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Humanitarian Access: What are the rights? What are the obligations?

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A. What do we mean by “humanitarian access”?

This expression is frequently used in political documents such as United Nations General Assembly or Security Council resolutions but does not appear in any treaty. It is a lay term for referring to the provision of humanitarian relief to civilians in situations of armed conflict.

For the purposes of legal analysis the notion must be broken down in two separate and consecutive stages:

- the “initial” authorisation of relief operations
- once this authorisation has been granted, the implementation by parties to the conflict and relevant non-belligerent states of the obligation to allow and facilitate the free passage of relief operations.

B. What are the basic rules of international humanitarian law regulating humanitarian relief operations?

The treaty rules of international humanitarian law (IHL) on humanitarian relief operations applicable in international armed conflicts, including occupation, are found principally in Articles 23 and 59 of the Fourth Geneva Convention of 1949 (GC IV), and Articles 69-71 of the First Additional Protocol thereto of 1977 (AP I).

Those applicable in non-international conflicts are common Article 3(2) to the Geneva Conventions of 1949 (GCs) and Article 18 of Additional Protocol II of 1977 thereto (AP II).

Customary law rules of IHL apply alongside these treaty provisions. According to the ICRC Customary Law Study, these treaty rules are mirrored in customary law applicable in both types of conflict.¹

¹ Louise Doswald-Beck and Jean-Marie Henckaerts, *Customary International Humanitarian Law*, (2006), Rule 55, (ICRC Customary Law Study).

Also of relevance is international human rights law and, in particular, the rights to physical integrity and to an adequate standard of life in terms of right to food and water, shelter and to health. Today I will focus principally on IHL.

The rules of IHL regulating humanitarian assistance are simple and essentially the same in international and non-international conflicts:

- primary responsibility for meeting the needs of civilians lies with the party to the conflict in whose control they find themselves.
- If this party is unable or unwilling to meet these needs, states and humanitarian organisations may offer to carry out relief actions that are humanitarian and impartial in character and conducted without any adverse distinction.
- In the majority of situations, the consent of affected states is required, but may not be arbitrarily withheld.

There are two situations in which states have no latitude to withhold consent to relief operations:

- first, in situations of occupation: If it is not in a position to ensure the adequate provision of supplies essential to the survival of the civilian population, the occupying power must accept relief operations that are humanitarian and impartial in character.
 - Second, in situations where the United Nations Security Council has adopted binding measures requiring parties concerned to consent to humanitarian relief operations or, more radically, imposed relief operations on parties.
- Once relief actions have been authorised, parties to the conflict and relevant non-belligerent states must allow and facilitate rapid and unimpeded passage of relief consignments, equipment and personnel. Parties may prescribe technical arrangements under which such passage is permitted.

In the majority of cases it is this final element that causes the most operational problems: relief operations have been authorised but parties subsequently fail to do what is required or necessary to allow and facilitate their rapid and unimpeded passage.

This being said, recently attention has focused on the first element – the authorisation of relief operations - principally because of a small number of situations (South Kordofan, Syria and the recent convoy into Eastern Ukraine) where the affected state did not authorise the relief operations.

I will spend the rest of my presentation on this point and in particular at the questions of:

- whose consent is required
- what amounts to arbitrary withholding of consent.

I will conclude with some extremely brief comments on the consequences of unlawfully withholding consent.

C. Whose consent is required?

1. International armed conflicts

As is frequently the case, the position in international armed conflict is pretty clear.

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 the conflict in whose territory the humanitarian relief operations are intended to be carried out. The consent of enemy states is only required if the relief operations must transit over territory under their control.

Also required is the consent of any non-belligerent states in whose territory humanitarian relief operations are initiated or through whose territory they must transit.

Non-international armed conflicts

The position in non-international armed conflicts is more complex. 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 as to whose consent is required.

Some interpret Article 3(2) GCs as implicitly allowing humanitarian relief operations to be carried out if the party to which an offer is made accepts it, regardless of the position adopted by its opponent. Provided the relief operations do not have to transit through territory controlled by the latter its consent is not required. This approach is only applicable to the impartial humanitarian actors referred to in Article 3(2) GCs. Other actors offering their services, such as states, would have to meet the more onerous requirements of Article 18 AP II, that I will turn to in a moment.

Personally, I find it difficult to interpret the silence of Article 3(2) GCs in this manner, particularly in view of the significant infringement of the affected state’s sovereignty and territorial integrity such an approach would entail.

Article 18(2) of 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.

However, it has been suggested that the state party to a non-international conflict is “concerned” by humanitarian relief operations for civilians in opposition-held areas and, consequently, its consent required, only if the relief actions must transit through territory under its effective control. If the territory controlled by the opposition is accessible by sea or can be reached from another country directly, the consent of the government is not required.

I am equally unpersuaded by this argument. It too sits uncomfortably with considerations of state sovereignty. Moreover, it means that there may be circumstances in which there is *no* “High Contracting Party *concerned*” which would make the reference to it in Article 18 AP II redundant. This is unlikely to have been the intention of the drafters.

In light of the silence of Article 3 GCs, and of the specific reference to “the High Contracting Party” in Article 18 AP II, a view that would give due weight to a state’s sovereignty over its territory and also to its responsibility towards the civilian population under its control is to always require the consent of the state in whose territory the relief operations will be conducted, which will, however, have a more limited range of grounds for withholding consent where relief is intended for civilians in opposition-held areas. Grounds based on imperative considerations of military necessity would be limited to those arising in the opposition-held territory or where military activity outside that territory could affect the safe passage of relief operations to it. Withholding consent out of concerns that the relief operations could legitimize the opposition or cement its control of territory would be arbitrary.

The reactions to the Russian convoy sent into Eastern Ukraine would appear to confirm the interpretation that requires the consent of the territorial state. It was a non-international armed conflict in a state that had ratified AP II, where the territory under the control of the opposition would be reached directly from the neighbouring state, Russia. A number of states and intergovernmental organisations highlighted the fact that the consent of the Ukraine to the entry of the relief operations was required.

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

D. What amounts to arbitrary withholding of consent?

The next difficult legal question is what amounts to arbitrary withholding of consent.

1. Preliminary conditions

Two conditions must be met before the issue of consent even arises:

- relief must be necessary, ie civilians must be inadequately provided with essential supplies and the party in whose control they are, unable or unwilling to provide the necessary assistance; and
- the actor (state, international organisation, NGO) offering its services must provide the assistance in a principled manner - ie it must be exclusively humanitarian and impartial in character and carried out without any adverse distinction.

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

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

Despite its centrality to the rules regulating humanitarian assistance, there is little clarity as to what constitutes arbitrary withholding of consent. There is no definition or guidance in any treaty and, to date, the issue has not been addressed by any international or national tribunal, human rights mechanism or fact-finding body.

While there is no single or all-encompassing definition of “arbitrariness”, IHL, international human rights law and general principles of public international law provide guidance.

Essentially, consent is withheld arbitrarily if it is withheld

- in circumstances that violate a party’s other obligations under international law with respect to the civilian population in question; or
- if it violates the principles of necessity and proportionality; or
- if it is withheld in an arbitrary manner.

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

A non-exhaustive list of such circumstances includes:

- Withholding consent to humanitarian relief operations in situations where the civilian population is facing starvation. This would violate the prohibition on starvation of the civilian population as a method of warfare.²
- Withholding consent to medical relief operations including on the ground that medical supplies and equipment could be used to treat wounded enemy combatants. This is a problem witnessed in Syria.

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

² Article 54(1) AP I and Article 14 AP II.

grounds other than medical ones.³ Withholding consent to medical relief operations and supplies as they might assist wounded and sick enemy combatants would violate this rule. Moreover, the same equipment and supplies are also likely to be necessary for the civilian population, which would be denied the assistance to which it is entitled by law.

- Selective withholding of consent to humanitarian relief operations with the intent or effect of discriminating against a particular group or section of the population. For example, systematically rejecting offers of humanitarian assistance for crisis-affected regions populated by ethnic groups perceived as favouring the opposition. This would violate the prohibition on discrimination.⁴
- Withholding of consent to humanitarian relief operations that violates fundamental human rights, most notably the rights to physical integrity;⁵ or prevents the satisfaction of the minimum core of relevant economic, cultural and social rights, such as the rights to an adequate standard of living, including food and water, and to health and medical services.⁶

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

Where consent to relief operations is withheld for a legitimate reason, such as imperative considerations of military necessity, this will nonetheless be arbitrary if it exceeds what is necessary in the circumstances. 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.

c. Withholding of consent in an arbitrary manner

In addition to situations where the withholding of consent is arbitrary because it leads to an effect that is unlawful under international law, consent is also withheld arbitrarily if it is withheld by a process that may lead to injustice or lack of predictability.

³ Article 10 AP I and Article 7 AP II.

⁴ 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 of the 1966 International Covenant on Civil and Political Rights (ICCPR) and Article 2(2) ICESCR.

⁵ Articles 6 and 7 ICCPR.

⁶ Articles 11 and Article 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 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports* 2004, 189, 192, 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), UN Doc E/C.12/1999/5, 12 May 1999, 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 August January 2000, paras 43 and 44; and CESCR General Comment No. 15: The Right to Water (Arts. 11 and 12), UN Doc E/C.12/2002/11, 20 January 2003, para 37.

A possible example of this would be a total failure to provide reasons for withholding consent in situations where the preliminary conditions for accepting offers of services have been met. 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. Withholding consent without providing any reasons gives rise to a rebuttable presumption of arbitrariness.

E. Consequences of unlawful withholding of consent to humanitarian relief operations

Consent to humanitarian relief operations is withheld unlawfully in two situations: when consent is necessary but it is withheld arbitrarily; and when parties are obliged to agree to humanitarian relief operations but fail to do so. (ie occupation or where there is a Security Council binding demand to allow operations).

Unlawful withholding of consent raises two sets of questions:

- the responsibility under international law of the party unlawfully withholding consent and of persons associated with it; and,
- something with more immediate operational consequences, what such unlawful withholding of consent means for those seeking to carry out humanitarian relief operations.

1. Consequences for the party unlawfully withholding consent and the persons involved in the decision

Unlawful withholding of consent to 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.

Effect may be given to this responsibility in a number of ways.

- For example, states and international organisations may be entitled to take countermeasures
- Beyond countermeasures, the Security Council has resorted to military enforcement action to ensure the delivery of assistance to populations in need on a small number of occasions: in 1992 in relation to Bosnia-Herzegovina⁷ and to Somalia.⁸

In terms of individual responsibility, of persons associated with an unlawful withholding of consent

- “[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including

⁷ Security Council resolution 781 (1992), 9 October 1992, OP 1.

⁸ Security Council resolution 794 (1992), 3 December 1992, OP 10.

wilfully impeding relief supplies as provided for under the Geneva Conventions” is a war crime under the Statute of the International Criminal Court. This war crime is only applicable in international armed conflicts.⁹ 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, constitutes the crime against humanity of extermination under the Statute and is applicable at all times.¹⁰

- The Security Council has considered the impeding humanitarian activities or access to humanitarian assistance as a basis for imposing targeted sanctions on individuals or groups.¹¹ It has imposed sanctions on this basis, among others in relation to Al-Shabaab in Somalia.¹²

2. Consequences of unlawful withholding of consent for those seeking to carry out humanitarian relief operations

Finally, turning to something with immediate operational implications, while unlawful withholding of consent to humanitarian relief operations is a violation of international law, perhaps counter-intuitively, it does not give rise to a general entitlement to carry out unauthorised relief operations. Such operations are likely to be lawful only in extremely limited circumstances.

International humanitarian law and international human rights law address the questions of when and how humanitarian relief operations may be carried out. Other areas of public international law come into play in determining the lawfulness of unauthorised relief operations including, most notably, the rules safeguarding state sovereignty and territorial integrity.

The bodies of law that determine the lawfulness of unauthorised relief operations vary depending on the status of the party seeking to carry them out. 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, but unauthorised operations they carry out may violate the national law of the state where they are conducted.

a. Unauthorised humanitarian relief operations by states and international organisations

⁹ Article 8(2)(b)(xxv) Rome Statute of the International Criminal Court.

¹⁰ Articles 7(1)(b) and 7(2)(b) Rome Statute of the International Criminal Court.

¹¹ Security Council resolution 1844 (2008), 20 November 2008, OP 8(c) in relation to Somalia; Security Council resolution 1857 (2008) of 22 December 2008, OP 4(f) in relation to the Democratic Republic of the Congo; and Security Council resolution 2134 (2014), 28 January 2014, OP 37(e) in relation to the Central African Republic.

¹² UN Security Council Sanctions Committees, List of Individuals and Entities Subject to the Measures Imposed by Paragraphs 1, 3 and 7 of Security Council Resolution 1844 (2008), http://www.un.org/sc/committees/751/pdf/1844_cons_list.pdf.

Unauthorised humanitarian relief operations carried out by states or international organisations that penetrate a state's territory, including its airspace, violate the latter's sovereignty and territorial integrity and are therefore unlawful. Such operations would only be lawful in cases where the UN Security Council has imposed them.

The wrongfulness of unauthorised humanitarian relief operations may be precluded in extremely limited circumstances where they can be justified under the principle of necessity or as countermeasures. Both options raise fairly complex points of law so I will not go into them now, but I am happy to outline the law in the discussion.

By way of a very brief conclusion, at best these grounds could be invoked to justify an exceptional relief operation by a state or international organisation to bring life-saving supplies to a population in extreme need, when no alternatives exist.

b. Unauthorised humanitarian relief operations by private actors

Private actors, such as NGOs and their staff are not bound by the rules of public international law on sovereignty and territorial integrity. However, unauthorised relief operations may violate a number of provisions of the domestic law of the state where they are conducted, ranging from illegal entry into the country, to the provision of support to the enemy. In fact in 2013 Syria criminalised unlawful/unauthorised entry, reportedly to catch foreign fighters but also those providing relief.

As the staff of NGOs do not ordinarily benefit from international law privileges and immunity, they could face proceedings under the domestic law of the state where they provided the unauthorised assistance. However, they may not be punished for providing medical assistance, including to wounded or sick enemy combatants.