be considered.

3. Privileges and immunities

73. Treaties granting privileges and immunities to international organisations, such as the Convention on the Privileges and Immunities of the United Nations of 1946 and the Convention on the Privileges and Immunities of the Specialised Agencies of 1947, may impose additional obligations on states parties to armed conflicts that also apply with respect to humanitarian relief operations conducted by such organisations.

F(i) Once consent has been granted, parties to an armed conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel into and throughout territory under their effective control.

63. Article 70(3)(b) API.

F(ii) The activities of humanitarian relief personnel may be limited or their movements temporarily restricted only in case of imperative military necessity.

F(iii) Parties to an armed conflict may prescribe technical arrangements for the passage of humanitarian relief supplies, equipment, and personnel.

F(iv) Administrative procedures and formalities and technical arrangements must be applied in good faith, and their nature, extent and impact must not prevent the rapid delivery of humanitarian relief in a principled manner. Their imposition or effect must not be arbitrary.

G. Humanitarian Relief Supplies, Equipment, and Personnel: General Rules and Additional Safeguards for Two Privileged Types of Humanitarian Relief Operations

74. This Section sets out some rules of general application to all humanitarian relief operations and then presents additional safeguards for two privileged types of operations: medical relief operations and food assistance relief operations.

1. Humanitarian relief supplies, equipment, and personnel – general rules

a. Participation of personnel in humanitarian relief actions

75. Effective humanitarian relief operations require the participation of competent personnel. Personnel may participate subject to the approval of the state in whose territory the humanitarian relief operation is intended to be conducted.⁶⁴ Approval may be given generally, ie to the inclusion of personnel in a humanitarian relief operation, and individually for the participation of specific persons.⁶⁵

76. Personnel participating in humanitarian relief operations must operate in accordance with the terms of their humanitarian mission, ie in a manner that is exclusively humanitarian, impartial, and without adverse distinction. They must refrain from acts that may be harmful to any party to the conflict, such as sharing information of a military nature. They must also comply with technical arrangements prescribed by the relevant authorities, such as routes and schedules for the delivery of relief and curfews.

77. Failure to comply with technical arrangements may lead to the termination of the mission of the specific member of humanitarian relief operation, but not to the termination of the entire operation.⁶⁶

b. Protection of humanitarian relief personnel

78. Personnel participating in humanitarian relief operations will usually be civilians and, consequently, entitled to the protection afforded by international humanitarian law to such persons. Parties to an armed conflict must respect and protect

64. Article 71(1) API I. Neither common Article 3 GCs nor Article 18(2) AP II refer to humanitarian relief personnel, but the rules in Additional Protocol I are considered customary and applicable in both international and non-international armed conflicts. ICRC CIHL Study, *supra*, Rules 31, 55 and 56.

65. ICRC Commentary to the APs, *supra*, para 2883.

66. Article 71(4) API I.

humanitarian relief personnel.⁶⁷ They may not direct attacks or commit other forms of violence against them or take them hostage.

79. Intentionally directing attacks against personnel involved in humanitarian assistance missions, as long as they are entitled to the protection given to civilians by international humanitarian law, is a war crime under the Statute of the International Criminal Court (ICC) in international and non-international armed conflicts.⁶⁸

c. Limits on activities of humanitarian relief personnel

80. Restrictions may be imposed on the activities or the movements of humanitarian relief personnel only in case of imperative military necessity, for example in the case of a military operation in a particular location, and even then only temporarily.⁶⁹

d. Humanitarian relief supplies and equipment

81. Supplies, vehicles and equipment that form part of humanitarian relief operations are, in principle, civilian objects and, consequently, entitled to the protection afforded by international humanitarian law to such objects. Parties to an armed conflict must respect and protect them. Their destruction and looting is prohibited.⁷⁰
82. Parties to an armed conflict must refrain from and prevent the diversion of relief supplies from their intended destination or beneficiaries, including by providing clear instructions to this effect to all persons acting their behalf, and investigating allegations of looting, destruction, or diversion, and holding accountable those found responsible.⁷¹
83. Intentionally directing attacks against installations, material, units or vehicles involved in a humanitarian assistance mission, as long as they are entitled to the protection given to civilian objects under international humanitarian law, is a war crime under the ICC Statute in international and non-international armed conflicts.⁷²

67. Article 71(2) AP I.

68. Articles 8(2)(b)(iii) and 8(2)(e)(iii) of the Rome Statute of the International Criminal Court, 17 July 1998 (ICC Statute). Also of relevance is the war crime of intentionally directing attacks against individual civilians not taking direct part in hostilities, Articles 8(2)(b)(i) and 8(2)(e)(i) ICC Statute.

69. Article 71(3) AP I.

70. Article 59 GC IV, and Articles 48 and 70(4) AP I. Neither Common Article 3 GCs nor Article 18(2) AP II refer to humanitarian relief supplies and equipment, but the rules of Additional Protocol I are considered customary and applicable in both international and non-international armed conflicts. ICRC CIHL Study, *supra*, Rule 32.

71. Article 60 GC IV and Article 70(3)(c) AP I. ICRC Commentary to the APs, *supra*, para 2858.

72. Articles 8(2)(b)(iii) and 8(2)(e)(iii) ICC Statute. Also of relevance is the war crime of intentionally directing attacks against civilian objects, Article 8(2)(b)(ii) ICC Statute.

G(i) Relief personnel may participate in humanitarian relief actions, subject to the approval of the state in whose territory the humanitarian relief operation is intended to be conducted. Such personnel must not exceed the terms of their mission and must comply with technical arrangements prescribed by the relevant authorities.

G(ii) Parties to an armed conflict must respect and protect supplies, equipment, and personnel that form part of humanitarian relief operations. Intentionally directing attacks against personnel, installations, material, units, or vehicles involved in a humanitarian assistance mission, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is a war crime under the ICC Statute in international and non-international armed conflicts.

2. Medical humanitarian relief operations

84. The wounded and sick as well as medical supplies, equipment, personnel, means of transport, and facilities benefit from numerous protections and safeguards under international humanitarian law. This Subsection only focuses on the rules relevant to medical humanitarian relief operations that go over and above the general rules applicable to all humanitarian relief operations set out above.

a. Protection of the wounded and sick and of medical care providers

85. It is a fundamental principle of international humanitarian law that wounded and sick civilians and members of the armed forces of parties to an armed conflict must be respected and protected and are entitled to receive to the fullest extent practicable and with the least possible delay the medical care and attention required by their condition. In the provision of medical care no adverse distinction may be made on grounds such as sex, race, nationality, religion or affiliation with a party to the conflict. Medical reasons are the only permissible basis for treating the wounded and sick differently.⁷³

86. As a corollary of this principle, no one may be harassed, harmed, prosecuted, convicted, or punished for having provided medical care to the wounded and sick, regardless of the nationality, religion, status or affiliation with a party to the conflict of the person receiving such care.⁷⁴ This rule is broad and covers any form of medical assistance (treatment, diagnosis, basic first aid) or care aimed at improving the health or alleviating the suffering of the wounded and sick, provided by medical staff or members of the civilian population. Any form of legal sanction, harm or harassment is prohibited.⁷⁵

73. Article 12 GC I and Article 12 GC II; Article 10 AP I and Article 7 AP II.

74. Article 18 GC I; Articles 16(1) and 17(1) AP I and Article 10(1) AP II.

75. On the prohibition of compelling those who have provided medical care to provide information that could be harmful to the patients and their relatives see Article 16(3) AP I and Articles 10(3) and 10(4) AP II.

b. Passage of medical relief supplies, equipment, and personnel

87. Article 23 GC IV requires parties to an international armed conflict and other states through whose territory consignments of medical supplies must transit to allow their free passage, subject to a number of safeguards. In particular, it stipulates that parties to an armed conflict are not required to allow such passage if there are serious reasons for fearing that the consignments may be diverted from their intended destination; that measures of control may not be effective; or that such passage would grant a definite military advantage to their enemy.
88. Article 23 GC IV, and, in particular, the limitations to the obligation to allow free passage of medical supplies contained therein, must now be read in the light of Article 70 AP I. The latter provision also applies to medical supplies, but it does not contain the limitations included in Article 23 GC IV,⁷⁶ and because, as noted earlier, Article 70 AP I is regarded as representing customary international law, is therefore applicable to all states, including those that have not ratified Additional Protocol I. Accordingly, provided consent has been granted, parties to an international armed conflict and other relevant states have an absolute obligation to allow and facilitate rapid and unimpeded passage of medical relief supplies and equipment. The position is the same in non-international armed conflicts, in relation to which Article 18(2) AP II expressly refers to medical supplies and, like Article 70 AP I, does not contain limitations.
89. As discussed in Section E, in view of the entitlement of the wounded and sick to receive to the fullest extent practicable and with the least possible delay the medical care and attention required by their condition, if there are people in need of such care, who are not receiving it, withholding consent to offers to provide the necessary assistance in a principled manner would be arbitrary.
90. The medical supplies and equipment in question are those necessary for the care of wounded and sick civilians and members of the armed forces. They are not limited to supplies and equipment necessary for life-saving treatment but also include pharmaceutical items used in preventive or therapeutic medicine as well as medical, dental and surgical instruments and equipment.

76. Article 68 AP I specifically notes that the provisions of Additional Protocol I with regard to humanitarian relief operations are supplementary to Article 23 GC IV and other relevant provisions of the Fourth Geneva Convention on such operations. This is in addition to Article 1(3) AP I, which indicates more generally that Additional Protocol I “supplements” the Geneva Conventions. This statement indicates that the rules contained in Additional Protocol I on this issue develop the rules in the Geneva Conventions by extending the protections in the latter and removing any restrictions. Had the drafters of Additional Protocol I intended to retain the restrictions set out in Article 23 GC IV, they could have used the term “without prejudice to” as they did elsewhere in the Protocol, for example, in Articles 53 and 85(5) AP I. See also ICRC Commentary to the APs, *supra*, para 2851 (“... Article 70 of the Protocol in this respect modifies Article 23 of the Fourth Convention, and the second paragraph of that article should be considered as obsolete in any armed conflict to which Protocol I applies”).

91. Once consent has been granted, as set out in Sections F and H, parties to an armed conflict and states in whose territory medical relief operations are initiated or through whose territory they must transit must allow and facilitate rapid and unimpeded passage of medical relief supplies and equipment. They are entitled to prescribe technical arrangements for such passage, but such measures must be applied in good faith and their nature, extent, and impact must not prevent the rapid delivery of medical relief in a principled manner. Their imposition or effect must not be arbitrary within the meaning of that term set out in Section E above.

G(iii) The wounded and sick must be respected and protected. They are entitled to receive to the fullest extent practicable and with the least possible delay the medical care and attention required by their condition. Distinction may not be drawn among them on any grounds other than medical ones.

G(iv) Under no circumstances may anyone be harassed, harmed, subjected to any form of legal proceedings or punished for having carried out medical activities compatible with medical ethics, or for having provided care to the wounded and sick.

G(v) In situations where the wounded and sick are in need of medical care and they are not receiving it, withholding consent to offers to provide the necessary assistance in a principled manner would be arbitrary.

G(vi) Once consent has been granted, parties to an armed conflict and states in whose territory the medical relief operations are initiated or through whose territory they must transit must allow and facilitate the rapid and unimpeded passage of medical relief supplies, equipment, personnel, and vehicles forming part thereof. They may prescribe technical arrangements for their passage. The nature, extent, and impact of administrative procedures and formalities and technical arrangements must not prevent the rapid delivery of medical humanitarian relief in a principled manner, and their imposition or effect must not be arbitrary.

3. Food assistance relief operations

a. Passage of essential foodstuffs

92. Article 23 GC IV also requires parties to an international armed conflict and other states through whose territory consignments of essential foodstuffs and clothes for children under fifteen, expectant mothers and maternity cases must transit, to allow the free passage of such goods. As in the case of consignments of medical supplies, while Article 23 GC IV contains a number of safeguards limiting the obligation to allow free passage, it must now be read in the light of Article 70 AP I, which also covers foodstuffs but does not contain such limitations. In fact, Article 70 AP I specifically requires that priority be given in the distribution of relief to the very categories of particularly vulnerable persons mentioned in Article 23 GC IV. It would

not make sense for Article 70 AP I to demand that priority be given to relief for these categories of vulnerable people if the limitations in Article 23 GC IV allowing parties to an armed conflict to restrict the free passage of essential foodstuffs and clothes to these same categories of people remained applicable; all the more so, considering that these limitations are not applicable to relief items intended for the other categories of people to whom Article 70 AP I also applies. Provided consent has been granted, parties to an international armed conflict and other relevant states have an absolute obligation to allow and facilitate the rapid and unimpeded passage of food assistance relief supplies and equipment. The position is the same in non-international armed conflicts, in relation to which Article 18(2) AP II expressly refers to foodstuffs and, like Article 70 AP I, does not contain limitations.

93. Essential foodstuffs are those necessary for the normal physical and mental development of the categories of people for whom they are intended, such as milk, flour, sugar, fats, salt, and drinking water.⁷⁷
94. Once consent has been granted, as set out in Sections F and H, parties to an armed conflict and states in whose territory food relief operations are initiated or through whose territory they must transit must allow and facilitate rapid and unimpeded passage of supplies, equipment, and personnel participating in food assistance relief operations. They are entitled to prescribe technical arrangements for such passage, but such measures must be applied in good faith and their nature, extent, and impact must not prevent the rapid delivery of food assistance in a principled manner. Their imposition or effect must not be arbitrary within the meaning of that term set out in Section E.

b. Prohibition of starvation of the civilian population as a method of warfare

95. Parties to an armed conflict are prohibited from using starvation of the civilian population as a method of warfare, ie intentionally causing, contributing to, or perpetuating it.⁷⁸ Among other things, it is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population such as foodstuffs, crops, livestock, and drinking water supplies and installations, for the specific purpose of denying such objects for their sustenance value to the civilian population. The prohibition of starvation extends to causing starvation of the civilian

77. Jean Pictet (ed), *Commentary – IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1958) (ICRC Commentary to GC IV), 180.

78. Article 54(1) API and Article 14 AP II.

population by wilfully impeding relief supplies.⁷⁹ The prohibition also applies to blockades and sieges.⁸⁰

96. As a consequence of this prohibition, as discussed in Section E, withholding consent to offers to conduct humanitarian relief operations with the intention of starving the civilian population would be arbitrary.

G(vii) Once consent has been granted, parties to an armed conflict and states in whose territory food assistance relief operations are initiated or through whose territory they must transit must allow and facilitate rapid and unimpeded passage of supplies, equipment, personnel, and vehicles forming part thereof. They may prescribe technical arrangements for such passage. The nature, extent, and impact of administrative procedures and formalities and technical arrangements must not prevent the rapid delivery of food assistance relief in a principled manner, and their imposition or effect must not be arbitrary.

G(viii) Starvation of the civilian population as a method of warfare is prohibited, including by deliberately depriving it of foodstuffs or other objects indispensable to its survival. Withholding consent to offers to conduct food assistance relief operations with the intention of starving the civilian population would be arbitrary.

79. Causing the starvation of the civilian population including by wilfully impeding relief supplies as provided for under the Geneva Conventions is a war crime in international armed conflicts under Article 8(2)(b)(xxv) ICC Statute.

80. *Manual on International Law Applicable to Air and Missile Warfare* (2009) (AMW Manual), Rules 157 and 158; and *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994), paras 102(a) and 103. According to these manuals, it is prohibited to establish a blockade if its sole or primary purpose is to starve the civilian population or to deny it other objects essential for its survival. If the civilian population of a blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must allow the free passage of such supplies, but are entitled to prescribe the technical arrangements, including search, under which such passage is permitted.

H. Non-Belligerent States and Humanitarian Relief Operations

97. In addition to states parties to an armed conflict, other, non-belligerent, states may be concerned by humanitarian relief operations in different ways. Non-belligerent states in whose territory relief operations are initiated or through whose territory it is necessary or expedient for them to transit (transit states) have clear obligations with respect to such operations, and all non-belligerent states have a potential role to play.

1. Non-belligerent states in whose territory humanitarian relief operations are initiated and non-belligerent transit states

a. Consent

i. International armed conflicts

98. The position in relation to humanitarian relief operations intended for occupied territories is clear. GC IV requires non-belligerent states to permit the free passage of humanitarian relief consignments intended for the civilian population of an occupied territory, subject to the right to prescribe technical arrangements.⁸¹ Such states may not withhold consent to such passage⁸² – in the same way that an occupying power is required to consent to offers to conduct humanitarian relief operations if the civilian population of the occupied territory is inadequately supplied.

99. While there is general agreement that in situations of international armed conflict other than occupation, the consent of non-belligerent states in whose territory humanitarian relief operations are initiated and of non-belligerent transit states is required, there is a divergence of views as to whether such states are under an absolute obligation to consent, or whether they may withhold consent where it is not arbitrary to do so.

100. Article 70(1) AP I requires “the agreement of the Parties concerned in such relief actions” in the plural. The divergence of views hinges on whether this expression refers exclusively to states parties to an armed conflict, or whether it also includes non-belligerent states, and, if so, which ones.

81. Article 59(3) GC IV.

82. See for example, ICRC Commentary to GC IV, *supra*, 322.

101. According to the first view, Article 70(1) AP I refers exclusively to states parties to an armed conflict, whose consent is required if humanitarian relief operations are to be conducted in their territory or must transit through it to reach territory under the control of the adverse party.⁸³ All other states are covered by Article 70(2) AP I, which does not refer to consent but simply requires them to “allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section”. According to this view, these non-belligerent states may not withhold consent to such passage.
102. A second view is that the “Parties concerned” in the humanitarian relief operations referred to in Article 70(1) AP I are the party to the conflict in whose territory the operations are conducted and any non-belligerent state from whose territory the relief operations are initiated.⁸⁴ The consent of these states is required but they may not arbitrarily withhold it. In contrast, transit states are referred to in Article 70(2) AP I, which requires them to allow and facilitate rapid and unimpeded passage of relief supplies, equipment, and personnel.⁸⁵ These transit states are under an absolute obligation to consent to such passage.⁸⁶ A possible rationale for obliging transit states to agree to humanitarian relief operations is that, by acceding to Additional Protocol I, these states have implicitly given their consent to the passage of humanitarian relief operations.
103. This approach leads to an apparently unfounded distinction between non-belligerent states where relief operations are initiated, whose consent to passage of humanitarian relief supplies, equipment, and personnel is required but may not be withheld arbitrarily, and non-belligerent transit states, which have no latitude to withhold consent.
104. A third approach interprets the expression “Parties concerned in such relief actions” in Article 70(1) AP I as referring to the state party to the conflict in whose territory the

83. An adverse party to that receiving relief, but through whose territory relief consignments do not have to pass, is not among “the Parties concerned” in the sense of Article 70(1) AP I. See ICRC Commentary to the APs, *supra*, para 2806.

84. ICRC Commentary to the APs, *supra*, paras 2806-2807.

85. *Ibid.*

86. ICRC Commentary to the APs, *supra*, paras 2824-2825.

humanitarian relief operations will be conducted as well as all other states concerned by the operations: those where they are initiated and transit states.⁸⁷ The consent of each of these states is required but they may not withhold it arbitrarily.⁸⁸ The apparently absolute obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel in Article 70(2) AP I is limited to relief “provided in accordance with this Section”. This is a reference *inter alia* to the requirement in Article 70(1) AP I for the consent of “the Parties concerned in the relief actions”. According to this interpretation, the obligation in Article 70(2) AP I to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel only arises in respect of those operations that have been consented to by the states concerned thereby. The consent of all such states is required, but may not be arbitrarily withheld.

105. This third interpretation is more in keeping with the actual wording of Article 70(1) AP I and with general principles of international law, as it recognises that a state’s entitlement to regulate activities carried out in its territory, such as the passage of humanitarian relief supplies, equipment, and personnel, is a basic element of territorial sovereignty. Moreover, this interpretation does not draw apparently unwarranted distinctions between non-belligerent states in whose territory relief operations are initiated and non-belligerent transit states.

ii. Non-international armed conflicts

106. Common Article 3(2) GCs only refers to “the Parties to the conflict” and does not address the position of non-belligerent states. Article 18(2) AP II requires the consent of “the High Contracting Party concerned”, in the singular. The fact only one state is mentioned makes it unlikely that this expression could include non-belligerent states, as there may be more than one non-belligerent state concerned by particular humanitarian relief operations. Moreover, in situations where the consent of the state party to the conflict is unequivocally required, this reference to a single state precludes

87. The view that parties “concerned” in humanitarian relief operations includes all of the states mentioned in the text is supported by the interpretation given to the expression “concerned” in Article 9 GC I, Article 9 GC II, Article 9 GC III, and Article 10 GC IV in the ICRC Commentaries. It is stated there that: “[t]he “Parties concerned” must be taken to mean those upon which the possibility of carrying out the action contemplated depends. For example, when consignments of relief are forwarded, it is necessary to obtain the consent not only of the state to which they are being sent, but also of the state from which they come, of the countries through which they pass in transit and, if they have to pass through a blockade, of the Powers which control the blockade.” See, for example, ICRC Commentary to GC I, *supra*, 58. But see ICRC Commentary to GC I, 2nd ed, *supra*, para 1166, taking a contrary approach.

88. See, for example, AMW Manual, *supra*, commentary to Rule 100(a), para 6, which states that the reference to the requirement of consent in Rule 100, “... covers all ‘Parties concerned’. These Parties include not only the Belligerent Parties, but also Neutrals from which relief is sent or through whose territory the relief consignments pass”.

it from referring to non-belligerent states, even though humanitarian relief operations might be initiated in or have to transit through their territory. In view of this, it is probable that, like Common Article 3(2) GCs, Article 18(2) AP II simply does not address the position of non-belligerent states.

107. Relevant non-belligerent states are therefore free to regulate the matter as they wish under national law, including the question of whether consent is required and, if so, in which circumstances. However, as discussed below, the position they adopt must not result in a violation of their obligations under international law.

b. Arbitrary withholding of consent by non-belligerent states

108. In relation to international armed conflicts, the requirement of consent to humanitarian relief operations in Article 70(1) AP I should be interpreted in the same way for all states “concerned” in the relief operations, ie states parties to an armed conflict and other relevant states. As is the case for states parties to an armed conflict, non-belligerent states whose consent to humanitarian relief operations is required may not withhold it arbitrarily.
109. Since non-belligerent states and parties to an international armed conflict are bound by the same rule with regard to the requirement of consent and the obligation not to withhold consent arbitrarily, it makes sense to adopt the same criteria for determining what would constitute an arbitrary withholding of consent by non-belligerent states in the context of international armed conflicts. These are the criteria set out in Section E, according to which consent is withheld arbitrarily if: (i) it is withheld in circumstances that result in a violation by a non-belligerent state of its obligations under international law with respect to the civilian population in question; or (ii) the withholding of consent violates the principles of necessity and proportionality; or (iii) consent is withheld in a manner that is unreasonable, unjust, lacking in predictability, or that is otherwise inappropriate.
110. Non-belligerent states are likely to be entitled to withhold consent to humanitarian relief operations in fewer situations than parties to an armed conflict. This point is particularly relevant to the assessment of arbitrariness under the second and third criteria. Moreover, they are entitled to prescribe measures of control for the passage of relief consignments that should enable them to allay concerns about the nature of the shipments.
111. The position with respect to non-international armed conflicts is slightly different. Although international humanitarian law does not address whether non-belligerent states are required to consent to the initiation or passage of humanitarian relief supplies, equipment, and personnel from or through their territory, other obligations under international law will remain relevant. As the actions of non-belligerent states

with regard to these operations must not violate their other obligations under international law, they may not withhold consent in circumstances that would essentially fall within the first criterion of arbitrariness outlined in Section E.

i. Withholding of consent that violates a non-belligerent state's obligations under international law with respect to the civilian population in question

112. Consent may not be withheld in circumstances that would violate a state's other obligations under international law with respect to the civilian population in question. While the bases of these obligations are slightly different for parties to an armed conflict and non-belligerent states, the situations in which consent may not be withheld are essentially the same.
113. Non-belligerent states' obligations under international humanitarian law differ from those of parties to an armed conflict. While the international humanitarian law prohibition of starvation of the civilian population is not directly applicable to non-belligerent states, the undertaking to respect and ensure respect for international humanitarian law⁸⁹ requires them to refrain from acts that would lead to a violation of this prohibition, for example by withholding consent to humanitarian relief operations in such circumstances.
114. Similarly, the undertaking to ensure respect also requires non-belligerent states to consent to medical relief operations so that the wounded and sick are not prevented from receiving, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.
115. The undertakings to respect and ensure respect for international humanitarian law, and to secure international human rights law, also preclude non-belligerent states from withholding consent to humanitarian relief operations with the intent or effect of discriminating against a particular group or section of the civilian population.
116. Non-belligerent states may not withhold consent to humanitarian relief operations if doing so would violate fundamental human rights. It is well-established that there are circumstances where a state may violate its human rights obligations when the prohibited harm occurs extra-territorially.⁹⁰ States must respect the enjoyment of

89. Common Article 1 GCs and Article 1 API. Neither Common Article 3 GCs nor Additional Protocol II contain a similar undertaking to ensure respect for international humanitarian law in non-international armed conflicts, but the undertaking in Common Article 1 GCs and Article 1 API is considered customary and applicable in both international and non-international armed conflicts. ICRC CIHL Study, *supra*, Rule 144.

90. In discharging their undertaking in Article 2(1) ICESCR to take steps towards the progressive realization of economic, social and cultural rights, including by international cooperation and assistance, states parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. See CESCR *General Comment No. 12: The Right to Adequate Food (Art. 11)*, *supra*, para 36.

relevant social, economic, and cultural rights in other countries and must refrain from acts that would prevent directly or indirectly their enjoyment.⁹¹ In situations where a civilian population is in need, and offers to conduct humanitarian relief operations have been accepted by the state party to an armed conflict in whose territory the operations are intended to be conducted, non-belligerent states must refrain from withholding consent if there is a real risk that doing so would prevent the satisfaction of the minimum core elements of relevant economic, social, and cultural rights of the intended beneficiaries.

117. Finally, there may be circumstances in which the withholding of consent to humanitarian relief operations by non-belligerent states would amount to aiding or assisting another state to commit an internationally wrongful act. Where this is the case, withholding of consent would be a violation of the non-belligerent states' obligations under international law.⁹²

ii. Withholding of consent in violation of the principles of necessity and proportionality

118. In terms of the requirements of necessity and proportionality, non-belligerent states would have to show that they have a valid reason for withholding consent to relief operations that are exclusively humanitarian and impartial in character. When such a ground exists, it must be shown that the effect of withholding of consent is proportionate – ie that the limitations in terms of time, duration, location, and affected goods and services do not go beyond what is absolutely necessary to achieve the legitimate aim. It is likely to be more difficult for non-belligerent states than for parties to an armed conflict to show that withholding of consent would meet the requirements of necessity and proportionality.

iii. Withholding of consent in a manner that is unreasonable, that may lead to injustice or to lack of unpredictability, or that is otherwise inappropriate

119. Consent may also not be withheld in an arbitrary manner, ie in a manner that is unreasonable, that may lead to injustice or to lack of predictability, or that is otherwise inappropriate. For example, as in the case of a party to an armed conflict, withholding consent without providing any reasons gives rise to a rebuttable presumption of arbitrariness.

91. See, for example, *CESCR General Comment No. 15: The Right to Water (Arts. 11 and 12)*, *supra*, para 31.

92. See Article 16 of the ILC articles on the responsibility of states for internationally wrongful acts (*Report of the ILC, fifty-third session (23 April–1 June and 2 July–10 August 2001)*, UN doc A/56/10) (ILC Articles on State Responsibility).

c. Obligation to allow and facilitate passage

120. In international armed conflicts, once consent has been granted, non-belligerent states must allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel.⁹³
121. What amounts to “rapid and unimpeded passage” must be determined in view of the circumstances in each particular case. It seems reasonable to assume that passage should be simpler and swifter through the territory of non-belligerent states than through that of parties to an armed conflict.
122. Non-belligerent states may not divert humanitarian relief supplies and equipment nor delay their forwarding.⁹⁴ They should simplify and expedite the entry of relief supplies, equipment, and personnel, and their transit across their territory. Measures that would have this effect are similar to those outlined in Section F, bearing in mind that as they are not parties to the conflict, non-belligerent states are likely to have fewer security concerns and therefore should adopt less onerous procedures. Possible measures include:
- waiving entry-visa requirements for personnel participating in humanitarian relief operations or establishing a simplified and expedited “transit” visa;
 - expediting customs procedures and granting priority to consignments of humanitarian relief supplies and equipment;
 - endeavouring to allow the passage of consignments free of charge by not levying entry and exit taxes and other fees.⁹⁵
123. In relation to non-international armed conflicts, neither Common Article 3 GCs nor Article 18(2) AP II refer to the obligations of non-belligerent states.⁹⁶ While it may be unclear whether such states are under an obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel, the undertakings to ensure respect for international humanitarian law and for international human rights law⁹⁷ would suggest that they should endeavour to do so by taking measures along the lines outlined above.

93. Article 70(2) AP I.

94. Article 70(3)(c) AP I.

95. This is expressly foreseen in Article 61 GC IV in relation to humanitarian relief consignments for occupied territory.

96. The ICRC CIHL Study also does not address non-belligerent states.

97. Common Article 1 GCs, Article 1 AP I, and CESCR *General Comment No. 12: The Right to Adequate Food (Art. 11)*, *supra*, para 36.

d. Technical arrangements

124. In international armed conflicts, like parties to an armed conflict, non-belligerent states in whose territory humanitarian relief operations are initiated and non-belligerent transit states are entitled to prescribe technical arrangements for the passage of humanitarian relief supplies, equipment, and personnel.⁹⁸
125. These arrangements are similar to those discussed in Section F, including searching the humanitarian relief consignments and prescribing specific routes and timetables for their passage. Other possible measures could include those dictated by health and safety concerns. Technical arrangements must be applied in good faith and their nature, extent, and impact must not prevent the rapid delivery of humanitarian assistance in a principled manner.
126. In relation to non-international armed conflicts, neither Common Article 3(2) GCs nor Article 18(2) AP II address this issue. While non-belligerent states are entitled to prescribe technical arrangements in such situations, they should endeavour to ensure that any measures they adopt are applied in good faith and do not prevent rapid delivery of humanitarian relief in a principled manner.

2. All non-belligerent states

127. In addition to the specific obligations of non-belligerent states in whose territory humanitarian relief operations are initiated and non-belligerent transit states, all non-belligerent states have a role to play in relation to humanitarian relief operations.
128. In the spirit of Articles 55 and 56 of the Charter of the United Nations (UN Charter), where Member states pledged to cooperate in the promotion of universal respect for, and observance of, human rights, in Article 2(1) ICESCR parties undertake to take steps towards the progressive realisation of economic, social, and cultural rights, including by international assistance and cooperation. This aspect is expressly highlighted in some provisions, like Article 11 ICESCR, where parties recognise the essential importance of international cooperation based on free consent in the progressive realization of the right to an adequate standard of living.

98. Article 59 GC IV and Article 70(3) AP I.

129. The Committee on Economic, Social and Cultural Rights has considered the nature and extent of this undertaking in relation to rights relevant to humanitarian relief operations on a number of occasions. For example, in General Comment 12 on the right to adequate food, the Committee noted that “states parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required ...”⁹⁹ It added that parties to the ICESCR have a joint and individual responsibility, in accordance with the UN Charter, to cooperate in providing disaster relief and humanitarian assistance in times of emergency.¹⁰⁰ States may discharge this responsibility in various ways, the most direct being by providing relief goods, equipment, and personnel to parties to an armed conflict or to those conducting humanitarian relief operations, or by funding the latter’s activities.
130. Also important is the role all states may play in promoting compliance by parties to an armed conflict with their international humanitarian law obligations relating to humanitarian relief operations, pursuant to their undertaking under Common Article 1 GCs and Article 1 AP I to ensure respect for international humanitarian law. The same role should also be played to promote respect for international human rights law.

H(i) Non-belligerent states must allow the free passage of humanitarian relief consignments intended for the civilian population of occupied territories.

H(ii) In international armed conflicts, the consent of non-belligerent states in whose territory humanitarian relief operations are initiated or through whose territory they must transit is required. Such consent must not be arbitrarily withheld.

H(iii) Non-belligerent states in whose territory humanitarian relief operations are initiated or through whose territory they must transit withhold consent arbitrarily if they do so

- *in circumstances that result in a violation of their obligations under international law with respect to the civilian population in question, including, in particular, their obligations under international humanitarian law and international human rights law; or*
- *in violation of the principles of necessity and proportionality; or*
- *in a manner that is unreasonable, or that may lead to injustice or lack of predictability, or that is otherwise inappropriate.*

99. CESCR General Comment No. 12: *The Right to Adequate Food (Art. 11)*, *supra*, para 36.

100. *Ibid.*, para 38. The Committee made similar statements in relation to the right to water (CESCR General Comment No. 15: *The Right to Water (Arts. 11 and 12 of the Covenant)*, *supra*, paras 30-34) and the right to health (CESCR General Comment No. 14: *The Right to the Highest Attainable Standard of Health (Art. 12)*, *supra*, para 39).

H(iv) *In international armed conflicts, non-belligerent states in whose territory humanitarian relief operations are initiated or through whose territory they must transit must allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel for relief operations that have been consented to. These states may prescribe technical arrangements, including search of humanitarian relief consignments, under which such passage is permitted but may not divert humanitarian relief consignments nor delay their forwarding. Technical arrangements must be applied in good faith and their nature, extent, and impact must not prevent the rapid delivery of humanitarian relief in a principled manner.*

H(v) *In relation to non-international armed conflicts, non-belligerent states may regulate the initiation and transit of humanitarian relief operations from or through their territory under national law, including the question of whether consent is required and, if so, in which circumstances it may be withheld. The position they adopt must not violate their obligations under international law.*

H(vi) *In non-international armed conflicts, non-belligerent states should endeavour to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel for relief operations that have been consented to. These states may prescribe technical arrangements, including search, under which such passage is permitted, but should endeavour to ensure that such arrangements are applied in good faith and that their nature, extent, and impact do not prevent the rapid delivery of humanitarian relief in a principled manner.*

H(vii) *All non-belligerent states should cooperate in providing humanitarian assistance and promoting compliance by parties to an armed conflict and other relevant states with their obligations under international humanitarian law and international human rights law relating to humanitarian relief operations.*

I. Consequences of Unlawful Impeding of Humanitarian Relief Operations

131. Humanitarian relief operations are impeded unlawfully as a matter of international law in three situations:

- when parties to an armed conflict or other relevant states are obliged to consent to offers to conduct humanitarian relief operations, as discussed in Subsection D.2 above, but fail to do so; or
- when states whose consent is required before offers to conduct humanitarian relief operations can be implemented withhold it arbitrarily, as discussed in Sections E and H above; or
- when parties to an armed conflict or other relevant states violate their obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel, as discussed in Sections F, G and H above.¹⁰¹

132. Unlawful impeding of humanitarian relief operations raises two sets of questions: the responsibility under international law of the party unlawfully impeding operations and of persons responsible therefor; and the consequences of such conduct for those seeking to conduct humanitarian relief operations.

1. Responsibility of the party and of persons unlawfully impeding humanitarian relief operations

133. Unlawful impeding of humanitarian relief operations is a violation of international humanitarian law and often also of international human rights law that gives rise to responsibility under international law.

134. Effect may be given to this responsibility in a number of ways. For example, states and international organisations may be entitled to take countermeasures in accordance with international law. This is discussed in Section I.2 below.

135. Beyond countermeasures, the Security Council has resorted to military enforcement action to ensure the delivery of assistance to populations in need on a very limited number of occasions: in 1992 in relation to Bosnia-Herzegovina¹⁰² and to Somalia.¹⁰³

101. See particularly para 72 above.

102. S/RES/781, *supra*, operative para 1.

103. S/RES/794, *supra*, operative para 10.

136. In terms of individual responsibility, “[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions” is a war crime under the ICC Statute.¹⁰⁴

Under the ICC Statute this can only be a war crime in international armed conflicts. However, there are strong arguments that suggest that under customary international law this is a war crime in both international and non-international armed conflicts.¹⁰⁵

137. Other war crimes under the ICC Statute and under customary law are also of relevance to humanitarian relief operations. These include: (a) intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance mission, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law;¹⁰⁶ (b) intentionally directing attacks against individual civilians not taking direct part in hostilities;¹⁰⁷ and (c) intentionally directing attacks against civilian objects. Under the ICC Statute the first two are war crimes in international and non-international armed conflicts; the third is a war crime only in international armed conflicts.¹⁰⁸ Moreover, the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population when committed as part of a widespread or systematic attack directed against any

104. Article 8(2)(b)(xxv) ICC Statute.

105. ICRC CIHL Study, *supra*, Rule 156, and commentary at 599 and 603. In S/RES/787 (1992), operative para 7, the Security Council “[c]ondemns all violations of international humanitarian law, including ... the deliberate impeding of the delivery of food and medical supplies to the civilian population of the Republic of Bosnia and Herzegovina, and reaffirms that those that commit or order the commission of such acts will be held individually responsible in respect of such acts”. Likewise, in S/RES/794, *supra*, operative para 5, the Council “[s]trongly condemns all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population, and affirms that those who commit or order the commission of such acts will be held individually responsible in respect of such acts”. See also *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on Interlocutory Appeal on Jurisdiction, 2 Oct 1995, (Tadić) paras 117–134, where the ICTY Appeals Chamber noted state practice which establishes that serious breaches of international humanitarian law committed in non-international armed conflicts (including resort to prohibited methods of warfare) give rise to individual criminal responsibility. Article 28D(e)(xvi) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014 criminalises starvation of civilians as a method of warfare in non-international armed conflicts.

106. Articles 8(2)(b)(iii) and 8(2)(e)(iii) ICC Statute.

107. Articles 8(2)(b)(i) and 8(2)(e)(i) ICC Statute.

108. Article 8(2)(b)(ii) ICC Statute. However, in *Tadić*, *supra*, paras 127 and 134, the ICTY Appeals Chamber suggested that intentionally attacking civilian objects in non-international armed conflicts is a war crime under customary international law. See also *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 Jan 2005, paras 216 and 223–226, where the accused was charged with the war crime of attacking civilian objects and it was accepted that the classification of a conflict was irrelevant to the validity of the charge. See also ICRC CIHL Study, *supra*, Rule 156, and commentary at 599 and 603.

civilian population, with knowledge of the attack, constitutes the crime against humanity of extermination under the ICC Statute and is applicable at all times.¹⁰⁹

138. The Security Council has considered the obstruction of humanitarian activities or of access to humanitarian assistance as a basis for imposing targeted sanctions on individuals or groups.¹¹⁰ To date it has imposed sanctions on this basis, among others, in relation to Al-Shabaab in Somalia,¹¹¹ and on an anti-Balaka commander in the Central African Republic.¹¹²

I(i) Humanitarian relief operations are impeded unlawfully as a matter of international law

- *when parties to an armed conflict or other relevant states are obliged to consent to offers to conduct humanitarian relief operations but fail to do so; or*
- *when states whose consent is required before offers to conduct humanitarian relief operations can be implemented withhold it arbitrarily; or*
- *when parties to an armed conflict or other relevant states violate their obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel.*

I(ii) Unlawful impeding of humanitarian relief operations gives rise to responsibility under international law.

I(iii) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies, is a war crime.

I(iv) Intentionally directing attacks against personnel, installations, material, units or vehicles

109. Articles 7(1)(b) and 7(2)(b) ICC Statute.

110. S/RES/1844 (2008), operative para 8(c) (in relation to Somalia); S/RES/1857 (2008), operative para 4(f) (in relation to the Democratic Republic of the Congo); S/RES/2134 (2014), operative para 37(e) (in relation to the Central African Republic); S/RES/2206 (2015), operative para 7(f) (in relation to South Sudan); and S/RES/2216 (2015), operative para 19 (in relation to Yemen).

111. UNSC Committee established pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, *Narrative summaries of reasons for listing*, <https://www.un.org/sc/suborg/en/sanctions/751/materials/summaries/entity/al-shabaab>.

The reasons for listing on this ground appear principally related to food aid diversion and kidnapping of aid workers. *Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1853 (2008)*, 59-66, UN doc S/2010/91, 10 March 2010.

112. UNSC Committee established pursuant to resolution 2127 (2013) concerning the Central African Republic, *Narrative summaries of reasons for listing*, <https://www.un.org/sc/suborg/en/sanctions/2127/materials/summaries/individual/habib-soussou>.

The reasons for listing on this ground appear principally related to attacks against humanitarian workers and looting of supplies and equipment. Annexes 59-61, UN doc S/2014/762, 29 October 2014.

involved in a humanitarian assistance mission, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is a war crime.

I(v) Intentionally directing attacks against individual civilians not taking direct part in hostilities is a war crime.

I(vi) Intentionally directing attacks against civilian objects is a war crime.

I(vii) The intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.

2. Consequences of unlawful impeding of humanitarian relief operations for those seeking to conduct such operations

139. While unlawful impeding of humanitarian relief operations is a violation of international law, it does not automatically give rise to a general entitlement to conduct such operations without the consent of the relevant states. Humanitarian relief operations conducted without the consent of the relevant states will be lawful in cases where the Security Council imposes such operations by a binding decision under the UN Charter. Apart from such cases, the possibility that humanitarian relief operations conducted without consent are lawful will only arise in extremely limited circumstances.
140. International humanitarian law and international human rights law address the questions of when and how humanitarian relief operations may be conducted. Other areas of public international law come into play in determining the lawfulness of relief operations conducted without the consent of the relevant states including, most notably, the rules safeguarding state sovereignty and territorial integrity.
141. All actors seeking to conduct humanitarian relief operations – states, international organisations, and NGOs – must comply with the relevant rules of international humanitarian law if their activities and staff are to benefit from its safeguards. Operating without consent does not mean that humanitarian relief supplies, equipment, and personnel lose their civilian status and consequent protection from attack. However, the duty to allow and facilitate rapid and unimpeded passage of supplies, equipment, and personnel only arises for humanitarian relief operations that have been consented to.
142. The bodies of law that determine the lawfulness of humanitarian relief operations conducted without the consent of the relevant states vary depending on the status of the actor implementing them. Only states and international organisations must comply with the rules of public international law on sovereignty and territorial integrity. Private actors are not directly bound by these rules and thus humanitarian relief operations they conduct

without the consent of the relevant states will not necessarily be a violation of *international law*. However, such operations may violate the *national law* of the relevant states. Consequently, the analysis set out below applies exclusively to states and international organisations.

143. The starting position is that humanitarian relief operations conducted by states or international organisations on the territory of another state, including its airspace, without that state's consent, violate the latter's sovereignty and territorial integrity and are therefore unlawful.
144. However, as discussed below, the wrongfulness of such humanitarian relief operations may, exceptionally, be precluded in extremely limited circumstances of severe need if in such circumstances they can be justified under the principle of necessity, or as countermeasures. The fact that unlawful impeding of humanitarian relief operations is a violation of international law does not automatically bring these principles into play.
145. Whether an international organisation may conduct operations on the territory of a member or other state, without the latter's consent, will also depend on the rules of the organisation, including its constituent instrument.¹¹³ Even in cases where the wrongfulness of an act would otherwise be precluded, it may be that particular rules binding on the organisation in question will mean that it cannot rely on such circumstances precluding wrongfulness.¹¹⁴

i. Necessity

146. Necessity may be invoked by a state or an international organisation to justify an otherwise wrongful act, if that act was the only way for it to safeguard an essential interest against a grave and imminent peril; and it does not seriously impair an essential interest of the injured state or of the international community.¹¹⁵
147. The "essential interest" to be safeguarded can be that of the state or international organisation undertaking the wrongful act or of the international community as a whole.¹¹⁶ While necessity is frequently invoked in relation to environmental

113. "Rules of the organization" are understood as referring to constituent instruments, decisions, resolutions, and other acts of the international organization adopted in accordance with those instruments, and the established practice of the organization. See Article 2(b) of the ILC articles on the responsibility of international organizations (*Report of the ILC, Sixty-third session (26 April–3 June and 4 July–12 August 2011)*, UN doc A/66/10) (ILC Articles on the Responsibility of International Organizations).

114. This point is made with regard to the invocation of countermeasures by international organisations in Articles 22(2)(b) and 52(1)(b) of the ILC Articles on the Responsibility of International Organizations, *supra*.

115. Article 25 of the ILC Articles on State Responsibility, *supra*. See also Article 25 of the ILC Articles on the Responsibility of International Organizations, *supra*.

116. Commentary to Article 25 of the ILC Articles on State Responsibility, *supra*, 80-84.

emergencies, preventing the imminent and severe suffering of a civilian population may also be considered an essential interest of the international community.

148. Humanitarian relief operations conducted without consent would impair an essential interest of the state withholding consent: its territorial integrity. While territorial integrity is an “essential interest” of a state, arguably, instances where its violation, in order to conduct humanitarian relief operations, is relatively brief, for example air drops of humanitarian relief supplies, do not impair this essential interest to the serious degree precluded by the principle. However, to the extent that the violation of territorial integrity involves exercising control of territory or contributes to the inability of the state where the operations are conducted to exercise or regain control of territory, such an operation would, arguably, constitute a serious impairment of that state’s essential interests and, therefore, would not be justifiable as a situation of necessity.
149. The wrongful act justified by necessity must be the only way of preserving the essential interest. If other, lawful, ways exist for doing so, necessity may not be invoked. In the case of humanitarian relief operations, such alternative methods could be the provision of assistance through actors whose operations the relevant state has consented to.
150. In view of this, arguably, necessity could be invoked to justify an exceptional humanitarian relief operation by a state or international organisation to bring life-saving supplies to people in extreme need, when no alternatives exist. This would meet the requirements of grave and imminent peril but would not seriously impair territorial integrity of the state withholding consent.
151. Necessity, like other circumstances precluding wrongfulness under the law relating to the responsibility of states and international organisations, may not be used to justify or excuse breaches of peremptory norms of international law.¹¹⁷ Therefore, reliance on necessity must not lead to a violation of the prohibition of the threat or use of force for the purpose of ensuring the delivery of humanitarian relief supplies.

ii. Countermeasures

152. A possible alternative basis for precluding the wrongfulness of humanitarian relief operations conducted by states or international organisations without the consent of the relevant states would be to argue that they constitute countermeasures.

117. Article 26 of the ILC Articles on State Responsibility, *supra*. Moreover, the ILC stated in the commentary to Article 25 that: “[t]he question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.” (*Ibid.*, 84, para 21).

153. Countermeasures must meet a number of conditions, only some of which warrant highlighting here.¹¹⁸ First, ordinarily, countermeasures may only be taken by a state or international organisation injured by an internationally wrongful act. Second, the purpose of the countermeasures must be to induce the violating party to comply with its obligations, including the obligation to cease its violation of international law. Third, countermeasures must be proportionate to the injury suffered. Fourth, in the case of international organisations, countermeasures must not be inconsistent with the rules of the organisation, and where the countermeasures are in response to a breach by a member state of obligations arising under the rules of the organisation, the countermeasures must be provided for by those rules.¹¹⁹
154. The requirement that countermeasures be taken by a state or international organisation injured by an internationally wrongful act could be met by relying on the increasingly accepted notion of “third party” countermeasures or countermeasures in the collective interest. This is the possibility that states or international organisations may take countermeasures in response to violations of erga omnes obligations, ie obligations owed to the international community as a whole.¹²⁰ Since it is accepted that international humanitarian law lays down such erga omnes obligations,¹²¹ states and international organisations not injured by a violation of international humanitarian law, such as the unlawful impeding of humanitarian relief operations, might nonetheless be considered as entitled, at least in principle, to take countermeasures, subject to the other conditions outlined above being met.
155. It may be questioned whether humanitarian relief operations conducted without the consent of the relevant state meet the requirement that the purpose of countermeasures must be to induce the violating party to comply with its obligations. In such a case, it is the state or international organisation conducting relief operations without consent that is itself performing the duties not discharged by the party with responsibility for meeting the needs of the civilian population. This notwithstanding, what is important in examining compliance with the requirement under consideration is that the measures must be “taken with a view to procuring the cessation of and reparation for the internationally wrongful act”.¹²² Thus, as long as the purpose of the acts is to induce the

118. See text and commentary to Articles 22 and 49-54 of the ILC Articles on State Responsibility, *supra*, 75-76 and 130-139. Articles 22 and 51-57 of the ILC Articles on the Responsibility of International Organizations set out largely identical rules.

119. See Articles 22(2)(b) and (3) of the ILC Articles on the Responsibility of International Organizations, *supra*.

120. See text and commentary to Article 54 of the ILC Articles on State Responsibility, *supra*, 137-139.

121. Wall Advisory Opinion, *supra*, para 157. The ICRC Commentaries also suggest this. See, for example, ICRC Commentary to the APs, *supra*, para 45.

122. ILC Articles on State Responsibility, *supra*, introductory commentary to Part 3; Chapter II (Countermeasures), para 6.

party unlawfully impeding humanitarian operations to cease its breaches of international law, and as long as the operations undertaken without consent are temporary in character, and can and will be stopped once the illegality ceases, the condition being discussed will be met.

156. In addition, even with respect to countermeasures in response to violations of erga omnes obligations, the condition of proportionality must be met. In considering whether the imposition of countermeasures is proportionate, consideration must be given “not only [to] the purely ‘quantitative’ element of the injury suffered, but also ‘qualitative’ factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach”.¹²³ Furthermore, assessment of proportionality must take into account “the gravity of the internationally wrongful act, and the rights in question”.¹²⁴ Since a state’s territorial integrity is an essential attribute of statehood, its breach may only be justified as a countermeasure (even when it occurs without the use of force) in the most extreme cases. For humanitarian relief operations conducted without the consent of the relevant states to be justifiable as countermeasures, it will need to be shown that the unlawful impeding of humanitarian relief operations amounts to a particularly serious breach of international law with severe consequences for those in need of assistance.
157. Countermeasures may not in any circumstance violate the prohibition of the threat or use of force.¹²⁵

I(viii) Humanitarian relief operations conducted by states or international organisations on the territory of another state, including its airspace, without that state’s consent, violate the latter’s sovereignty and territorial integrity, even in cases where humanitarian relief operations have been unlawfully impeded.

I(ix) In situations where humanitarian relief operations are imposed by a binding decision of the United Nations Security Council, such operations conducted by states or international organisations without the consent of the relevant states would be lawful.

I(x) Exceptionally, states or international organisations may conduct temporary humanitarian relief operations to bring life-saving supplies to a people in extreme need, when no alternatives exist. Such operations must not violate the prohibition of the threat or use of force or seriously impair the territorial integrity of the state on whose territory they are conducted.

123. Commentary to Article 51 of ILC Articles on State Responsibility, *supra*, para 6.

124. *Ibid.*

125. Article 50 of the ILC Articles on State Responsibility, *supra*.

Conclusions

These conclusions should be read together with the narrative commentary above in order to obtain a fuller understanding of the relevant legal framework.

A. Introduction

A(i) For the purposes of this Guidance document, “humanitarian relief operations” include, but are not limited to, operations to provide food, water, medical supplies, clothing, bedding, means of shelter, heating fuel, and other supplies and related services essential for the survival of a civilian population, as well as objects necessary for religious worship.

A(ii) The rules of international humanitarian law on humanitarian relief operations apply to relief operations that are exclusively humanitarian and impartial in character, and that are conducted without adverse distinction.

B. Responsibility for Meeting the Needs of the Civilian Population

B(i) States have the primary responsibility to meet the needs of civilians in their territory or under their effective control.

B(ii) In non-international armed conflicts, in situations where organised armed groups exercise effective control over territory, they also have a responsibility to meet the needs of civilians under their effective control if the state party to the conflict is unable to or otherwise does not discharge its obligations in this regard.

C. Offers of Services

C(i) In situations where a civilian population remains inadequately provided with food, water, medical supplies, clothing, bedding, means of shelter, heating fuel, and other supplies essential for its survival, as well as objects necessary for religious worship, offers may be made to conduct relief operations that are exclusively humanitarian and impartial in character and conducted without adverse distinction.

C(ii) Offers to conduct humanitarian relief operations do not constitute interference in the armed conflict or unfriendly acts.

D. Consent to Humanitarian Relief Operations

D(i) If civilians are inadequately provided with essential supplies and offers have been made to conduct relief operations that are exclusively humanitarian and impartial in character and conducted without adverse distinction, such operations must be carried out subject to the consent of the state in whose territory the operations will be carried out. Such consent must not be arbitrarily withheld.

D(ii) In situations of non-international armed conflict, where a humanitarian relief operation is intended for civilians in territory under the effective control of an organised armed group, and this territory can be reached without transiting through territory under the effective control of the state party to the conflict, the consent of the state is nonetheless required, but it has a narrower range of grounds for withholding consent.

D(iii) If the whole or part of the civilian population of an occupied territory is inadequately supplied, the occupying power may not withhold consent to offers to conduct humanitarian relief operations that are exclusively humanitarian and impartial in character.

D(iv) The United Nations Security Council may adopt binding decisions requiring parties to an armed conflict and other relevant states to consent to offers to conduct humanitarian relief operations, or may impose such operations, thereby dispensing with the requirement of consent.

E. Arbitrary Withholding of Consent

E(i) Consent to humanitarian relief operations must not be withheld arbitrarily if:

- *civilians are inadequately provided with essential supplies; and*
- *the party responsible for meeting their needs does not provide the necessary assistance; and*
- *offers of services have been made by actors capable of carrying out relief operations that are exclusively humanitarian and impartial in character, and conducted without any adverse distinction.*

E(ii) Consent is withheld arbitrarily if it is withheld:

- *in circumstances that result in a violation of obligations under international law with respect to the civilian population in question, including, in particular, obligations under international humanitarian law and international human rights law; or*

- *in violation of the principles of necessity and proportionality; or*
- *in a manner that is unreasonable, or that may lead to injustice or lack of predictability, or that is otherwise inappropriate.*

F. Implementation of Humanitarian Relief Operations

F(i) Once consent has been granted, parties to an armed conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel into and throughout territory under their effective control.

F(ii) The activities of humanitarian relief personnel may be limited or their movements temporarily restricted only in case of imperative military necessity.

F(iii) Parties to an armed conflict may prescribe technical arrangements for the passage of humanitarian relief supplies, equipment, and personnel.

F(iv) Administrative procedures and formalities and technical arrangements must be applied in good faith, and their nature, extent and impact must not prevent the rapid delivery of humanitarian relief in a principled manner. Their imposition or effect must not be arbitrary.

G. Humanitarian Relief Supplies, Equipment, and Personnel: General Rules and Additional Safeguards for Two Privileged Types of Humanitarian Relief Operations

Humanitarian relief supplies, equipment, and personnel – general rules

G(i) Relief personnel may participate in humanitarian relief actions, subject to the approval of the state in whose territory the humanitarian relief operation is intended to be conducted. Such personnel must not exceed the terms of their mission and must comply with technical arrangements prescribed by the relevant authorities.

G(ii) Parties to an armed conflict must respect and protect supplies, equipment, and personnel that form part of humanitarian relief operations. Intentionally directing attacks against personnel, installations, material, units, or vehicles involved in a humanitarian assistance mission, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is a war crime under the ICC Statute in international and non-international armed conflicts.

Medical humanitarian relief operations

G(iii) The wounded and sick must be respected and protected. They are entitled to receive to the fullest extent practicable and with the least possible delay the medical care and attention required by their condition. Distinction may not be drawn among them on any grounds other than medical ones.

G(iv) Under no circumstances may anyone be harassed, harmed, subjected to any form of legal proceedings or punished for having carried out medical activities compatible with medical ethics, or for having provided care to the wounded and sick.

G(v) In situations where the wounded and sick are in need of medical care and they are not receiving it, withholding consent to offers to provide the necessary assistance in a principled manner would be arbitrary.

G(vi) Once consent has been granted, parties to an armed conflict and states in whose territory the medical relief operations are initiated or through whose territory they must transit must allow and facilitate the rapid and unimpeded passage of medical relief supplies, equipment, personnel, and vehicles forming part thereof. They may prescribe technical arrangements for their passage. The nature, extent, and impact of administrative procedures and formalities and technical arrangements must not prevent the rapid delivery of medical humanitarian relief in a principled manner, and their imposition or effect must not be arbitrary.

Food assistance relief operations

G(vii) Once consent has been granted, parties to an armed conflict and states in whose territory food assistance relief operations are initiated or through whose territory they must transit must allow and facilitate rapid and unimpeded passage of supplies, equipment, personnel, and vehicles forming part thereof. They may prescribe technical arrangements for such passage. The nature, extent, and impact of administrative procedures and formalities and technical arrangements must not prevent the rapid delivery of food assistance relief in a principled manner, and their imposition or effect must not be arbitrary.

G(viii) Starvation of the civilian population as a method of warfare is prohibited, including by deliberately depriving it of foodstuffs or other objects indispensable to its survival. Withholding consent to offers to conduct food assistance relief operations with the intention of starving the civilian population would be arbitrary.

H. Non-Belligerent States and Humanitarian Relief Operations

H(i) Non-belligerent states must allow the free passage of humanitarian relief consignments intended for the civilian population of occupied territories.

H(ii) In international armed conflicts, the consent of non-belligerent states in whose territory humanitarian relief operations are initiated or through whose territory they must transit is required. Such consent must not be arbitrarily withheld.

I. Consequences of Unlawful Impeding of Humanitarian Relief Operations

Responsibility of the party and of persons unlawfully impeding humanitarian relief operations

I(i) Humanitarian relief operations are impeded unlawfully as a matter of international law

- *when parties to an armed conflict or other relevant states are obliged to consent to offers to conduct humanitarian relief operations but fail to do so; or*
- *when states whose consent is required before offers to conduct humanitarian relief operations can be implemented withhold it arbitrarily; or*
- *when parties to an armed conflict or other relevant states violate their obligation to allow and facilitate rapid and unimpeded passage of humanitarian relief supplies, equipment, and personnel.*

I(ii) Unlawful impeding of humanitarian relief operations gives rise to responsibility under international law.

I(iii) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies, is a war crime.

I(iv) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance mission, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is a war crime.

I(v) Intentionally directing attacks against individual civilians not taking direct part in hostilities is a war crime.

I(vi) Intentionally directing attacks against civilian objects is a war crime.

I(vii) The intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.

Consequences of unlawful impeding of humanitarian relief operations for those seeking to conduct such operations

I(viii) Humanitarian relief operations conducted by states or international organisations on the territory of another state, including its airspace, without that state's consent, violate the latter's sovereignty and territorial integrity, even in cases where humanitarian relief operations have been unlawfully impeded.

I(ix) In situations where humanitarian relief operations are imposed by a binding decision of the United Nations Security Council, such operations conducted by states or international organisations without the consent of the relevant states would be lawful.

I(x) Exceptionally, states or international organisations may conduct temporary humanitarian relief operations to bring life-saving supplies to a people in extreme need, when no alternatives exist. Such operations must not violate the prohibition of the threat or use of force or seriously impair the territorial integrity of the state on whose territory they are conducted.



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