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## Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict

*Dapo Akande & Emanuela-Chiara Gillard*

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# Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict

Dapo Akande\* & Emanuela-Chiara Gillard\*\*

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## I. INTRODUCTION

The UN Secretary-General has identified enhancing humanitarian access as one of the five core challenges to the protection of civilians in armed conflict.<sup>1</sup> In recent years considerable attention has been devoted to identifying and mapping a wide range of practical constraints with respect to humanitarian operations and attempting to find ways of overcoming—or at least mitigating—their effect at field level.<sup>2</sup> Less attention has been devoted to the legal framework regulating humanitarian assistance—including, in

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1. U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, ¶ 26, U.N. Doc. S/2009/277 (May 29, 2009). This was repeated in subsequent reports. See U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, ¶ 43, U.N. Doc. S/2010/579 (Nov. 11, 2010); U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, ¶ 57, U.N. Doc. S/2012/376 (May 22, 2012); U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, ¶¶ 51–59, U.N. Doc. S/2013/689 (Nov. 22, 2013) [hereinafter *Protection of Civilians in Armed Conflict 2013*].

2. For example, the United Nations Office for Coordination of Humanitarian Affairs has developed an Access Monitoring and Reporting Framework, including a database, based on a typology of nine different access constraints to facilitate better data collection and analysis and to inform policy and improve field operations' access. *OCHA Access Monitoring & Reporting Framework* HUMANITARIANRESPONSE.INFO, [http://www.humanitarianresponse.info/system/files/documents/files/OCHA\\_Access\\_Monitoring\\_and\\_Reporting\\_Framework\\_OCHA\\_revised\\_May2012.pdf](http://www.humanitarianresponse.info/system/files/documents/files/OCHA_Access_Monitoring_and_Reporting_Framework_OCHA_revised_May2012.pdf) (last visited July 5, 2016).

particular, the essential starting point of humanitarian relief operations: the requirement of consent thereto.<sup>3</sup>

After briefly outlining the rules of international humanitarian law (IHL) regulating humanitarian assistance, the present article focuses on the question of what constitutes arbitrary withholding of consent to humanitarian relief operations. This focus is warranted in the light of the increasing recognition by the international community that arbitrary denial of humanitarian access amounts to a violation of IHL. In its response to the conflict in Syria, the United Nations Security Council, in a presidential statement adopted in October 2013, condemned the denial by parties to the conflict of humanitarian access, and recalled “that arbitrarily depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access, can constitute a violation of international humanitarian law.”<sup>4</sup> A few months later, in Resolution 2139 of February 21, 2014, the Council “recall[ed] that arbitrary denial of humanitarian access and depriving civilians of objects indispensable to their survival, including wilfully impeding relief supply and access, can constitute a violation of international humanitarian law.”<sup>5</sup> The Council made similar statements in 2015 in dealing with the situation in Yemen.<sup>6</sup> Likewise, 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 in Syria, South Sudan and Sudan from the perspective of “arbitrary denial” of access.<sup>7</sup>

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3. The rules on humanitarian relief operations raise a number of other important legal questions, including whose consent is required and the impact of binding Security Council decisions. For a fuller analysis of some of these issues, see, e.g., Emanuela-Chiara Gillard, *The Law Regulating Cross-Border Relief Operations*, 95 INTERNATIONAL REVIEW OF THE RED CROSS 351 (2013).

4. U.N. President of the S.C., Statement by the President of the Security Council, U.N. Doc. S/PRST/2013/15 (Oct. 2, 2013).

5. S.C. Res. 2139), pmb., para. 5 (Feb. 21, 2014). *See also* S.C. Res. 2165), pmb., para. 15 (July 14, 2014 (Where the Council noted that it was “[d]eeply disturbed by the continued, arbitrary and unjustified withholding of consent to relief operations . . . and [also noted] the United Nations Secretary-General’s view that arbitrarily withholding consent for the opening of all relevant border crossings is a violation of international humanitarian law . . .”).

6. *See, e.g.*, S.C. Res. 2216, pmb., para. 10 (Apr. 14, 2015).

7. *See* G.A. Res. 68/182, ¶ 14 (Dec. 18, 2013) (Syria); Human Rights Council Res. 29/13, U.N. Doc. A/HRC/Res/29/13, ¶ 1 (July 23, 2015) (South Sudan); U.N. Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the Sudan*, ¶ 8(f),

However, the question of what would constitute arbitrary reasons for withholding consent to humanitarian relief operations has not been explored in any detailed manner either in the literature nor, indeed, in practice.<sup>8</sup> As the UN Secretary-General noted in his 2013 Report on the Protection of Civilians,<sup>9</sup> “it is generally accepted that . . . consent [to relief operations] must not be arbitrarily withheld. . . . This area requires further analysis and development in order to ensure that the law has meaning for those who suffer beyond the reach of assistance.” This article responds to that call for more detailed consideration of the issue.

## II. BASIC RULES OF INTERNATIONAL HUMANITARIAN LAW REGULATING HUMANITARIAN RELIEF OPERATIONS

The conventional rules of IHL regulating collective humanitarian relief operations for civilian populations are found in different treaties, depending on whether the conflict is international or non-international. The rules applicable in international armed conflicts, including occupation, are found principally in Articles 23 and 59 of the Fourth Geneva Convention of 1949 (GC IV)<sup>10</sup> and Articles 69–71 of Additional Protocol I of 1977 (AP I).<sup>11</sup> Those applicable in non-international conflicts are contained in Common Article 3(2) of the Geneva Conventions of 1949 and Article 18 of Additional Protocol II of 1977 (AP II).<sup>12</sup>

Customary law rules of IHL apply alongside these treaty provisions. According to the ICRC’s customary law study, these treaty rules are mir-

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U.N. Doc. CCPR/C/SDN/CO/4 (Aug. 19, 2014) [hereinafter *Fourth Periodic Report of the Sudan*].

8. See, however, in the context of consent to disaster relief, Sandesh Sivakumaran, *Arbitrary withholding of Consent to Humanitarian Assistance in Situations of Disaster*, 64 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 501 (2015).

9. *Protection of Civilians in Armed Conflict 2013*, *supra* note 1, ¶ 58.

10. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

11. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

12. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

rored in customary law applicable in both international and non-international armed conflict.<sup>13</sup>

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

(i) Primary responsibility for meeting the needs of civilians lies with the party to the conflict in whose control they find themselves. States have primary responsibility to meet the needs of persons within their territory or effective control.<sup>14</sup> In situations of non-international armed conflict where organized armed groups exercise effective control over territory, such groups also have a duty to meet the needs of civilians under their control if the State with responsibility in this regard is unable to, or is precluded from, discharging its obligations.<sup>15</sup>

(ii) If a party with responsibility to meet the needs of a civilian population fails to do so, States and humanitarian organizations

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13. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 55 ((Jean-Marie Henckerts & Louise Doswald-Beck eds., 2005).

14. *See generally* OXFORD GUIDANCE ON THE LAW RELATING TO HUMANITARIAN RELIEF OPERATIONS IN SITUATIONS OF ARMED CONFLICT sec. B (Dapo Akande & Emanuela-Chiara Gillard, 2016). *See* G.A. Res. 46/182, annex, Guiding Principles, ¶ 4 (Dec. 19, 1991) (“Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory.”). *See also* Francis M. Deng (Representative of the Secretary-General), *Report Submitted Pursuant to Commission Resolution 1997/39: Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *Guiding Principles on Internal Displacement*] (Principle 3, ¶ 1: “National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction.”) (Principle 25, ¶ 1: “The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.”).

In relation to natural disasters, see International Law Commission, *Protection of Persons in the Event of Disasters*, U.N. Doc. A/CN.4/L.871, at 2 (art. 2) (May 27, 2016) [hereinafter *ILC, Protection of Persons in the Event of Disasters*].

15. In recent years there has been a shift towards imputing obligations to comply with human rights on non-State armed groups in situations where they exercise effective control over territory and populations and discharge a degree of public and administrative functions. *See, e.g.*, S.C. Res. 1574, pmb., para. 11 (Nov. 19, 2004); S.C. Res. 1376, ¶ 5 (Nov. 9, 2001); S.C. Res. 1417, ¶ 4 (June 14, 2002). *See also* Walter Kälin (Representative of the Secretary-General), *Report on the Human Rights of Internally Displaced Persons: Addendum: Mission to Georgia*, ¶ 5, U.N. Doc. E/CN.4/2006/71/Add.7 (Mar. 24, 2006).

may offer to carry out relief actions that are humanitarian and impartial in character and conducted without any adverse distinction.<sup>16</sup>

(iii) In the majority of cases, the consent of affected States<sup>17</sup> is required, and may not be arbitrarily withheld. There are two situations in which States have no latitude to withhold consent to humanitarian relief operations: first, situations of occupation<sup>18</sup>; and, second, where the Security Council has adopted a binding decision to that effect.<sup>19</sup>

(iv) Once humanitarian relief actions have been agreed to, all parties must allow and facilitate rapid and unimpeded passage of relief consignments, equipment and personnel, even if assistance is destined for the civilian population under the control of the adverse party. Parties may prescribe technical arrangements under which such passage is permitted.<sup>20</sup>

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16. See GC IV, *supra* note 10, art. 3(2); AP I, *supra* note 11, art. 70(1); AP II, *supra* note 12, art. 18(2). Offers to provide assistance or to carry out other humanitarian activities with the consent of the parties to the conflict may also be made in other situations, including where the civilian population is not inadequately provided with supplies essential to its survival. Likewise, States may also ask for assistance in such situations. GC IV, *supra*, arts. 3, 10; Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field arts. 3, 9, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea arts. 3, 9, Aug. 12, 1949, 6 U.S.T. 3217 75 U.N.T.S. 85 [hereinafter GC II]; Convention (III) Relative to the Treatment of Prisoners of War arts. 3, 9, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. Nothing precludes offers of assistance being made or, indeed, assistance being sought also in relation to other needs of the civilian population. See *generally* OXFORD GUIDANCE, *supra* note 14, sec. C.

17. For a discussion of whose consent is required and, in particular, whether, in the case of a non-international armed conflict it is always that of the affected State as a matter of law or, in some circumstances, that of non-State groups in control of territory, see OXFORD GUIDANCE, *supra* note 14, sec. D; Gillard, *supra* note 3.

18. GC IV, *supra* note 10, art. 59.

19. In addressing the situation in Syria, in 2014 the Security Council authorized UN humanitarian agencies and their implementing partners to deliver humanitarian assistance to people in need, across conflict lines and through specified border crossings without requiring the consent of the Syrian government or of other parties to the conflict. S.C. Res. 2165, ¶ 2 (July 14, 2014).

20. AP I, *supra* note 11, arts. 70(2)–(4); 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 13, r. 55, cmt. at 194–200; OXFORD GUIDANCE, *supra* note 14, sec. F.

## III. THE REQUIREMENT OF CONSENT

The principal element of complexity in these otherwise simple rules is the requirement of consent. While States and humanitarian organizations may offer their services, consent is required before humanitarian relief operations may be implemented. This requirement of consent is explicit in both Article 70(1) of AP I (which provides that such operations “shall be undertaken, subject to the agreement of the Parties concerned in such relief actions”) and Article 18(2) of AP II (such operations “shall be undertaken subject to the consent of the High Contracting Party concerned”).

Despite the apparently absolute nature of the requirement that consent be obtained, it has been accepted that such consent may not be withheld arbitrarily. This principle prohibiting arbitrary withholding of consent is derived from (1) the need to provide an effective interpretation of the relevant treaty texts, which gives effect to all aspects of those provisions and does not render parts of them redundant; (2) the intention of those who negotiated the Additional Protocols, as reflected in the drafting history of the provisions; and (3) practice subsequent to the adoption of the protocols. In other words, the principle prohibiting arbitrary withholding of consent to humanitarian relief operations, where the preliminary conditions for such operations to be undertaken are met, derives from the interpretation of the relevant treaty texts which best accords with the relevant provisions of the Vienna Convention on the Law of Treaties.<sup>21</sup>

The texts of Article 70 of AP I and of Article 18(2) of AP II dealing with humanitarian relief operations include a number of distinct elements, all of which make up the package of rules contained in those provisions. These texts state that where the civilian population is inadequately provided with essential supplies, relief actions that are humanitarian and impartial in character and conducted without any adverse distinction “shall be undertaken.” However, these operations are also stated to be “subject to the agreement/consent” of the State concerned in such relief actions. While that last phrase makes it clear that consent is required, the use of the word “shall” also suggests that acceptance of humanitarian relief is not entirely discretionary. To interpret the provisions in such a way as to ignore the requirement of consent entirely, or, alternatively to insist on an unlimited

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21. *See* Vienna Convention on the Law of Treaties arts. 31, 32, May 23, 1969, 1155 U.N.T.S. 331.



right of the State to withhold consent, would fail to give effect to one or other aspect of the provision. Interpreting the texts in a manner which insists on the requirement of consent but which also requires that such consent must not be withheld arbitrarily, gives effect to both aspects of the provision.<sup>22</sup> Such an interpretation is consistent with the principle that a treaty must not be interpreted in such a way as to render parts of the text redundant or meaningless.<sup>23</sup> It also accords with the principle that a treaty must be interpreted in good faith, a principle that in turn requires the balancing of treaty elements and excludes abuse of rights.<sup>24</sup>

The requirement that consent must not be withheld arbitrarily may also be derived from the drafting history of the Additional Protocols. The negotiators expressed and supported the view that parties did not have “absolute and unlimited freedom to refuse their agreement to relief actions.”<sup>25</sup> A party refusing consent had to do so for “valid reasons,” not for “arbitrary or capricious ones.”<sup>26</sup> According to a leading commentator, who participat-

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22. To the same effect, see INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 25 (2011), <https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>.

23. This is the principle of effectiveness (*ut res magis valeat quam pereat*). See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, Judgment, 2011 I.C.J. 70, ¶¶ 133–34 (Apr. 11). See also Appellate Body Report, *Korea—Definitive Safeguard Measure on Import of Certain Dairy Products*, ¶ 81, WTO Doc. WT/DS98/AB/R (adopted Dec. 14, 1999) (“In 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)). See RICHARD K. GARDNER, TREATY INTERPRETATION 179–81 (2d ed. 2015).

24. See GARDNER, *supra* note 23, at 176–79.

25. 12 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 336, ¶ 27 (1978) (statement of Michael Bothe representative of Germany) [hereinafter 12 OFFICIAL RECORDS]; 4 HOWARD LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL 1 TO THE 1949 GENEVA CONVENTIONS 15 (1981).

26. LEVIE, *supra* note 25, at 15; 12 OFFICIAL RECORDS, *supra* note 25, at 336, ¶ 27. This position was supported by the United States, the Netherlands, the USSR and the UK. No delegations opposed this understanding. *Id.* at 336–37, ¶¶ 28–31. Similar comments were also made in relation to the consent requirement in Article 18 of Additional Protocol II. 7 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 156–57 (1978) (Belgium and Germany). See also COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST

ed in the negotiations, an interpretation that does justice to both the requirement that humanitarian relief actions be undertaken and the requirement of consent, is that consent “has to be granted as a matter of principle, but that it can be refused for valid and compelling reasons. Such reasons may include imperative considerations of military necessity. However, there is no unfettered discretion to refuse agreement, and it may not be declined for arbitrary or capricious reasons.”<sup>27</sup>

Finally, despite the absence of specific words in the relevant treaty texts, it is now generally accepted that although the consent of the affected State to humanitarian relief actions is required, it may not be arbitrarily withheld.<sup>28</sup> This position is reflected in subsequent formulations of the rules on humanitarian assistance that expressly note that consent may not be arbitrarily withheld. Examples include the Guiding Principles on Internal Displacement;<sup>29</sup> the Resolution on Humanitarian Assistance adopted by the Institute of International Law in 2003;<sup>30</sup> Council of Europe Recom-

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1949, ¶¶ 2805, 4885 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

27. MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS, COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 485 (2d ed. 2013) (quoting Michael Bothe).

28. *See, e.g.*, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 13, r. 55, cmt. at 194–200; *Protection of Civilians in Armed Conflict 2013*, *supra* note 1, ¶ 58; Felix Schwendimann, *The Legal Framework of Humanitarian Access in Armed Conflict*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 993, 999 (2011).

29. The Guiding Principles on Internal Displacement state that

[i]nternational humanitarian organizations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State’s internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.

*Guiding Principles on Internal Displacement*, *supra* note 14, princ. 25.2.

30. This resolution states that

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

Institute of International Law, Resolution on Humanitarian Assistance art. VIII (Sept. 2, 2003), <http://www.ifrc.org/Docs/idrl/I318EN.pdf>.

mentation 6 on internally displaced persons;<sup>31</sup> and, beyond situations of armed conflict, in the International Law Commission's (ILC) work on the protection of persons in the event of disasters,<sup>32</sup> to mention but a few. While General Assembly Resolution 46/182 only refers to the need for the consent of the affected State, it is submitted that it should be read in the light of the above-mentioned rules and instruments requiring that consent not be arbitrarily withheld.

With respect to offers of services by impartial humanitarian organizations, it has been stated that "international law as informed by subsequent State practice in the implementation of the Geneva Conventions has now evolved to the point where consent may not be refused on arbitrary grounds."<sup>33</sup> More generally, as indicated above, recent UN practice by the Security Council, General Assembly, Human Rights Council and UN Human Rights Committee has addressed the issue of the legality of obstructions to humanitarian access from the perspective of "arbitrary denial" of access, thus confirming the prohibition of arbitrary withholding of consent.<sup>34</sup>

#### IV. WHAT AMOUNTS TO ARBITRARY WITHHOLDING OF CONSENT?

##### A. Preliminary Conditions

Two conditions must be met before the issue of consent even arises. First, relief must be necessary, i.e., civilians must be inadequately provided with essential supplies and the party with responsibility to meet their needs must be failing to provide the requisite assistance. Second, the actor (State, international organization, non-governmental organization) offering its services must provide the assistance in a principled manner, that is the assistance must be exclusively humanitarian and impartial in character and carried out

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31. Council of Europe Recommendation Rec(2006)6 of the Committee of Ministers to Member States on Internally Displaced Persons, ¶ 4 (Apr. 5, 2006).

32. ILC, Protection of Persons in the Event of Disaster, *supra* note 14, at 3 (art. 13(2)). *See also* Sivakumaran, *supra* note 8.

33. *See* INTERNATIONAL COMMITTEE FOR THE RED CROSS, COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶ 834 (2d ed. 2016), [https://ihl-dat.abas-es.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#783\\_B](https://ihl-dat.abas-es.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#783_B).

34. *See supra* notes 4–7. *See also* G.A. Res. 46/182, *supra* note 14, Guiding Principles, ¶ 3.

without any adverse distinction.<sup>35</sup> If these conditions are met, consent may not be arbitrarily withheld.

*B. 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<sup>36</sup> or fact-finding body.

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

Under international law, the notion of arbitrariness has a wide meaning and “is a much broader one than the ordinary meaning of the term might suggest.”<sup>37</sup> In particular, it must not be thought that the concept is related solely, or even mainly, to conduct which is engaged in without reason, or is random. It has been stated that the UN Human Rights Committee has “never read ‘arbitrary’ . . . by its purely discretionary meaning, as referring to unrestrained decisions made purely by discretion or on whim, without any rational reason—a standard so low that it could be satisfied by having almost any rule allowing for the interference.”<sup>38</sup> This position is equally true of other international tribunals that have considered the concept of arbitrariness. None of them have confined the notion of arbitrariness to deci-

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35. AP I, *supra* note 11, art. 70. See BOTHE, PARTSCH & SOLF, *supra* note 27, at 484–85; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977, *supra* note 26, ¶ 4883; Walter Kälin (Representative of the Secretary-General), *Report on the Human Rights of Internally Displaced Persons*, ¶ 81, U.N. Doc. A/65/282 (Aug. 11, 2010).

36. *But see Fourth Periodic Report of the Sudan*, *supra* note 7, ¶ 8(f) (which mentions, but does not elaborate on, “the prohibition of arbitrary denial of humanitarian access”).

37. See Sivakumaran, *supra* note 8, at 519.

38. See Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, 56 HARVARD JOURNAL OF INTERNATIONAL LAW 81, 133 (2015).

sions made capriciously or on a whim.<sup>39</sup> They have all taken a wider view, which relates to whether the conduct in question is justifiable in substance, as well as, in certain cases, whether the decision-making is procedurally appropriate. While it is not always possible to capture in advance all the elements that may render an action or a decision arbitrary, certain key elements, which are discussed below, may be identified and provide a starting point for considering the issue of arbitrariness for the purpose of humanitarian relief operations.

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; if it violates the principles of necessity and proportionality; or if it is withheld in a manner that is unreasonable, unjust, lacking in predictability or otherwise inappropriate.<sup>40</sup>

#### 1. Arbitrariness Deriving from Illegality under other Applicable Rules of International Law

Although the concept of arbitrariness is broader than unlawfulness,<sup>41</sup> where international law prohibits arbitrary action, conduct which would violate a party's other obligations under international law is regarded as arbitrary.<sup>42</sup>

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39. *See, e.g.*, the decisions of the International Court of Justice in the *Nuclear Weapons* case (*infra* note 45) and the World Trade Organization Appellate Body in *Brazil—Retreaded Tyres* (interpreting the concept of “arbitrary or unjustifiable discrimination” and stating “we believe that Brazil’s decision to act . . . [in this case] cannot be viewed as “capricious” or “random.”. . . “However, discrimination can result from a rational decision or behaviour, and still be ‘arbitrary or unjustifiable.’”). Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 232, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007).

40. U.N. Human Rights Committee, General Comment No. 35, Article 9: Liberty and Security of Person, U.N. Doc. CCPR/C/GC/35, ¶¶ 11, 12 (Oct. 28, 2014) [hereinafter General Comment No. 35].

41. *See id.*; SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* 346, ¶ 11.11 (3d ed. 2013).

42. *See* Kevin Boyle, *The Concept of Arbitrary Deprivation of Life*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW* 221, 234 (Bertrand Ramcharan ed., 1985) (speaking both of arbitrary deprivation of liberty and of life). In discussing the international law prohibition of arbitrary deprivation of nationality, the UN Secretary-General stated that “[m]easures leading to the deprivation of nationality must serve a legitimate purpose that is consistent with international law and, in particular, the objectives of international human rights law.” U.N. Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, ¶ 25, U.N. Doc. A/HRC/13/34 (Dec. 14, 2009) [hereinafter Secretary-General’s Report].

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.”<sup>43</sup> An example of a case in which the notion of arbitrariness was interpreted by reference to other applicable legal obligations is the International Court of Justice’s (ICJ) decision in the *Nuclear Weapons Advisory Opinion*. Here the ICJ held that whether a deprivation of life is to be regarded as arbitrary under Article 6 of the 1966 International Covenant on Civil and Political Rights (ICCPR)<sup>44</sup> in a situation of armed conflict must be determined by reference to the applicable principles of IHL.<sup>45</sup>

Parties to an armed conflict must comply with all their applicable obligations under international law. Of particular relevance in determining whether consent has been withheld arbitrarily are the obligations with respect to the civilian population in need of assistance. It may be that the effect of those obligations under IHRL, international criminal law and other relevant bodies of law, in addition to IHL, is to require parties to accept humanitarian relief operations. In circumstances where the withholding of consent to humanitarian relief operations by a party to an armed conflict would amount to a violation of its other applicable obligations with respect to the civilian population in question, such withholding of consent would be arbitrary.<sup>46</sup>

In sum, where the preliminary conditions for carrying out a humanitarian relief operation are met, and denial of relief to those in need of it would amount to a breach by the affected State or party of its obligations under other relevant rules of international law with respect to the civilian population in question, the withholding of consent must be considered arbitrary and, therefore, in violation of the rules regulating humanitarian relief operations.<sup>47</sup>

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43. Vienna Convention on the Law of Treaties, *supra* note 21, art. 31(3)(2). In its *Oil Platforms* decision the ICJ applied this provision in such a way that that it interpreted a bilateral Treaty of Amity, Economic Relations and Consular Rights by reference to applicable principles of the UN Charter and customary international law. *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 41 (Nov. 6).

44. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

45. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).

46. See *infra* Part IV for analysis of the relationship between IHRL and the rules of IHL relating to humanitarian relief operations.

47. Kälin, *Report on the Human Rights of Internally Displaced Persons*, *supra* note 35, ¶ 82.

A non-exhaustive list of examples of arbitrary reasons for withholding consent that would violate obligations under international law in relation to the civilian population would include, first, the desire to weaken the resistance of an adversary by depriving the civilian population of its means of subsistence.<sup>48</sup> Where a civilian population is inadequately supplied and the State intends to cause, contribute to or perpetuate starvation, withholding consent to a humanitarian relief operation would amount to a violation of the prohibition of starvation of the civilian population as a method of warfare under Article 54(1) AP I and Article 14 AP II.<sup>49</sup>

A second reason would be withholding consent to medical relief operations, including on the ground that medical supplies and equipment could be used to treat wounded enemy combatants. It is a fundamental rule of IHL that the wounded and sick—including enemy combatants—must receive, to the fullest extent practicable and with the least possible delay, the medical care required by their condition.<sup>50</sup> No distinction may be made on any grounds other than medical ones. Withholding consent to medical relief operations and supplies, including on the ground that they might assist wounded and sick enemy combatants, would violate this rule. Moreover, the same equipment and supplies are also likely to be necessary for the civilian population, who would be denied the assistance to which it is entitled by law.

Third, selective withholding of consent with the intent or effect of discriminating against a particular group or section of the population would be arbitrary. An example would be systematically rejecting offers of humanitarian assistance for crisis-affected regions populated by ethnic groups

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48. Michael Bothe, *Relief Actions: The Position of the Recipient State*, in ASSISTING THE VICTIMS OF ARMED CONFLICT AND OTHER DISASTERS 94 (Frits Kalshoven ed., 1988).

49. *See, e.g.*, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977, *supra* note 26, ¶¶ 2808, 4885. The seriousness of withholding consent in such circumstances is evidenced by the fact that under the Rome Statute of the International Criminal Court it is a war crime in international armed conflicts to “intentionally us[e] starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions.” Rome Statute of the International Criminal Court art. 8(2)(b)(xxv), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

Although not specified in the adopted version of the Elements of Crime for this offense, delegations agreed that the crime would cover “the deprivation not only of food and drink, but also, for example, medicine or in certain circumstances blankets.” *See* KNUT DÖRMANN, ELEMENTS OF CRIME UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 363 (2003).

50. *See, e.g.*, AP I, *supra* note 11, art. 10; AP II, *supra* note 12, art. 17.

perceived as favoring the opposition.<sup>51</sup> IHL prohibits adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria;<sup>52</sup> while under IHRL, discrimination on grounds of race, color, language, religion, national or social origin is prohibited.<sup>53</sup> Furthermore, discriminatory conduct against any identifiable group or collectivity on political, racial, national, ethnic, cultural, or religious grounds, when committed in connection with any other international crime may amount to the crime against humanity of persecution under the Statute of the International Criminal Court (ICC).<sup>54</sup>

Finally, and more generally, withholding of consent that is “likely to endanger the fundamental human rights” of the affected civilians will be arbitrary.<sup>55</sup> Humanitarian assistance is also often considered from a human rights perspective, which requires withholding of consent not to violate particular rights, most notably the rights to bodily integrity, or prevent the satisfaction of the minimum core of relevant economic, social and cultural rights, such as the rights to an adequate standard of living, to food and to be free from hunger, to housing, and to health and medical services.<sup>56</sup>

Limited guidance exists, however, as to the precise circumstances in which withholding consent would violate these rights. One of the most specific indications to date is that provided by the Special Representative of the UN Secretary-General on internally displaced persons:

A State is deemed to have violated the right to an adequate standard of living, to health and to education, if authorities knew or should have known about the humanitarian needs but failed to take measures to satisfy, at the very least, the most basic standards imposed by these rights.

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51. Kälin, *Report on the Human Rights of Internally Displaced Persons*, *supra* note 35, ¶ 83.

52. GC I, *supra* note 16, art. 3; GC II, *supra* note 16, art. 3; GC III, *supra* note 16, arts. 3, 16; GC IV, *supra* note 10, arts. 3, 13; AP I, *supra* note 11, art. 75(1); AP II, *supra* note 12, art. 4(2).

53. ICCPR, *supra* note 44, arts. 2(1), 26; International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3.

54. ICC Statute, *supra* note 49, art. 7(1)(h).

55. Institute of International Law Resolution, *supra* note 30, art. VIII (1).

56. *See, e.g.*, Walter Kälin, *Guiding Principles on Internal Displacement: Annotation*, 38 STUDIES IN TRANSNATIONAL LEGAL POLICY 1, 117 (2008); Kälin, *Report on the Human Rights of Internally Displaced Persons*, *supra* note 35, ¶¶ 68–69; SWISS FEDERAL DEPARTMENT OF FOREIGN AFFAIRS, HUMANITARIAN ACCESS IN SITUATIONS OF ARMED CONFLICT: HANDBOOK ON THE NORMATIVE FRAMEWORK ch. 4 (2011). In relation to assistance in natural disasters, see Eduardo Valencia-Ospina (Special Rapporteur), *Fourth Report on the Protection of Persons in the Event of Disasters*, ¶¶ 58–60, U.N. Doc. A/CN.4/643 (May 11, 2011).



State obligations thus include the responsibility to follow up on these situations of concern and assess relevant needs in good faith, and ensure that humanitarian needs are being met, by the State itself or through available assistance by national or international humanitarian agencies and organizations, to the fullest extent possible under the circumstances and with the least possible delay.<sup>57</sup>

Fuller analysis of the role that IHRL may play in determining whether consent to humanitarian relief operations has been arbitrarily withheld is set out in Part V below.

## 2. Arbitrariness as a Failure to Comply with Principles of Necessity and Proportionality

In contexts where international law prohibits arbitrary conduct, it has consistently been stated that for conduct not to be arbitrary, not only must it be lawful, but it must also be necessary for achieving legitimate ends<sup>58</sup> and a proportionate means of achieving those ends. The notions of necessity and proportionality described here are those that find expression in international human rights law. Human rights tribunals that have interpreted the notion of arbitrariness (in the context of the right to life and the right to liberty) have consistently held that the concept requires that the measure taken was necessary, no more than necessary and proportionate to the end sought to be achieved.<sup>59</sup> Similarly, in the context of the prohibition of arbitrary deprivation of nationality, it has been stated that the conditions for not infringing the prohibition of arbitrariness include “serving a legitimate

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57. Kälin, *Report on the Human Rights of Internally Displaced Persons*, *supra* note 35, ¶ 69.

58. Sivakumaran, *supra* note 8, at 521.

59. JOSEPH & CASTAN, *supra* note 41, at 169, ¶ 8.07 (referring to cases of the UN Human Rights Committee which hold that in order for use of lethal force to be non-arbitrary and lawful, the use of firearms must be strictly unavoidable). *See also* A v. Australia, Human Rights Committee, Comm. No. 560/1993, ¶ 9.2, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997) (where it was held that the element of proportionality is relevant in the context of assessing arbitrary deprivation of liberty). *See generally* JOSEPH & CASTAN, *supra*, at 168, ¶ 8.04; WALTER KÄLIN & JORG KUNZLI, *THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION* 102 (2009) (“[T]he [Human Rights] Committee treats as ‘arbitrary’ all cases of interference with a right that are not reasonable or proportionate in the circumstances, or, in other words, that are not proportional to the end sought and are not necessary in the circumstances of a given case.”).

purpose, being the least intrusive instrument to achieve the desired result and being proportional to the interest to be protected.”<sup>60</sup>

Where consent to humanitarian relief operations is withheld because of imperative reasons of security, for example if foreign relief personnel could hamper military operations, it may be argued that the withholding of consent is not arbitrary.<sup>61</sup> However, such consent should not be withheld beyond what military necessity demands. Where it is, such a withholding would violate the principle that measures must not exceed that which is necessary.

The principle of proportionality under IHRL can provide guidance on what would amount to arbitrary limitations on the granting of consent. Limitations in terms of time, duration, location, and affected goods and services must not go beyond what is absolutely necessary to achieve the legitimate aim of the State withholding consent.<sup>62</sup>

### 3. Arbitrariness as Unreasonableness or Capriciousness

International tribunals that have been given the task of determining whether conduct by States is arbitrary have in varying contexts held that “‘arbitrariness’ is not simply to be equated with ‘against the law’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability.”<sup>63</sup> Furthermore, conduct will be regarded as arbitrary when it is unreasonable in all the circumstances.<sup>64</sup> Applied to humanitarian

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60. U.N. Secretary-General, *Human Rights and Arbitrary Deprivation of Nationality*, ¶ 4, U.N. Doc. A/HRC/25/28 (2013). *See also id.* ¶ 40.

61. BOTHE, PARTSCH & SOLF, *supra* note 27, at 485; Bothe, *supra* note 48, at 95; Walter Kälin, UN Resident Coordinator Induction Programme (February 23, 2013) (on file with authors).

62. Kälin, UN Resident Coordinator Induction Course, *supra* note 61.

63. *See, e.g., Taright v. Algeria*, Human Rights Committee, Comm. No. 1085/2002, ¶ 8.3, U.N. Doc. CCPR/C/86/D/1085/2002 (May 16, 2006) (speaking about arbitrary deprivation of liberty under ICCPR Article 9). This idea has been reiterated by the Human Rights Committee in many of its cases, such as *A v. Australia*, *supra* note 59, ¶ 9.2. *See also* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Productions*, ¶ 180, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) (holding that a measure constituted “arbitrary discrimination” on the grounds, *inter alia*, of unpredictability).

64. General Comment No. 35, *supra* note 40, ¶ 12. *See also, e.g., Taright v. Algeria*, *supra* note 63; *A v. Australia*, *supra* note 59. For a similar view, see Report of the Working Group on Arbitrary Detention, ¶ 61, U.N. Doc. A/HRC/22/44 (Dec. 24, 2012). *See also* JOSEPH & CASTAN, *supra* note 41, at 168, ¶ 8.04 (Noting that the case law of the UN Human Rights Committee “confirms that ‘arbitrary’ is a broader concept than ‘unlawful’ . . . . The

relief operations, withholding of consent will be regarded as arbitrary or capricious if the reasons for withholding consent, though not inherently unlawful, fail to accord with the values that underpin IHL and IHRL. Also, withholding of consent will be arbitrary if the manner in which it is done leads to injustice or lack of predictability.

While IHRL seeks to promote human dignity, IHL recognizes that in situations of armed conflict, a balance will need to be struck between the imperative considerations of security and the protection of humanitarian interests. As discussed in the previous section, withholding of consent on grounds of imperative reasons of security might not be arbitrary, provided the measures taken comply with the principles of necessity and proportionality. Examples of reasons for withholding consent which fall into the category of inappropriate or unreasonable, and thus be arbitrary, would be withholding of consent simply because of “State sovereignty, the internal legal order, national pride and/or interests, political orientation, the interests of the regime in power, and similar arguments.”<sup>65</sup>

Where consent to assistance is withheld because the offer does not meet the preliminary conditions provided for by IHL, such a withholding of consent will not be arbitrary. Where a State or party is able to provide an adequate and effective response to the humanitarian needs from its own resources, such a denial of consent will not be in breach of its obligations under IHL with respect to relief operations, since those obligations only apply in cases where the party is unable to meet relevant needs. Also, even where there are unmet needs, if the actor offering its services will not provide the assistance in a principled manner—i.e., in a manner which is exclusively humanitarian and impartial in character and carried out without any adverse distinction—it will not be arbitrary to refuse consent.<sup>66</sup>

In addition, and as the ILC has noted in the area of consent to assistance in the event of natural disasters, “withholding consent to assistance from one external source is not arbitrary if an affected State has accepted

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prohibition on the ‘arbitrary’ deprivation of life signifies that life must not be taken in unreasonable or disproportionate circumstances.”) Taking a similar view is the Secretary General’s Report, *supra* note 42, at 7, ¶ 25.

65. *Humanitarian Assistance*, 70-I YEARBOOK OF THE INSTITUTE OF INTERNATIONAL LAW 563 (Budislav Vukas, Rapporteur, 2002–2003).

66. AP I, *supra* note 11, art. 70. See BOTHE, PARTSCH & SOLF, *supra* note 27, at 484–85; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977, *supra* note 26, ¶ 4883; Kälén, *Report on the Human Rights of Internally Displaced Persons*, *supra* note 35, ¶ 81.

appropriate and sufficient assistance from elsewhere.”<sup>67</sup> However, where an offer of assistance that meets the preliminary conditions for relief operations is made and no alternate sources of assistance are available, there would be a strong presumption that a decision to withhold consent is arbitrary.<sup>68</sup> These principles will apply equally to humanitarian relief operations in situations of armed conflict.

An example of a withholding of consent that may be considered arbitrary because of the unreasonable or capricious manner in which it is done would be a rejection of offers of assistance without providing any reasons, or if the reasons are based on errors of fact, for example, a denial of humanitarian needs without a proper assessment.<sup>69</sup> It is unclear precisely to whom a party to a conflict is required to provide the reasons underlying its withholding of consent and, while it may not be under an obligation to respond individually to each offer of humanitarian assistance, a blanket failure to provide reasons for withholding consent would be an example of lack of predictability and capriciousness which are indicators of arbitrariness. A failure to provide reasons for withholding consent, in cases where the preliminary conditions for accepting offers of assistance appear to be met, would make it impossible to assess whether there are valid reasons underlying the refusal of consent. The obligation to provide reasons is a procedural obligation which allows the substantive obligations relating to humanitarian relief operations to be monitored and to be given effect. As the ILC has stated, again in the context of natural disasters, “[t]he provision of reasons is fundamental to establishing the good faith of an affected State’s decision to withhold consent. The absence of reasons may act to support an inference that the withholding of consent is arbitrary.”<sup>70</sup>

However, the ILC has also “recognized that a rigid duty formally to respond to every offer of assistance may place too high a burden on affected States”<sup>71</sup> and was of the view that maximum flexibility should be given to affected States to decide how best to respond to offers of assistance. It considered that there was “a wide range of possible means of

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67. International Law Commission, Report on the Work of its Sixty-Third Session, U.N. Doc. A/66/10, at 270, ¶ 7 (2011) [hereinafter ILC Report].

68. *Id.*

69. Kälin, *Report on the Human Rights of Internally Displaced Persons*, *supra* note 35, ¶ 82. See also Sivakumaran, *supra* note 8, at 519–21.

70. ILC Report, *supra* note 67, at 270, ¶ 8.

71. *Id.* at 270, ¶ 9.

response, including a general publication of the affected State's decision regarding all offers of assistance.<sup>72</sup>

*C. Concluding Remarks on Arbitrary Withholding of Consent*

In view of the above, the determination of whether consent has been withheld for valid or arbitrary reasons must be made on a case-by-case basis, taking into consideration a number of inter-related elements, including:

- *Compatibility with other obligations under international law with respect to the civilian population in question.* If withholding consent amounts to a violation of the affected State's other international obligations with respect to that civilian population, it will be arbitrary. Examples include violation of the prohibition of starvation of the civilian population as a method of warfare; the entitlement of the wounded and sick to receive to the fullest extent possible, and with the least possible delay, the medical care required by their condition; the prohibition of discrimination; or violation of the rights to bodily integrity, or the minimum core of relevant economic, social and cultural rights.
- *Whether the withholding of consent is necessary and is not a disproportionate means for achieving a legitimate objective.* This may require considering the location of the proposed humanitarian relief operations; despite needs, a party may be entitled to withhold consent to offers of assistance on certain grounds. For example, if the location of the intended operations is the theater of ongoing hostilities. Other grounds would not be acceptable, for example, if it is because the local population is viewed as supportive of the enemy. The timeframe of the proposed operations may also be relevant. What may constitute valid reasons for withholding access, such as ongoing hostilities or other reasons of security, could turn into arbitrary ones if their duration is such that the needs of the affected civilian population become severe.

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72. *Id.*

- *Whether the withholding of consent is reasonable and pursues a legitimate objective.* This will require consideration of a number of factors, including, first, the needs of the population—what are they in terms of types of supplies and services and how acute are they? Second, who, if anyone, is providing assistance? The starting point of the analysis is the needs of the civilian population, rather than any “entitlement” of relief organizations to provide assistance. If the affected State itself or some other humanitarian actor is providing the necessary assistance in a principled manner, the State may be entitled to turn down other offers of relief. Third, does the actor offering the assistance: have a record of operating in a principled manner? And can it provide the type of assistance that is needed?

#### V. INTERNATIONAL HUMAN RIGHTS LAW AND HUMANITARIAN RELIEF OPERATIONS

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

It is useful to recall that a State’s obligations under IHRL continue to apply in time of armed conflict. The ICJ has stated that “the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict . . . .”<sup>73</sup> Moreover, a number of international tribunals and/or mechanisms (the ICJ,<sup>74</sup> the UN Human Rights Committee,<sup>75</sup> the European Court of Human Rights<sup>76</sup> and the Inter-American Commis-

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73. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9). Some human rights treaties provide that States may take measures which derogate from some of their obligations in time of public emergency, including in time of armed conflict. *See, e.g.*, ICCPR, *supra* note 44, art. 4.

74. *See, e.g.*, *Legal Consequences of the Construction of a Wall*, *supra* note 73, ¶¶ 107–13.

75. U.N. Human Rights Committee, General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (May 26, 2004) [hereinafter General Comment 31].

76. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) ¶¶ 62–64 (1995) (Preliminary Objections); *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07 (2011), (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-105606>; *Al-Jedda v. United Kingdom*, App. No. 27021/08 (2011), (ECtHR), <http://hudoc.echr.coe.int/eng?i=001-105612>.

sion on Human Rights<sup>77</sup>) have confirmed that a State's human rights obligations will continue to apply outside of that State's sovereign territory where the State exercises effective control over the territory of another State, for example through occupation.<sup>78</sup>

In time of armed conflict, IHL and IHRL are to be applied in a complementary manner. As indicated in Part III, treaties are to be interpreted taking into account "any relevant rules of international law applicable in the relations between the parties."<sup>79</sup> This principle of "coordinated interpretation" means that obligations under IHL and IHRL are to be applied in parallel and simultaneously. In particular, the principle of coordinated interpretation means that obligations existing in one of these areas of law can be given content and be elaborated by reference to obligations of the State in the other area of law. This is particularly true in cases where the obligation uses concepts and notions of a general character—like "arbitrary"—that need to be given more specific content by reference to the circumstances of particular cases. The content of such notions depends on the interactions between general principles animating the law and that particular scenario being considered.

An example of the complementary application of IHL and IHRL can be seen in the ICJ's decision in the *Nuclear Weapons Advisory Opinion* to the effect that, in time of armed conflict, "[i]n principle, the right not arbitrarily to be deprived of one's life . . . falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities."<sup>80</sup> In other words, a breach by a State of its IHL obligations with regard to protection of life in time of armed conflict would amount to a breach of its IHRL obligation to respect the right to life. Moreover, the content of one obligation was determined by reference to obligations in the other area of law.

With respect to humanitarian relief operations, IHRL provides guidance on two issues. First, as developed in Part III, IHRL provides guidance in determining what is an arbitrary withholding of consent. Second, IHRL

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77. *Coard v. United States*, Case 10.951, Inter-Am. Comm'n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 3 rev., ¶ 37 (1999).

78. *See, e.g.*, General Comment 31, *supra* note 75, ¶ 10; *Loizidou v. Turkey*, *supra* note 76, ¶¶ 62–64. On the extraterritorial application of human treaties, see generally MARKO MILANOVIĆ, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES AND POLICY* (2011).

79. Vienna Convention on the Law of Treaties, *supra* note 21, art. 31(3)(c).

80. *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 45, ¶ 25.

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

#### A. Arbitrariness under IHRL

The notion of arbitrariness is one that is used in several areas of IHRL. For example, under the ICCPR States may not “arbitrarily” deprive individuals of their life or their liberty and may not engage in arbitrary interference with privacy, family, home or correspondence.<sup>81</sup>

Where IHRL prohibits arbitrary conduct, the notion of arbitrariness has been interpreted to mean that the conduct in question includes elements of inappropriateness, injustice, lack of predictability or due process of law, unreasonableness, or is otherwise unnecessary or disproportionate.<sup>82</sup>

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81. See ICCPR, *supra* note 44, arts. 6, 9(1), 17(1). Although the European Convention on Human Rights, *infra* note 89, does not express these same rights by reference to arbitrariness, that Convention establishes rules that are practically equivalent to those on arbitrariness set out in the next paragraph.

82. See General Comment No. 35, *supra* note 40, ¶¶ 11, 12; Suárez de Guerrero v. Colombia, Human Rights Committee, Comm. No. R.11/45, U.N. Doc. Supp. No. 40 (A/37/40) (1982) (with regard to the right to life); van Alphen v. Netherlands, Human Rights Committee, Comm. No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (with regard to deprivation of liberty); U.N. Human Rights Committee, General Comment No. 16: Article 17 (Right to Privacy), U.N. Doc. HRI/GEN/1/Rev.1, at 21–22, ¶ 4 (July 29, 2014) [hereinafter General Comment No. 16] (“The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objective of the Covenant and should be, in any event, reasonable in the particular circumstances.”); Toonen v. Australia, Human Rights Committee, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, ¶ 8.3 (1994) (“The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.”).



Taking the case law of human rights tribunals into account, conduct will be regarded as arbitrary under IHRL, where it falls into one of the following categories:

- The conduct does not pursue a legitimate objective (which means an objective that is in accordance with the principles, aims and objectives of the law);<sup>83</sup>
- The measure taken is more than is necessary for the achievement of that legitimate aim;<sup>84</sup> and
- There is not a reasonable relationship of proportionality between harm caused by the conduct and the aim sought to be achieved.<sup>85</sup>

Thus, for the withholding of consent to a humanitarian relief operation to be lawful, consent must be withheld for a reason that accords with the principles, aims and objectives of the relevant IHL treaties. Withholding consent in furtherance of an objective that is at odds with IHL would not be consistent with the requirement that consent not be arbitrarily withheld.

Although the concept of arbitrariness is not synonymous with a requirement of legality,<sup>86</sup> conduct that is aimed at achieving an unlawful pur-

83. General Comment No. 16, *supra* note 82, ¶ 4 (arbitrariness indicates that interference “should be in accordance with the provisions, aims and objective of the Covenant”).

84. *Toonen v. Australia*, *supra* note 82, ¶ 8.3 (the concept of arbitrariness means that interference with rights must be reasonable and “the requirement of reasonableness” . . . impl[ies] that “any interference . . . must be proportional to the end sought and be necessary in the circumstances of any given case”); *van Alphen v. Netherlands*, *supra* note 82, ¶ 5.8 (the prohibition of arbitrary deprivation of liberty means that “remand in custody must be necessary in all the circumstances” to achieve certain permitted aims); *Suárez de Guerrero v. Colombia*, *supra* note 82, ¶ 13.2 (the prohibition of arbitrary deprivation of life meant in that case that action of the police must be necessary for self-defense, to effect arrest or to prevent escape).

85. *Toonen v. Australia*, *supra* note 82, ¶ 8.3; *van Alphen v. Netherlands*, *supra* note 82, ¶ 5.8 (the prohibition of arbitrary deprivation of liberty means that remand in custody must “be reasonable in all the circumstances”).

86. *See* General Comment No. 35, *supra* note 40, ¶¶ 11, 12. *See also* Elettronica Sicula SpA (ELSI) (U.S. v. Italy), Judgment, 1989 I.C.J. 15, ¶ 124 (July 20). It should be noted that the ICJ was discussing illegality under national law as opposed to illegality under international law.

pose will invariably be arbitrary or unreasonable.<sup>87</sup> Therefore, if the reason for withholding consent to humanitarian relief operations is to achieve an aim that would violate the State's other obligations under IHL or IHRL (e.g., starvation of the civilian population or discrimination against a particular group) or other rules of public international law, the refusal to consent will be deemed arbitrary.

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

#### B. Humanitarian Assistance under IHRL

In addition to the guidance that IHRL provides with regard to the content of arbitrariness, it should be recalled that IHRL also recognizes rights which, in turn, may impose substantive obligations on States to permit (and certainly not to prevent) the conduct of humanitarian relief operations. Denial by States of access to materials which are essential for survival will be a violation of the right to life,<sup>88</sup> which is non-derogable and, therefore, applicable in time of armed conflict.<sup>89</sup>

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87. Oliver Corten, *Reasonableness in International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 17 (2013), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1679?prd=EPIL>.

88. In 1982, the UN Human Rights Committee noted that the right to life cannot properly be understood in a restrictive matter and that protection of the right requires States to adopt positive measures, e.g., elimination of malnutrition and epidemics. Human Rights Committee, General Comment No 6: Article 6 (The Right to Life), U.N. Doc. HRI/GEN/1/Rev.1, at 7, ¶ 5 (July 29, 1994). *See also* KÄLIN & KUNZLI, *supra* note 59, at 303 (“The scope of human-rights-based protection of life is not confined to minimizing the risk of being killed. Access to the basic necessities of life, such as food, shelter and, in the case of life-threatening health problems, minimum medical treatment is equally relevant if not even more important for survival in situations where such access is being blocked or where basic goods are simply not available.”).

89. ICCPR, *supra* note 44, art. 4(2). Under the European Convention on Human Rights, the right to life is derogable only in respect of lawful acts of war. Convention for the Protection of Human Rights and Fundamental Freedoms art. 15(2), Nov. 4, 1950, 213 U.N.T.S. 222.

Similarly, the rights provided for in the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) continue to apply in time of armed conflict and will inform the obligation to accept humanitarian relief operations, as well as the content of such operations. Unlike the IC-CPR, the ICESCR does not have a derogations clause. Moreover, the ICJ has confirmed that the provisions of this treaty continue to apply in armed conflict, including occupation.<sup>90</sup>

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

The elements of the rights provided for under the ICESCR relevant to humanitarian relief operations in times of armed conflict may be summarized as consisting of the following obligations: (i) obligations of availability—there is a duty make the object of the right (food, water, health services, shelter etc.) available; (ii) the obligation of accessibility—the objects of the right have to be accessible to everyone without discrimination on unjustifiable grounds; and (iii) the obligation of acceptability and quality—the object of the rights must be culturally acceptable and of sufficient quality.<sup>91</sup>

With respect to the right to food (which also includes the right to water), the obligation entails respect for existing access to adequate food, which also encompasses an obligation not to take measures that result in preventing such access. The obligation to protect requires that States take measures to ensure that individuals are not deprived of access to adequate food by other actors. The obligation to fulfill includes an obligation to facilitate access to food, and, in certain circumstances, an obligation to provide adequate food. Despite the progressive nature of some of these obligations, States have an obligation to make every effort to ensure the minimum essential level required to be free from hunger.<sup>92</sup> Moreover, the

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90. *Legal Consequences of the Construction of a Wall*, *supra* note 74, ¶¶ 106, 112.

91. See KÄLIN & KUNZLI, *supra* note 59, at 304.

92. Committee on Economic, Social and Cultural Rights, General Comment 12: The Right to Adequate Food (Art.11), U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter General Comment 12].

Committee on Economic, Social and Cultural Rights has stated that if a State claims that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, it must demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations, including that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.<sup>93</sup>

The Committee on Economic, Social and Cultural Rights has also stated that it would be a violation of the right to food for a State to prevent humanitarian food aid in time of armed conflict.<sup>94</sup> Also, unjustifiable discrimination in providing or permitting access to food would be a violation of a State's obligations under the ICESCR.<sup>95</sup>

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

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

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93. *Id.* ¶ 17. See also ETO Consortium, Maastricht Principles on Extraterritorial Obligation of States in the Area of Economic, Social and Cultural Rights (2013), [http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23). Principle 34 provides that “[a] State has the obligation to seek international assistance and cooperation on mutually agreed terms when that State is unable to, despite its best efforts, to guarantee economic, social and cultural rights within its territory.”

94. General Comment 12, *supra* note 92, ¶ 19. (“Violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States. These include . . . the prevention of access to humanitarian food aid in internal conflicts.”).

95. *Id.* ¶ 18 (“[A]ny discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.”).

In light of its general comment No.12 (1999) on the right to adequate food, the Committee draws the attention of the State party to the fact that the prevention of access to humanitarian food aid in internal conflicts constitutes a violation of article 11 of the Covenant as well as a grave violation of international humanitarian law.<sup>96</sup>

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

## VI. CONCLUSION

This article has sought to show that although the consent of concerned States is, in most cases, required for the conduct of humanitarian relief operations, those States do not have complete liberty as to whether to grant consent. Where consent is required, it may not be arbitrarily withheld. Although the rule prohibiting arbitrary withholding of consent does not appear on the face of the relevant treaty texts, it can be derived not only from the drafting history of those treaties, but also from the need to give an effective and balanced meaning to the different elements of those texts. Furthermore, the principle is reflected in subsequent practice and is implicit in the many recent statements regarding “arbitrary denial of humanitarian access.”

The article has also sought to elaborate on what it means to withhold consent arbitrarily in the context of humanitarian relief operations. Drawing on the meaning attributed to arbitrariness in other areas of international law, most notably, in international human rights law, it has been demonstrated that the concept is by no means confined to conduct which is carried out on a whim or without reason. Instead, it is suggested that consent is withheld arbitrarily when the withholding would result in a violation of the State’s international law obligations with respect to the civilian population, when the withholding violates the principles of necessity and proportionality, and when it would be unreasonable or capricious.

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96. U.N. Committee on Economic, Social and Cultural Rights, Concluding Observations: Sri Lanka, U.N. Doc. E/C.12/LKA/CO/2-4, ¶ 28 (Dec. 9, 2010).

By examining the existence and meaning of a rule requiring that consent for humanitarian relief operations not be arbitrarily withheld, this article has taken only the first steps with regard to exploration of the concept of “arbitrary withholding of consent.” Since such action is prohibited by the relevant rules of international law, questions also arise as to consequences that may follow when consent is arbitrarily withheld. Inevitably questions of responsibility arise, not only for the party that is withholding consent, but also, under international criminal law<sup>97</sup> and relevant Security Council resolutions,<sup>98</sup> for individuals involved in such conduct. Furthermore, consideration needs to be given to the lawfulness of humanitarian relief operations conducted in the face of arbitrary withholding of consent. Although it has been asserted that “[w]here consent is withheld for . . . arbitrary reasons, the relief operation is lawful without consent,”<sup>99</sup> more careful analysis of the legal basis, if any, for such operations is necessary.<sup>100</sup> In so far as humanitarian relief operations are conducted without consent and are therefore inconsistent with the rules protecting the territorial integrity of States, an assessment of the permissibility of such operations will depend on analysis of the circumstances precluding wrongfulness in the law of State responsibility.<sup>101</sup>

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97. For example, under Article 8(2)(b)(xxv) of the Statute of the International Criminal Court, “[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. Although, the ICC Statute provides for this crime only in international armed conflicts, there are strong arguments that suggest that under customary international law this is a war crime in both international and non-international armed conflicts. See 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 13, r. 156, cmt. at 599, 603.

98. In a number of cases, UN Security Council resolutions list obstruction of humanitarian activities or of access to humanitarian assistance as one of the grounds on which targeted sanctions may be imposed on individuals or groups. S.C. Res. 1844, ¶ 8(c) (Nov. 20, 2008) (in relation to Somalia); S.C. Res. 1857, ¶ 4(f) (Dec. 22, 2008) (in relation to the Democratic Republic of the Congo); S.C. Res. 2134, ¶ 37(e) (Jan. 28, 2014) (in relation to the Central African Republic); S.C. Res. 2206, ¶ 7(f) (Mar. 3, 2015) (in relation to South Sudan); S.C. Res. 2216, *supra* note 6, ¶ 19 (in relation to Yemen).

99. Nicolas Bratza et al., Letter to the Editor, *There is No Legal Barrier to UN Cross-border Operations in Syria*, THE GUARDIAN, Apr. 29, 2014, at 35, <https://www.theguardian.com/world/2014/apr/28/no-legal-barrier-un-cross-border-syria>.

100. For an analysis of these issues, see OXFORD GUIDANCE, *supra* note 14, sec. I.

101. The position of private actors on the one hand is different from that of States and international organizations on the other since the former are not bound by the international law rule relating to territorial integrity. See OXFORD GUIDANCE, *supra* note 14, sec. I.